
The Elements of Liability in a Trails Act Taking: A Guide to the Analysis

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*The National Trails System Act permits railroad companies and trail managers to preserve unwanted railroad corridors in perpetuity by converting them into recreational trails. If railroad use ever became desirable again—decades or centuries into the future—then a railroad may request permission to restore these linear parks back to a railroad corridor. Oftentimes, the railroad originally received only an easement to cross private or public lands for railroad purposes. In *Preseault v. Interstate Commerce Commission*, Justice O’Conner explained that if the original railroad interest was an easement limited to railroad purposes, the Trails Act does not merely delay a landowner’s right to claim his property, but defeats his property rights, which implicates the Fifth Amendment to the Constitution. And the Federal Circuit in *Preseault v. United States* held that the intended use of running locomotives for the transportation of people and commerce is simply and fundamentally different from establishing linear parks for hiking, biking, picnicking and horseback riding. Accordingly, when implementing the Trails Act and authorizing trail use on private property, the United States must pay just compensation to the landowner. This Article sets out the courts’ well-settled reasoning for finding the United States liable in a rails-to-trails takings case, and further explains why the United States’ most recent effort to reformulate the settled analysis is misguided under established precedent.*

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INTRODUCTION

The National Trails System Act (Trails 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.¹ This Article provides a background of rails-to-trails takings litigation, discusses the primary rationale employed by courts when holding the U.S. government liable for a taking effected by a rails-to-trails conversion, and sets out the blueprint for examining the liability question regardless of venue.

Landowners Pat and Paul Preseault were the first to challenge the Trails Act for violating the Fifth Amendment of the U.S. Constitution. In the 1980s, the Preseaults argued that the Trails Act was unconstitutional because it stripped their rights to the extinguishment of easements intended for one purpose by prescribing the easements be put to a use not contemplated in the original grants. The Preseaults’ case was ultimately reviewed by the U.S. Supreme Court in *Preseault v. Interstate Commerce Commission (Preseault I)*, which held the Trails Act to be constitutional. The Court reasoned that, if the conversion was impermissible under the original terms of an easement, any injury to private property could be remedied through a takings claim against the United States under the Tucker Act.²

The Preseaults filed a Tucker Act taking claim in the United States Court of Federal Claims and ultimately won on the issue of liability in the United States Court of Appeals for the Federal Circuit.³ In the seminal case *Preseault v. United States (Preseault II)*, the Federal Circuit⁴ ruled in favor of the Preseaults, holding that the government is liable for taking private property if the rails-to-trails conversion exceeds the scope of the property interest originally acquired by the railroad, as was the case with the Preseaults.⁵

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

1. National Trails System (Trails) Act, 16 U.S.C. §§ 1241–1251 (2006).

2. *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 4–5 (1990). Under the Tucker Acts, 28 U.S.C. § 1491(a)(1) (2006) (“Big Tucker Act”) and 28 U.S.C. § 1346(a)(2) (2006) (“Little Tucker Act”) (collectively “Tucker Acts”), the United States waives its sovereign immunity, permitting suits seeking damages against the federal government for breach of contract, and for violation of protections under the Constitution, including the Fifth Amendment. See *Preseault I*, 494 U.S. at 11–12.

3. *Preseault v. United States (Preseault II)*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) (4-2-2 decision).

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

5. *Preseault II*, 100 F.3d at 1541–44.

arguments it had made in *Preseault II*.⁶ After losing several liability arguments, culminating in a second Federal Circuit decision, *Toews v. United States*, the DOJ's challenges to the Government's liability subsided. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts.⁷ But the reprieve was brief.

The DOJ has resurrected its challenges to the government's liability in recent years. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments that the Federal Circuit previously rejected. 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 was 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, glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, by 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 use, 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 assist any court in which a client's case is brought in adhering to the issues that are actually material to a liability analysis, as set out by the Federal Circuit. In order to do so, the plaintiff's attorney needs to understand the breadth and reach of the *Preseault* and *Toews* decisions and 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.⁸

This Article provides a background on courts' takings claim analyses in rails-to-trails cases and presents an outline for plaintiffs to follow in litigating their claims. Part I provides a legal background of the Trails Act and reviews the heart of the *Preseault I* decision. Part II provides a short checklist to follow when considering whether a Trails Act taking claim can be brought in a rails-

6. See *Glosemeyer v. United States*, 45 Fed. Cl. 771, 773 (2000); *Toews v. United States*, 53 Fed. Cl. 58 (2002); *Schmitt v. United States*, No. IP 99-1852-Y/S, 2003 WL 21057368 (S.D. Ind. Mar. 5, 2003); *Schneider v. United States*, Nos. 8:99CV315, 4:99CV3056, 4:99CV3153, 4:99CV31542003, WL 25711838 (D. Neb. Aug. 29, 2003).

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

8. While the vast majority of courts have engaged in reasoning that tracks the Federal Circuit's, as discussed *infra*, one recent court has not. See *Troha v. United States*, 692 F. Supp. 2d 550, 558–62 (W.D. Pa. 2010) (speculating on whether the railroad would have abandoned the right of way "but for" the Trails Act, and reasoning that because the railroad company railbanked the right of way, it evinced no intent to abandon the right of way, and therefore there was no taking).

to-trails case. Finally, Part III explains the proper roadmap for the liability analysis in any Trails Act taking case as has been set out by the United States Court of Appeals for the Federal Circuit.

I. THE TRAILS ACT, RELEVANT REGULATION, AND *PRESEAUULT I*

A. *The National Trails System Act*

Congress passed the first iteration of the Trails Act in 1968, seeking to preserve unwanted railway lines for possible future use.⁹ However, the Act had little appeal. In 1983, recognizing the Act did not garner much public interest, Congress added provisions designed to facilitate the preservation of the lines while encouraging third parties to acquire the lines for recreational use.¹⁰

As part of the amendments, the Trails 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, transfer, lease, sale, or otherwise in a manner consistent with this chapter [of 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.¹¹

9. National Trails System Act, Pub. L. No. 90–543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241–1251 (2006)).

10. National Trails System Act Amendments of 1983, Pub. L. No. 98–11, 97 Stat. 42, to the National Trails System Act, Pub. L. No. 90–543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241–1251 (2006)).

11. 16 U.S.C. § 1247(d) (2006).

If the railroad does choose to relinquish a line, generally, and for the purposes of the Trails Act, it may do so in one of two ways: a railroad carrier may relinquish its responsibility for a line through standard abandonment proceedings,¹² or the carrier may seek an exemption from the standard abandonment proceedings.¹³ 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.¹⁴ 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 recreational trail use in perpetuity.¹⁵

B. Regulatory Framework

The Surface Transportation Board (STB)¹⁶ maintains exclusive and plenary authority over the construction, operation and abandonment of most of the nation’s interstate railway lines.¹⁷ When a railroad company wishes to abandon one of its lines, it must petition the STB.¹⁸ After the petition is submitted, and if the railroad satisfies procedural contingencies and consummates abandonment of its line pursuant to abandonment or exemption proceedings, the STB’s jurisdiction ceases and “state law reversionary interests, if any, take effect.”¹⁹

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 willingness” avowing its commitment to assume financial and legal responsibility for the line.²⁰

The putative trail manager’s submission will automatically prompt the STB to issue a Notice of Interim Trail Use or Abandonment (NITU) or

12. 49 U.S.C. § 10903 (2006).

13. 49