

**VERMONT LAW SCHOOL  
GEORGETOWN UNIVERSITY LAW CENTER  
BERKELEY LAW**

**THE 13<sup>TH</sup> ANNUAL CONFERENCE ON LITIGATING TAKINGS  
AND OTHER LEGAL CHALLENGES TO LAND USE AND  
ENVIRONMENTAL REGULATION**

**NOVEMBER 5, 2010  
BERKELEY, CALIFORNIA**

**THE ELEMENTS OF LIABILITY IN A TRAILS ACT TAKING:  
A GUIDE TO THE ANALYSIS**

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# THE ELEMENTS OF LIABILITY IN A TRAILS ACT TAKING: A GUIDE TO THE ANALYSIS

## 1. Introduction

The National Trails System Act permits railroad companies to forego the outright abandonment of unused and unwanted railroad rights of way by converting them into linear recreational parks. This process is called “railbanking” and theoretically preserves the rights of way for possible future railroad operations.<sup>1</sup> In the 1980s, landowners Pat and Paul Preseault challenged the constitutionality of the Act. They argued the Trails Act stripped their rights to the extinguishment of easements intended for one purpose, by prescribing the easements be put to a different use which had never been contemplated in the original grants.

Their case was ultimately reviewed by the Supreme Court in *Preseault v. Interstate Commerce Commission (Preseault I)*, which held the Trails Act to be constitutional. The Court reasoned that while the conversion may have been impermissible under the original terms of any easements, the injury to private property could be remedied by bringing a taking claim against the United States.<sup>2</sup>

The Preseaults filed a Tucker Act taking claim in the Court of Federal Claims, and ultimately won the issue of liability in the United States Court of Appeals for the Federal Circuit.<sup>3</sup> In that seminal case, *Preseault v. United States (Preseault II)*, the Federal Circuit<sup>4</sup> ruled in favor of the Preseaults, holding that the Government is liable for taking private property if the rails-to-trails conversion exceeded the scope of the property interest originally acquired by the railroad, as was the case with the Preseaults.

Despite unequivocal pronouncements by the *Preseault II* court on the principles underlying the Government’s liability, the history of the Trails Act takings litigation has not been straightforward.

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<sup>1</sup> 16 U.S.C. §1241-51 (2006) (Trails Act).

<sup>2</sup> *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990).

<sup>3</sup> *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) (4:2:2).

<sup>4</sup> The Federal Circuit has exclusive jurisdiction over any appeals taken in a federal takings case. 28 U.S.C. § 1295(a)(2) (2006).

In the first several years following the *Preseault II* decision the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful arguments it had made in *Preseault II*.<sup>5</sup>

After losing several liability arguments, book-ended by a second Federal Circuit decision, *Toews v. United States*,<sup>6</sup> the DOJ's challenges to the Government's liability abated. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts. But the reprieve was brief.

In the last few years, the DOJ has resurrected its challenges to the Government's liability. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments, previously rejected by the Federal Circuit, in newly filed cases. Worse for the attorneys and courts who do not typically deal with these Tucker Act Cases, the DOJ advances these arguments without acknowledging the contrary law that had been established during its earlier attempts to escape the Government's liability.

The DOJ's strategy relies on the marginalization of *Preseault II*, as purportedly being limited to the facts in that case, as well as glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, and recycling the arguments it made in *Preseault II* and *Toews*, the Government persists in arguing in various guises that recreational use is no different from railroad uses, or that railbanking is a "railroad purpose," so that nothing was taken from the landowner when the right of way became a recreational trail. In arguing that hikers and bikers are the same as railroad locomotives, the Government sweeps several decades of contrary law under the rug.

To avoid becoming the inadvertent and accidental partner in the DOJ's strategy, the plaintiff's attorney should understand the breadth and reach of the *Preseault* and *Toews* decisions, should understand what is and is not germane to the liability analysis, and should avoid presenting arguments in a manner that can lead a court down the wrong path into an errant line of reasoning.<sup>7</sup>

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<sup>5</sup> See *Glosemeyer v. United States*, 45 Fed. Cl. 771, 773 (2000); *Toews v. United States*, 53 Fed. Cl. 58 (2002); *Schmitt v. United States*, 2003 WL 21057368 (S.D. Ind. 2003); *Schneider v. United States*, 2003 WL 25711838 (D. Neb. 2003).

<sup>6</sup> *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004).

<sup>7</sup> E.g., *Troha v. United States*, 692 F.Supp.2d 550 (W.D. PA 2010).

The below (1) presents an introduction of the key statutory and regulatory provisions pertaining to the Trails Act; (2) reviews the heart of the *Preseault I* decision; (3) provides a short checklist to follow when considering whether a taking claim can be brought; and (4) explains the proper roadmap for the liability analysis in any Trails Act taking case.

## 2. The Statute, Regulations, and *Preseault I*

### A. The Trails Act.

#### **(1) *Trails Act: 16 U.S.C. §1241-51.***

Congress passed the first iteration of the Trails Act in 1968,<sup>8</sup> seeking to preserve unwanted railway lines for possible future use, but the Act had little appeal. In 1983, recognizing the Act lacked public interest, Congress amended the Trails Act, adding provisions designed to facilitate the preservation of the lines while encouraging third parties to acquire the lines for interim recreational use.<sup>9</sup>

#### **(2) *Preservation, not abandonment: 16 U.S.C. § 1247(d).***

As part of the amendments, the Act provided that trail conversion shall not constitute “an abandonment of the use of . . . rights-of-way for railroad purposes”:

The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation,

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<sup>8</sup> National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §1241-51 (2006))

<sup>9</sup> National Trails System Act Amendments of 1983, Pub.L. 98-11, 97 Stat. 48, to the National Trails System Act, Pub.L. 90-543, 82 Stat. 919 (codified, as amended, at 16 U.S.C. § 1241 et seq.).

transfer, lease, sale, or otherwise in a manner consistent with this chapter [the Trails Act], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.<sup>10</sup>

As such, the Act served to preempt any applicable state (or federal) law that may have been triggered but for the trails conversion.

### **(3) Standard abandonment or exemption.**

Generally, and for the purposes of the Trails Act, a railroad carrier may relinquish its responsibility for a line either through standard abandonment proceedings,<sup>11</sup> or by seeking an exemption from the standard abandonment proceedings.<sup>12</sup> The “abandonment” proceeding is generally more onerous for the carrier, while the “exemption” proceeding, is relatively streamlined, allowing the railroad to completely relinquish all responsibility and concomitant liabilities for its unprofitable lines.<sup>13</sup> Either process—the initiation of abandonment proceedings or an exemption therefrom—can lead to either an outright abandonment of the line or to the “discontinuance” of the line by transferring the line to a trail manager for the interim trail use.

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<sup>10</sup> 16 U.S.C. § 1247(d).

<sup>11</sup> 49 U.S.C. § 10903.

<sup>12</sup> 49 U.S.C. § 10502 (Formerly 49 U.S.C. § 10505 in materially similar form; repealed, effective January 1, 1996, by I.C.C. Termination Act of 1995, Pub. L. 104-88, 109 Stat 803 (1995)).

<sup>13</sup> Cf. *Hayfield N. R.R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 628-30 (1984) (referring to a generally similar proceeding as offering a more streamlined process for abandonment of unprofitable lines, as compared with the onerous abandonment proceedings under § 10903).

## **B. Regulatory framework.**

### **(1) Trail use request: 49 C.F.R. §1152.29.**

The Surface Transportation Board (STB)<sup>14</sup> maintains exclusive and plenary authority over the construction, operation and abandonment of most of the nation's interstate railway lines.<sup>15</sup> When a railroad company wishes to abandon one of its lines, it must petition the STB to do so.<sup>16</sup> After the petition is submitted, and if the railroad satisfies procedural contingencies and consummates abandonment of its line pursuant to either abandonment or exemption proceedings, the STB's jurisdiction ceases and "state law reversionary interests, if any, take effect."<sup>17</sup>

Upon submission of a carrier's petition, the STB will publish a notice of the proposed abandonment and any entity may come forward, within a specified period, to file a "statement of interest," avowing its commitment to assume financial and legal responsibility for the line.<sup>18</sup>

### **(2) NITU or CITU: Dual purpose.**

The putative trail manager's submission will automatically prompt the STB to issue a Notice of Interim Trail Use or Abandonment (NITU) or Certificate of Interim Trail Use or Abandonment (CITU).<sup>19</sup> The NITUs and CITUs serve a "dual-purpose," wherein the STB authorizes the railroad carrier to either discontinue its operation and relinquish all responsibilities for a line to the trail operator, or outright abandon the line within one year of the order.<sup>20</sup> Because the CITUs are issued

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<sup>14</sup> The STB assumed authority over the federal railway system on January 1, 1996. See ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). Prior to that, the Interstate Commerce Commission (ICC) controlled federal railways. See The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, as amended and revised, and the Transportation Act of 1920, ch. 91, 41 Stat. 477-78; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313 (1981).

<sup>15</sup> See *Preseault I*, 494 U.S. at 8; see also *id.* at 5-8 (chronicling history of Trails Act and related authority).

<sup>16</sup> 49 C.F.R. §1152.29.

<sup>17</sup> *Caldwell v. United States*, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004).

<sup>18</sup> § 1152.29(a)(3).

<sup>19</sup> §§ 1152.29(c)-(d).

<sup>20</sup> § 1152.29(e). On the one hand, the NITU provides for the railroad company and trail sponsor to negotiate and ultimately consummate an agreement for trail use. § 1152.29(d)(1). On the other hand, if the parties fail to reach agreement within the 180 days, the NITU "will convert into an effective notice of exemption, permitting the

pursuant to petitions filed under the abandonment process,<sup>21</sup> which is typically more onerous, NITUs are more common in the Trails Act taking cases.<sup>22</sup>

**(3) All trail managers must avow preservation of the line.**

As part of the Trails Act scheme, trail managers are required to attest to the intent to “railbank”—namely, preserve—the right of way for potential future railroad use.<sup>23</sup> For this reason, trail operators’ statements avowing an earnest intention to preserve the line and keep it intact for future railroad use and operations will populate each and every Trails Act regulatory proceeding.

**C. Preseault I: Railbanking “burdens and defeats” interests.**

**(1) 2nd Circuit: Trails Act does not result in a taking of property.**

The Preseaults’ grit and determination was nothing short of remarkable. Losing a quiet title action before the Vermont state trial and Supreme courts, and losing a challenge to the ICC’s continued jurisdiction over the former railroad right of way, the Preseaults eventually found themselves in front of the United States Court of Appeals for the Second Circuit, challenging the constitutionality of the Trails Act, where they lost yet again.<sup>24</sup>

The Second Circuit held the Trails Act was constitutional and that no injury had befallen the Preseaults. In reaching the holding, the court reasoned that no taking could occur so long as railbanking was intended. As explained by that court, notwithstanding that the easements were inactive in the present moment, preserving railroads for future use served a “railroad purpose.” Accordingly, in the Second Circuit’s view, the Trails Act could “not effect a taking”:

Preserving railway corridors for future railway use is a function that congress has recently delegated to the ICC, and it is, as discussed

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railroad to abandon the line immediately.” *See Rail Abandonments – Use of Rights of Way as Trails*, Ex Parte No. 274 (Sub-No. 13), 2 I.C.C.2d 591, 612 (1986) (Commission comment).

<sup>21</sup> § 1152.29(c); 49 U.S.C. § 10903.

<sup>22</sup> NITUs and CITUs are collectively referred to hereinafter as “NITU” for ease of reference.

<sup>23</sup> § 1152.29(a)(3).

<sup>24</sup> *See Preseault v. Interstate Commerce Commission*, 853 F.2d 145 (2d Cir. 1988).

earlier, permissible under the commerce clause. For as long as it determines that the land will serve a “railroad purpose”, the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle congress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.

We therefore hold that § 1247(d) does not effect a taking.<sup>25</sup>

**(2) *Preseault I: 2nd Circuit’s reasoning conflates federal powers with Fifth Amendment principles.***

The United States Supreme Court affirmed the Second Circuit in a unanimous opinion. Justice O’Connor wrote separately, however, to explain that while the Court affirmed the lower court’s ultimate holding—the Trails Act *was* constitutional—the reasoning underlying that holding was flawed.<sup>26</sup> The Second Circuit’s line of reasoning was in error because, while state law (or federal law under federal grants) determines the nature of the original interests the landowner held, federal takings doctrine would dictate the analysis of “whether the Government must compensate petitioners for the burden imposed on any property interest they possess.”<sup>27</sup> Under *federal* takings doctrine, Justice O’Connor admonished that the Second Circuit’s errant view regarding the immateriality of future use versus present use,

conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution. The ICC may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power.<sup>28</sup>

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<sup>25</sup> *Id.* at 151.

<sup>26</sup> *Preseault I*, 494 U.S. at 20.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 23.

**(3) Trails Act “defeats,” not merely “defers,” private property interests.**

In recent history, the Government’s challenges to takings cases ignore the Supreme Court’s holding in *Preseault I*, both in its briefs and at oral argument. The Government typically argues that railbanking did not take anything from the plaintiff because, as its reasoning goes, before the STB issued a NITU a rail easement traversed plaintiff’s property, and after the STB issued the NITU the same easement traversed the property.<sup>29</sup>

Justice O’Connor’s pronouncements concerning “traditional takings doctrine”<sup>30</sup> and review of the Court’s takings jurisprudence relevant to the issue,<sup>31</sup> however, negate the Government’s arguments. The Court recognized that the authorization of interim trail use and railbanking would maintain the status quo—namely, the easement that existed before a NITU was issued would exist the day after it issued, all thanks to the implementation of the Trails Act. Justice O’Connor, however, explained that this process did not merely delay the enjoyment of restored property interests; instead, under Fifth Amendment principles, the delay burdened and defeated the interests:

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<sup>29</sup> Recently, in early September of this year, 2010, the Government made this argument to the Federal Circuit. Judge Moore cautioned the argument would not pass muster in the Federal Circuit, given the Supreme Court’s views:

DOJ (12:37-12:47): “The[ landowners] enjoy a fee interest burdened only by the railroad’s right to run a railroad. That was the pre-existing situation before the NITU; that’s the same situation today.”

Judge Moore (12:47-13:02): “What’s the argument you made unsuccessfully in the Supreme Court where Justice Scalia seemed to actually make fun of you?\* I mean, I don’t think that’s going to work on us at this point. You can’t say ‘oh yeah, well they didn’t lose anything because they didn’t have anything the day before.’”

Oral Argument, *Ladd v. United States*, No. 2010-5010 (Fed. Cir.) (available at <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2010-5010.mpr>).

\*Judge Moore may have been remembering then-Chief Justice Rehnquist’s comment to a similar, “it takes nothing and changes nothing” argument, which drew laughter in the courtroom: “That is like saying if my aunt were a man she would be my uncle.”

Oral Argument, *Preseault I*, 494 U.S. 1 (No. 88-1076) available at [http://www.oyez.org/case/1980-1989/1989/1989\\_88\\_1076/argument](http://www.oyez.org/case/1980-1989/1989/1989_88_1076/argument) (statement of Chief Justice Rehnquist).

<sup>30</sup> *Preseault I*, 494 U.S. at 20.

<sup>31</sup> *Id.* at 20-23.

Commission'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*.<sup>32</sup>

Accordingly, while the Trails Act provides that a rails-to-trails conversion shall not constitute abandonment of the line even if the original interests were merely easements, the conversion gives rise to a taking claim so long as the plaintiff can claim title to the underlying property.

### **3. The Initial Trails Act Claim Checklist**

Understanding whether a landowner has a viable Trails Act taking claim is important for two reasons: First, no one wants to needlessly waste the court's, client's, or attorney's resources. Second, understanding the elements in the checklist illustrates the rationale for pursuing a cogent organization of the analysis and arguments presented in the liability part of the claim, which should focus entirely on the issue of "the scope of easement" in most cases, and which should ordinarily eschew the older, "alternative" analysis on a question of abandonment, as explained in § 4C, *infra*.

#### **A. Legal abandonment preceding a trails conversion: Is there a taking?**

##### **(1) *Fritsch*: Has there been de jure abandonment?**

If the STB has issued any order authorizing abandonment of a carrier's line, and the carrier has taken all requisite steps in compliance with that authorization, which typically includes submitting a letter to the STB stating that it has consummated the abandonment subject to the order upon which it relies, then the STB's jurisdiction over the matter has ended, and trail use may not be implemented.<sup>33</sup> Under these circumstances, there should have been no taking of private property because any easements that had existed prior to the abandonment have been extinguished and the STB can no longer exercise authority over the line.<sup>34</sup> In that regard, a NITU's dual purpose should be kept in mind if considering whether there has been an abandonment prior to the trails

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<sup>32</sup> *Id.* at 22 (emphasis added).

<sup>33</sup> *Fritsch v. Interstate Commerce Commission*, 59 F.3d 248 (D.C. Cir. 1995); *but see Birt v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir. 1996).

<sup>34</sup> *See Fritsch*, 59 F.3d 248.

conversion, since the NITU may be the only order issued by the STB authorizing the abandonment.<sup>35</sup>

**(2) *RLTD: Has there been de facto abandonment?***

Likewise, under certain circumstances, the STB may determine that, notwithstanding the absence of any regulatory proceedings permitting abandonment, a line may nonetheless have been *de facto* abandoned historically by a railroad carrier. If the STB determines there has been *de facto* abandonment, it may conclude it no longer has jurisdiction to authorize a rails-to-trails conversion.<sup>36</sup>

**(3) *If in doubt, the Trails Act applies for purposes of the statute of limitations.***

Of late, the STB has leaned in favor of finding it has jurisdiction to authorize a rails-to-trails conversion. The statute of limitations for a Trails Act taking is six years.<sup>37</sup> Unless there has been a final judgment on the question of the STB's jurisdiction, the practitioner should take all steps necessary to preserve a taking claim and/or clarify the question of whether the STB still retains jurisdiction over a line before the applicable limitations period to file suit has expired.

**B. A Trails Act claim accrues on the date of the first NITU order.**

**(1) *Has it been six years since the first NITU issued?***

The statute of limitations starts to run on the date the original NITU was issued.<sup>38</sup> This will be true regardless of whether the STB issues serial NITUs—namely, orders extensions on the NITU—re-opens the NITU after the time to act elapses, or even if trains are still operating on the line.<sup>39</sup> Indeed, there have been instances in which more than six years have transpired and where the original NITU is re-opened or extended.<sup>40</sup>

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<sup>35</sup> See n.20, *supra*.

<sup>36</sup> *RLTD Ry. Corp. v. Surface Transportation Board*, 166 F.3d 808 (6th Cir. 1999).

<sup>37</sup> 28 U.S.C. § 2501 (2002).

<sup>38</sup> *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004).

<sup>39</sup> *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2005).

<sup>40</sup> See *S. Pac. Transp. Co.—Abandonment Exemption—Wendel-Alturas Line in Modoc and Lassen Counties, CA, Decision*, Docket No. AB-12 (Sub-No. 184X), 2004 WL 1941838 (STB, Service Sept. 1, 2004) (extending the NITU negotiating period until September 3, 2005—more than nine years after the first NITU was served and with no trail use consummation reached); *CSX Transp., Inc.—Abandonment Exemption—In Franklin*

For this reason, regardless of the circumstances, and to avoid blowing the six-year limitations period deadline, the landowner must file her taking claim within six years from the issuance of the *first* NITU or CITU.<sup>41</sup>

**(2) Did the landowner own the property on the date of the taking?**

A plaintiff must have owned the property at issue on the date of the taking. Ownership can include inheriting the property from someone who did own it, and may include possessing a contract for deed, depending on the terms, facts, and applicable law. Ownership at the time the taking claim is brought is immaterial.

**4. Litigating Liability in a Trails Act Takings Case.**

The Federal Circuit has recently reiterated the traditional *Preseault II* roadmap for analyzing whether the Government is liable in a rails-to-trails takings case:

Under *Preseault II*, the determinative issues for takings liability are (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee

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*County, PA, Decision*, Docket No. AB-55 (Sub-No. 568X), 2005 WL 189881 (STB, Service January 28, 2005) (extending authorization to abandon the line until September 27, 2005, and the trail negotiating period until July 29, 2005—more than six years after the first NITU was served and with no trail use consummation reached); *St. Louis Sw. Ry. Co.—Abandonment Exemption—In Smith and Cherokee Counties, TX, CITU*, Docket No. AB-39 (Sub-No. 12), 2002 WL 383570 (STB, Service March 12, 2002) (trail use reached after 8 years on part of line; other part abandoned per the CITU).

<sup>41</sup> Currently pending before the Federal Circuit is the question of whether a rails-to-trails taking claim is unripe if there has been no actual trail use agreement. Landowners had lost the issue below—the Court of Federal Claims held there could be no physical taking prior to consummation of a trail agreement. See *Ladd v. United States*, No. 2010-5010 (Fed. Cir.) (appeal pending from *Ladd v. United States*, 90 Fed. Cl. 221 (2009)).

simple unencumbered by the easement (abandonment of the easement).<sup>42</sup>

The first issue, “who owns the strip of land involved,” will be established under state or federal law and concerns whether the railroad acquired full fee title in the strip, or acquired a lesser estate which would inure to the benefit of the landowner upon full abandonment.<sup>43</sup> The issue is plumbed by looking at the law and facts that were in play at the time the original interests were created—not the policy considerations that may have come later.<sup>44</sup> Thus, federal law will apply to the analysis if the strip was acquired as part of a federal grant;<sup>45</sup> state law applies if not.<sup>46</sup> In short, applicable state or federal law “determines what property interest petitioners possess.”<sup>47</sup>

The second issue, “scope of the easement,” however, is more complex. On the front end of that issue, the inquiry is whether the grant expressly allowed for uses other than railroad uses, and if so, what those “other” uses would be. Thus, on the front end, the question will be whether the original grant of the strip of land—e.g., by private deed, by a federal act, or by condemnation—was limited in its terms to railroad purposes, or whether the terms were less specific, allowing for uses beyond railroad use, and if so what the parameters of the other uses are. Additionally, the inquiry will include whether, as a matter of law or through other controlling or persuasive sources, other uses had been deemed to be included in the original grant. This inquiry is *substantive*—what *types* of uses were permitted?—not *temporal*.

Importantly, and as addressed below, “*traditional takings doctrine*”<sup>48</sup> suffuses this scope of the easement analysis. And traditional takings jurisprudence requires a “reality test.”<sup>49</sup> Under the Federal Circuit’s reality test in these rails-to-trails takings cases, which is grounded in traditional takings doctrine and un-tethered to any specific body of law,

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<sup>42</sup> *Phillips v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (parentheticals in the original).

<sup>43</sup> Courts and parties tend to refer to the issue as the “fee versus easement” issue.

<sup>44</sup> *Preseault II*, 100 F.3d at 1553 (Rader, J., concurring); *Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

<sup>45</sup> See *Phillips*, 564 F.3d 1367 (strip acquired through a federal grant).

<sup>46</sup> See *Preseault I*, 494 U.S. at 20 (O’Connor, J., concurring).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Toews*, 376 F.3d at 1381.

“realistically,”<sup>50</sup> recreational purposes are fundamentally different from railroad purposes. Thus, under controlling law from the Federal Circuit, it is “beyond cavil,”<sup>51</sup> that easements granted for the purpose of operating a railroad cannot be “transmogrified”<sup>52</sup> into “linear parks”<sup>53</sup> without payment of just compensation to the injured landowner.

As to the third issue, “abandonment of the easement,” that issue provides an *alternative* ground for the Government’s liability if the scope of easement question is not dispositive. This third issue should not ordinarily apply because, while anomalies exist in the decisional law,<sup>54</sup> if there has truly been an abandonment of the easement before a NITU is issued, or a consummated abandonment subject to a NITU, then the trail conversion is arguably unlawful and the landowner’s remedy should ordinarily be a claim to quiet title.<sup>55</sup>

These three issues are addressed below.

## **A. Fee versus easement.**

Railroads acquired their interests in right-of-way segments through either federal railway grants or under state law.

### **(1) Federal Grant: 1875 Act granted merely easements.**

As to the federal grants, in the 1800s Congress passed various acts which granted rights of way to railroad companies.<sup>56</sup> One of those grants, the 1875 Act,<sup>57</sup> resulted in railroads crisscrossing public lands

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<sup>50</sup> *Preseault II*, 100 F.3d at 1554 (Rader, J., concurring)

<sup>51</sup> *Toews*, 376 F.3d at 1376-77.

<sup>52</sup> *Id.* at 1377.

<sup>53</sup> *Id.* at 1379.

<sup>54</sup> *See Preseault II*, 100 F.3d at 1544 (affirming trial court’s finding that abandonment of easement occurred before the trail-conversion); *Phillips*, 564 F.3d at 1373-74 (concluding that *Hash*, 403 F.3d 1308, *supra*, did not reach the scope of easement question but did find the Government liable and therefore necessarily found liability under the alternative, abandonment theory).

<sup>55</sup> *Cf. Fritsch, RLTD, supra*, n.33, n.36.

<sup>56</sup> *E.g., Leo Sheep Co. v. United States*, 440 U.S. 668 (1979)

<sup>57</sup> The Right of Way Act of March 3, 1875, ch.152, 18 Stat. 492 (codified at 43 U.S.C. §§ 934-939 (2006)) (repealed in part, Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976))

nationwide. The 1875 Act was construed by the Federal Circuit in *Hash v. United States*.<sup>58</sup>

In *Hash*, the court rejected the Government’s arguments that the United States, not the landowner, held a “reversionary” interest in the 1875 Act grants. The court held the 1875 Act granted merely easements to the railroad companies; thus, if abandoned, the easements would be extinguished and inure to the benefit of the landowner.<sup>59</sup> The Government later challenged the reach of *Hash*, in a different case, *Phillips v. United States*, contending, inter alia, that the decision was limited to the facts in *Hash*—i.e., to that case alone.<sup>60</sup> The court rejected some of the Government’s arguments, finding that *Hash* had definitively disposed of the fee versus easement question with respect to the 1875 Act: the 1875 Act granted easements which, if abandoned, would inure to the benefit of the landowner and the United States had retained no interest in the grant. But *Phillips* agreed with the Government that *Hash* had not disposed of the scope of easement issue.<sup>61</sup>

## **(2) Non-federal grants require application of state law.**

If the original interests were not acquired through federal grants, then the analysis under the fee versus easement issue proceeds under applicable state law in which the interests were originally created. That process requires ascertaining the method by which the railroad acquired the interest—typically by private deed, adverse possession, prescriptive easement, or by condemnation.<sup>62</sup> In some situations the analysis is fairly straightforward and the Government may end up stipulating to the interest as being merely an easement, and in other situations it may choose to litigate the question.

Each circumstance will vary, and the issue may involve construing simply one deed,<sup>63</sup> or in other instances, such as in class actions, several hundreds (if not thousands) of parcels may be at issue, requiring

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<sup>58</sup> *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005).

<sup>59</sup> *Hash*, 403 F.3d at 1313-18; see *Phillips*, 564 F.3d at 1373-74.

<sup>60</sup> *Phillips*, 564 F.3d at 1373-74.

<sup>61</sup> See *id.*

<sup>62</sup> E.g., *Hash*, 403 F.3d at 1312-13.

<sup>63</sup> E.g., *Toews*, 376 F.3d at 1373.

categorization of the various source interests so that the parties may either stipulate to or litigate the fee versus easement question.<sup>64</sup>

## **B. Scope of the easement: Keep the eye on the ball.**

If the parties are litigating the scope of easement question in the trial court, under the Government's current litigation strategy a court will need to determine whether the *Preseault II* decision controls and whether the *Toews* decision has any bearing on the analysis. Contrary to the Government's typical arguments, both of these cases do control the analysis and were not limited to the facts of the two cases, nor to application of strictly Vermont and California law, respectively.

Rather, in both decisions, the Federal Circuit explained that, *as a fundamental matter*, nature trails, intended for recreational uses, are realistically different from railroad uses, and if the original grants were easements for railroad uses, then the Government must pay.

As such, in litigating the question of the scope of the easement issue, the plaintiff should recognize that, indeed, *Preseault II* and *Toews* provide precedent that transcends Vermont and California law, and should approach the analysis by confidently relying on these two Federal Circuit decisions rather than arguing the question afresh, as if no law on point exists. That thesis—no controlling law exists—is the Government's theory, but should not be the plaintiff's.

### **(1) *Preseault II* controls the analysis.**

From the moment the *Preseault II* ink dried, the Government has argued that *Preseault II* provides virtually no precedential value due to "unusual facts" which were "unique," the analyses for which were determined by a "plurality opinion." As such, the Government reasons, the *Preseault II* scope of the easement analysis was merely dicta, being merely tangential to the decision's alternative holding (the abandonment question), on which the Government has insisted the case actually

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<sup>64</sup> *E.g.*, *Hash*, 403 F.3d at 1312-13 (explaining the parties had identified 14 different categories of source interests—comprising federal grants, private deeds, and adverse possession—to which some had been stipulated); *Schneider v. United States*, Civ. No. 8:99CV0315, 2007 WL 2248050 (D. Neb. 2007) (explaining parties had distilled 3,500 source interests to approximately 28 categories for purposes of the fee versus easement determinations).

turned.<sup>65</sup>

In fact, the *Preseault II* court expressly noted that liability turns on the scope of the easement: “we find the question of abandonment is not the defining issue, since whether abandoned or not the Government's use of the property for a public trail constitutes a new, unauthorized, use.”<sup>66</sup> Thereafter, the Federal Circuit has repeatedly affirmed that the scope of easement question drives a Trails Act taking analysis.<sup>67</sup>

## **(2) *Preseault II* was issued by a substantial majority.**

In *Toews*, the court recognized the Government's effort to weaken the precedential value of *Preseault II*, and made clear the effort was misplaced:

Since there was a written concurrence by two of the majority judges, the Government throughout its brief insists on referring to the opinion of the en banc court in *Preseault* as a “plurality” opinion, presumably to weaken its precedential value. Even a cursory reading of the concurrence shows that *there was no disagreement on any of the issues, as well as on the result*. Whether denominated as a ‘concurrence’ or as ‘additional views,’ an appellation used in other

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<sup>65</sup> For as long as the Government persists in this strategy, plaintiffs should take the time to ensure courts are not led astray. Most recently, for example, the Federal Circuit erroneously stated that the Government had “admitted” the scope of the easement was limited to railroad purposes in *Preseault II*. See *Phillips*, 564 F.3d at 1373. The court's statement is somewhat ambiguous, but to the extent the court may have surmised the Government conceded the scope of easement issue in its entirety, that conclusion would be wrong.

<sup>66</sup> *Preseault II*, 100 F.3d at 1549; see also *id.* at 1533; *id.* at 1541-44; *id.* at 1554-55 (Rader, J., concurring).

<sup>67</sup> See *Toews*, 376 F.3d at 1376-77 (“The defining issue in this case is the question of the scope of the easements originally granted to the railroad.”); e.g., *Phillips*, 564 F.3d at 1373 (relying on *Preseault II*, and instructing that the Trails Act Taking analysis proceeds as follows: first, does the railroad own an easement or fee title; second, what is the scope; and third, *if* the scope is sufficiently broad, then had the railroad abandoned the easement?); cf. *Caldwell v. United States*, 391 F.3d 1226, 1233-34 (Fed. Cir. 2004) (noting compensation for a Fifth Amendment Taking is required when the abandonment is “suspended” and—by exceeding the scope of the original easement—the reversionary interests are thus “eliminated”); *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006) (same); see also *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010) (observing, “[a] Fifth Amendment Taking occurs if the original easement granted to the railroad . . . is not broad enough to encompass a recreational trail” (citing *Caldwell*, 391 F.3d at 1229)).

cases under similar circumstances, the holding of the case reflects the considered view of a *substantial majority* of the court.<sup>68</sup>

**(3) Six-judge majority: Liability turns on the scope of the easement.**

Today, the Government persists with its “plurality opinion” theme in various cases before different judges, advancing layers of argument to suggest the two-judge concurrence in *Preseault II* was misaligned with the four-judge plurality opinion, and that the scope of easement analysis had been merely dicta. But the decision itself does not support the Government’s view.

In *Preseault II*, the court explained that the issue of the Government’s liability turned on the scope of the easement.<sup>69</sup> There, the Government had “propounded” the argument “that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails.”<sup>70</sup> The court disagreed, dedicating substantial discussion to the point.<sup>71</sup> Judge Rader, who had been the dissenting judge on the panel which first considered the case before it was reviewed en banc in *Preseault II*, explained he wished to write separately to distill the issues on which he believed the analysis turned.<sup>72</sup>

Judge Rader highlighted three issues, the second of which pertained to the scope of the easement issue.<sup>73</sup> On that issue, Judge Rader noted that “ultimately,” the Government’s liability turns on the scope of the original easement because even if the easements were not abandoned *before* the trails conversion, “*realistically*” trail use is simply different from transportation uses; and, by converting the easement for trail use, the easement automatically abandons and reverts, giving rise to a

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<sup>68</sup> *Toews*, 376 F.3d at 1380 n.6 (emphases added).

<sup>69</sup> *Preseault II*, 100 F.3d at 1533; *id.* at 1541-44; *id.* at 1554-55 (Rader, J., concurring).

<sup>70</sup> *Id.* at 1530.

<sup>71</sup> *See Id.* at 1541-44; 1553-55 (concurring).

<sup>72</sup> *See Id.* at 1552-53.

<sup>73</sup> Judge Rader’s first point was that rights in private property vest in the original owner at the time of their creation, and if subsequent federal statutes authorize a reduction of these rights, the application of such statutes would result in a taking of private property. *Id.* at 1553. The third point concerned railbanking, where he noted that intentions of “railbanking” a line for future use are not germane to the issue of scope and do not absolve the Government from a finding of liability. *Id.*; *see also Preseault I*, 494 U.S. at 22-23 (O’Connor, J., concurring) (noting that railbanking is immaterial to liability).

compensable claim.<sup>74</sup> This analysis adhered closely to the analysis in *Lawson v. State*,<sup>75</sup> which was “practically on all fours” with *Preseault II*, where in *Lawson* the court explained that the conversion of a railroad easement to trail use caused an automatic abandonment and reversion as a matter of law.<sup>76</sup>

**(4) Resist pigeonholing “abandonment” references: Read past page 1553.**

Closely related to, but as an alternative to its outright “dicta” theory, the Government has argued that even if the *Preseault II* decision had precedential value, a majority of the judges on the Federal Circuit believed liability turned primarily on the abandonment question. This argument has relied on “abandonment” references found in the concurrence, which on first blush appears to warrant the argument: “In the continuing evolution of this litigation, the court now correctly sets its sights on the question of abandonment.”<sup>77</sup>

But when reading the concurrence in its entirety, namely past page 1553, it is evident that Judge Rader did not intend his analysis concerning “abandonment” to be pigeonholed and limited in its meaning.

Instead, after being satisfied that the original easement had been limited to railroad purposes, and after agreeing there were indicia of abandonment of the easement in the case,<sup>78</sup> Judge Rader repeatedly expressed his view that “ultimately,” by exceeding the scope of the easement it was, *ipso facto*, abandoned (irrespective of any abandonment in fact), which triggered a reversion as a matter of law, for which just compensation was due:<sup>79</sup>

- “*a public trail is a use distinguishable from that of a railroad.*”
- “*Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion.*”

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<sup>74</sup> *Id.* at 1554.

<sup>75</sup> 730 P.2d 1308 (Wash. 1986) (en banc).

<sup>76</sup> See 100 F.3d at 1543.

<sup>77</sup> *Id.* at 1553.

<sup>78</sup> The lower court’s opinion had relied on that ground. See *Preseault II*, 100 F.3d. at 1553-54 (“I cannot say that the grant of summary judgment on that issue is in error”).

<sup>79</sup> *Id.* at 1554 (emphases added).

- “*property condemned for a narrow transportation use crumbled when [the State] converted that property to a recreational use.*”
- “[i]f present use of that property [is] inconsistent with the easement[,] [t]hat conversion demands compensation.”<sup>80</sup>

Accordingly, the concurrence opined that if the interests were easements and were originally limited to railroad purpose—even allowing for that purpose to include “transportation” uses<sup>81</sup>—then recreational trail use exceeds the original scope under any realistic measure, causing an automatic abandonment and reversion which gives rise to a compensatory taking.<sup>82</sup> In this respect, the concurrence was in agreement with the reasoning that “a change in use from ‘rails to trails’ constitutes abandonment of an easement which was granted for railroad purposes only,” so that “the right of way would automatically revert to the reversionary interest holders.”<sup>83</sup>

This approach is consistent with Justice O’Connor’s reasoning in *Preseault I*. Federal law expressly prevents the right of way from being abandoned and *mandates* the railbanking when easements are converted to linear recreational parks unless the railroad consummates

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<sup>80</sup> *Id.* at 1554 (emphases added in all bullet points).

<sup>81</sup> This statement, concerning “transportation” use, is the only true discernable difference between the main and concurring opinions: in the main opinion the Court declined to reach this holding because it had found that under the applicable state law “railroad use” did not include transportation use; in contrast, the concurrence opined that even if the state law considered transportation use to be within the scope of a railroad easement, “[r]ealistically, nature trails are for recreation, not transportation.” *Compare* 100 F.3d at 1544, *with id.* at 1554. Later, in *Toews*, the Court examined the controlling law in that case and agreed with the Government that easements granted for railroad purposes could later be dedicated to other transportation uses without exceeding the original scope, but reasoned similarly to the concurrence in *Preseault II*, 100 F.3d at 1554, and found the Government liable. *See* 376 F.3d at 1381.

<sup>82</sup> *See* 100 F.3d at 1554.

<sup>83</sup> *See id.* at 1543 (main opinion explaining reasoning in *Lawson*, 730 P.2d 1308); *see also id.* at 1550 (“[S]ome courts consider that the establishment of a use outside the scope of an existing easement has the effect of causing an abandonment, and thus termination, of the existing easement.”) (citing *Lawson*, *supra*).

abandonment within one year from the issuance of a NITU.<sup>84</sup> In that regard, abandonment is beside the point in the vast majority of cases.<sup>85</sup>

In sum, “[t]he defining issue . . . is the question of the scope of the easements originally granted to the railroad.”<sup>86</sup>

**(5) *Preseault II*: The “nature of the usage is clearly different.”**

The Government’s tenacious effort to avoid the scope of easement issue is unsurprising. The Federal Circuit’s pronouncements concerning trail use in the context of the scope of the easement analysis are devastating to its case.

Grounded *not in state law* but in fundamental principles, the court has unequivocally held that the transportation of property and people is manifestly different from recreational trail use:

When the easements here were granted to the [plaintiffs'] predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not. *Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different.* In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. 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.*<sup>87</sup>

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<sup>84</sup> See 16 U.S.C. § 1247(d); 49 C.F.R. §1152.29(a)(3) (trail manager “must” file a statement indicating the line is “subject to possible future reconstruction and reactivation of the right-of-way for rail service”).

<sup>85</sup> See *Preseault I*, 494 U.S. at 22-23 (noting the argument that the railroad interests were merely inactive and were being preserved for future use was immaterial to the takings analysis) (O’Connor, J., concurring).

<sup>86</sup> *Toews*, 376 F.3d at 1376-77.

<sup>87</sup> *Preseault II*, 100 F.3d at 1542-43 (emphases added); see also *id.* at 1554 (Rader, J., concurring).

Nowhere in this statement can it be reasonably inferred that the court limited the reach of its analysis to application of Vermont law. To the contrary, the court chose words reflecting nothing but certitude to underscore its point that *any* 19th-century party, granting a railroad easement, could never have intended recreational trail use under any reasonable view: “the nature of the usage is *clearly different*” and “[i]t is difficult to imagine that either party to the original transfers had anything *remotely in mind* that would resemble a public recreational trail.”<sup>88</sup>

**(6) *Toews*: It is “beyond cavil” that recreational use is different from railroad use.**

Any liability analysis concerning the scope of the easement question should recognize the court issued similar, strong pronouncements on point in *Toews*. Again, unhampered by any references to specific state law, but rather grounded in the “reality test” required under federal takings jurisprudence, recreational linear parks are simply different from railroad uses:

[I]t appears beyond cavil that use of these easements for a recreational trail—for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway—is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens.<sup>89</sup>

Accordingly, the court’s declarative pronouncements on the fundamentally different burdens of a railroad easement versus recreational trail have been unequivocal and should be front and center in any takings analysis.

**(7) “Realistically,” nature trails are not intended for “transportation purposes.”**

Despite the Federal Circuit’s above pronouncements concerning the differences between trail and railroad use, the DOJ has unflaggingly maintained that even if interim trail use is technically different from railroad use, recreational trails nonetheless provide another means of public transportation, just like the railroads. As such, it reasons, the

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<sup>88</sup> *Id.* at 1542-43 (emphasis added).

<sup>89</sup> *Toews*, 376 F.3d at 1376.

Government should not be held liable for the trails conversion. Most recently, the Government has avoided using the historical moniker for this argument, previously coined a “shifting public use” doctrine.<sup>90</sup> Under any name, the Federal Circuit has twice rejected this argument.

First, in *Preseault II*, the court considered the argument at length, there reviewing applicable state law. The Government had argued that the railroad easements were broad enough in scope to permit a shift to recreational trail use under state law. The court found that applicable law permitted railroads “*broad scope*” to use corridors consistent with railroad purpose where, for example, plank roads could be turned to railways and, presumably, vice versa.<sup>91</sup> Nonetheless, the court ultimately reasoned that a “shifting public use” doctrine was unavailable as a defense under Vermont state law.<sup>92</sup>

Important to this holding was the court’s admonishing that “[t]he concept of “shifting public use” must be anchored in established precedent.”<sup>93</sup>

The concurrence agreed with the holding on point—that the shifting public use doctrine did not shield the Government from liability—but wrote separately: the concurrence reasoned that even if the doctrine was available as a matter of state law, so that railroad purpose could include “transportation purpose” as contended in the dissent, “realistically,” recreational trails are simply different:

[T]he State has held the easements for two purposes, public recreation and preservation of unobstructed transportation corridors. As to the former, the dissent insists that bicycling and walking fit within the shifting public use doctrine as alternative modes of transportation. While there is some dispute over the comparative burden of scheduled rumbling freight trains versus obnoxious in-line rollerskaters, the issue can be resolved on simpler terms. Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion.<sup>94</sup>

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<sup>90</sup> See *Toews*, 376 F.3d at 1376; *Preseault II*, 100 F.3d at 1541.

<sup>91</sup> *Preseault II*, 100 F.3d at 1541.

<sup>92</sup> *Id.* at 1544.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 1554 (Rader, J., concurring).

In *Toews*, the court closed any discernable gap between the concurrence and the main opinion, holding that even if transportation purposes were originally permitted, recreational trail use is fundamentally different. The court first considered the Government’s “shifting public use” argument and, after taking a long look at the state law authority on point,<sup>95</sup> agreed with the Government that under the applicable law original grants for railroad purposes could later, and under proper circumstances, be put to “other mechanical methods for public transportation”:

We agree with the Government that these two cases reflect the position of the California courts regarding the so-called shifting use doctrine. The Government by quoting from the language of the cases finds broad authority to transmogrify one kind of easement into another. We find in these cases when put in their proper context a consistent and appropriately narrow theme: a right of way for public transportation uses, initially defined in terms of a specific form of public transport (railroad trains or boats) may, under proper circumstances, be taken to include other mechanical methods for public transport (buses or cars), so long as the change is consistent with the grantor's purpose and general intention.<sup>96</sup>

As such, the grants at issue were deemed subject to “transportation” uses that could include buses or cars under controlling law.

Nonetheless, the court disagreed with the Government’s reasoning that the easements could “transmogrify” into recreational trail use pursuant to the original terms. Rather, the decisional law permitting the other uses suggested a contrary, “narrow theme,” wherein “a public transportation easement defined as one for railroad purposes is not stretchable into an easement for a recreational trail and linear park for skateboarders and picnickers, however desirable such uses may be for these linear strips of land.”<sup>97</sup> Accordingly, while the “Government has the legal power and is thus free to impose such new uses upon the fee interests held by . . . landowners. . . . the private property interests taken are not free; the Government must pay the just compensation *mandated by the Constitution*.”<sup>98</sup>

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<sup>95</sup> See *Toews*, 376 F.3d at 1376-1379,

<sup>96</sup> *Id.* at 1379.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (emphasis added).

As is evident from these two Federal Circuit decisions, any plaintiff forced to litigate the issue of liability on the trial court level should keep the court's focus on the Federal Circuit's scope of the easement analysis, as already laid out in *Preseault II* and *Toews*.<sup>99</sup> That analysis establishes that the lower courts are bound by the Federal Circuit's analysis,<sup>100</sup> wherein, without equivocation or qualification, a right of way for railroad purposes, even including for transportation purposes, is manifestly different in kind from a recreational trail or linear park:<sup>101</sup>

Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point. The landowner's grant authorized one set of uses, not the other.<sup>102</sup>

**(8) “Railbanking” is immaterial to the scope of easement issue.**

Just as with its “transportation purposes” argument, the Government inevitably advances a “railbanking” defense during the course of litigation. Under this defense, the Government argues that because the trail sponsor is preserving the line for future railroad use, the line is merely “inactive,” which would be permitted under the original easement, it argues, given that in most states a merely inactive status, coupled with

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<sup>99</sup> The Government will cite *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999), a case decided by a state court construing a private deed, as supporting its argument that the Federal Circuit shares its view in certain circumstances. Plaintiffs litigating the scope of easement issue should be aware that while it is true (as will have been contended by the Government) that the Federal Circuit “affirmed” this state court decision, the Federal Circuit had certified questions to the Maryland’s highest court, and subsequently accepted the court’s answers, thus affirming the lower court’s ruling that the Government was not liable. But the Federal Circuit itself did not engage in an analysis on those merits. See *Chevy Chase Land Co. v. United States*, 230 F.3d 1375, 1999 WL 1289099, at \*2 (Fed. Cir. Dec. 17, 1999) (unpublished table decision); see also *Biery v. United States*, 86 Fed. Cl. 516, 516 n.1 (2009) (parenthetically noting, the Chevy Chase “decision follow[ed] the state court’s answer to certified questions”) (Firestone, J.). When comparing the Federal Circuit reasoning in *Preseault II* and *Toews* with that of *Chevy Chase*, it is evident that the Federal Circuit simply disagrees with the *Chevy Chase* line of reasoning.

<sup>100</sup> *E.g.*, *Troha v. United States*, 692 F.Supp.2d 550 (W.D. PA 2010).

<sup>101</sup> See *Toews*, 376 F.3d at 1376-77; see also *Preseault II*, 100 F.3d at 1542-43 (“Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different. . . . It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.”).

<sup>102</sup> *Toews*, 376 F.3d at 1376-77.

the railroad’s intent to preserve the line for future use, will not constitute abandonment under state law.

This very reasoning, however, was the basis for the Second Circuit’s decision in the Preseaults’ case, which was specifically reviewed and rejected by Justice O’Connor in *Preseault I* when explaining the lower court’s decision had been affirmed on other grounds.<sup>103</sup>

And as later explained by Judge Rader in his *Preseault II* concurrence, “[t]he vague notion that the [trail manager] may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.”<sup>104</sup>

Yet again, in *Toews*, the Federal Circuit addressed the “railbanking is railroad purposes” argument and flatly rejected the argument as being immaterial to the scope of easement issue:

*There is a reality test in takings law.* It is clear from the record that for the foreseeable future these lands will be used for the recreational trail project. Whether there ever will be a light rail system or other railroad service over these paved routes . . . is a matter of speculation about the distant future, based on uncertain economic and social change, and a change in government policy by managers not yet known or perhaps even born. Such *speculation does not provide a basis for denying protection to existing property rights under the Constitution.*<sup>105</sup>

The Federal Circuit’s “reality test” in a Trails Act taking case is grounded in federal “takings law” and will control the question of liability in any takings case.

On the issue of railbanking, then, any court or party who addresses the question of the Government’s liability should be clear that controlling precedent exists directly on point: a “railbanking” analysis—regardless of the form it takes<sup>106</sup>—is immaterial to the question of the scope of

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<sup>103</sup> See § 2C, *supra*.

<sup>104</sup> *Preseault II*, 100 F.3d at 1552.

<sup>105</sup> *Toews*, 376 F.3d at 1381 (emphases added).

<sup>106</sup> Most recently the Government has avoided using the phrase “railbanking,” and instead engages in wordplay, wherein the original railroad grants were purportedly not limited to “active” use and, the argument goes, allowed for an “inactive” status so long as they were preserved for future railroad use. Whether the analysis goes to “active”

easement issue and should therefore not be a factor to be considered germane when specifically considering the scope of the easement. Instead, the railbanking theory should be recognized for what it is—a red herring—and should be rejected as being immaterial to the scope of easement analysis.

### **C. Abandonment issue: The third rail for establishing liability.**

#### **(1) Resist the *pro forma* abandonment analysis unless it's actually applicable.**

As a realistic matter, if a trail agreement is implemented, then the Trails Act *prevents* the railroad from abandoning the line as a matter of law.<sup>107</sup> For this reason, launching into an alternative argument for liability under an abandonment of easement theory in the typical Trails Act case where no actual abandonment has transpired will, at best, dilute what should ordinarily be a powerful argument for establishing liability under the scope of easement analysis. At worst, the argument results in confusing the court and potentially losing the plaintiffs' case. For these reasons, the plaintiff should heed the Federal Circuit's suggestion that the analysis ends with the scope of easement inquiry unless the easement was sufficiently broad to encompass trail use.<sup>108</sup>

To be sure, if the plaintiff has similar facts to those found in *Fritsch* or *RLTD*,<sup>109</sup> where there had been actual abandonment of the railroad lines

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versus “inactive use” while preserving the line for later use, the argument is materially no different from the “railbanking” argument of formative years.

<sup>107</sup> See §§ 2C, 3A, *supra*.

<sup>108</sup> *E.g.*, *Phillips*, 564 F.3d 1374 (“we vacate the court's judgment and remand for further consideration of the dual questions whether the easement in this case covers trail use and, [*only*] if so, whether the railroad terminated its right-of-way by abandonment.”). The *Preseault II* inquiry on the abandonment issue made sense under the circumstances. In 1996, the case was one of first impression, and the Preseaults had advanced the abandonment argument in the context of the “shifting public use” argument, to show the latter argument would not work under the circumstances of their case. *Preseault II*, 100 F.3d at 1544. By 2004, however, while the *Toews* court affirmed the lower court's ruling on the abandonment question—presumably reached because the plaintiffs there had followed the *Preseault II* formula, the court stated it need not “definitively decide the issue” of abandonment because “the defining issue . . . is the question of the scope of the easements originally granted to the railroad.” *Toews*, 376 F.3d at 1376. More recent courts have understood the abandonment question need not be reached at all if the scope of the original easement was exceeded. *E.g.*, *Rogers v. United States*, 90 Fed. Cl. 418 (2009).

<sup>109</sup> See § 3A, *supra*.

so that a reversion of interests had already transpired before trails were established, then the landowner may be in a better position to submit the “alternative” argument.<sup>110</sup> Still, and unless the scope of easement issue is weak on the merits, the landowner should consider leaving the argument out entirely, or at the least make sure he includes the abandonment argument only after a thorough treatment of the scope of easement issue.

**(2) If “abandonment” is an indispensable issue, place it last anyhow.**

Placing an abandonment argument last seems intuitively wrong: if the right of way had really been abandoned before the trail use was implemented, it should follow that the scope of an easement question is moot. Even so, the Federal Circuit places the abandonment issue behind the scope of easement issue, indicating courts need only reach the issue if the question of scope is not dispositive. The court has never expressly explained why it organizes the analysis that way, but it has likely recognized that to some extent the abandonment inquiry is hampered and muddled by federal law which, as a legal matter, preempts state law and the technical abandonment of the line.

Regardless, if the initial analysis is mired in questions of whether there had been technical abandonment, or in whether there *would have been* an abandonment “but for” the Trails Act, the analysis may end up falling into the logical loop found in the Second Circuit’s decision which had been rejected by Justice O’Connor.<sup>111</sup> Additionally, by first engaging in an analysis where one party is suffusing the dialogue with the policy benefits of preserving the right of way for future use, and multiple points concerning intentions of non-abandonment, by the time the court reaches the scope of easement issue, notions concerning “railbanking” and “shifting public use” benefits may have taken hold and color what should have been a clean scope of easement analysis.<sup>112</sup>

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<sup>110</sup> *Preseault II*, 100 F.3d at 1549.

<sup>111</sup> *See*, § 2C, *supra*.

<sup>112</sup> For example, in *Troha v. United States*, the United States District Court for the Western District of Pennsylvania recently ruled in favor of the Government in summary judgment proceedings. 692 F.Supp.2d 550 (W.D. Pa. 2010). The court first considered whether the “Railbanking Act” forestalled an abandonment that would have occurred but for the Act. *Id.* at 558. By the time it reached the scope of easement issue, the analysis had been locked in: “railbanking” under Pennsylvania law was part and parcel of a railroad easement, and the scope of the original easement had not been exceeded. In fairness to the court and parties, the *Troha* court relied heavily on

## 5. Conclusion

In litigating the liability question, the Government has an edge over the plaintiffs' bar—the DOJ coordinates and builds on its strategy over time. In contrast, and while plaintiffs' counsel do informally share their views on emerging issues of first impression, the plaintiff-side liability briefing has been, well, uncoordinated.

Given that liability will make or break a plaintiff's case, and given that errant reasoning in any given court may take root and grow,<sup>113</sup> rails-to-trails plaintiffs' counsel must be thoroughly versed in the *Preseault I*, *Preseault II*, and *Toews* analyses and holdings. Those decisions are devastating to the Government's liability defense when properly understood. On the trial court level, these decisions stand virtually alone to start up, drive, and end the liability analysis.

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*Moody v. Allegheny Valley Land Trust*, 601 Pa. 655, 976 A.2d 484 (2009), which had reasoned along those very same lines. Still, the two Pennsylvania court decisions engaged in the very line of reasoning which the Federal Circuit has rejected, as discussed, *supra*.

<sup>113</sup> *E.g.*, *Troha*, *Moody*, n.112, *supra*.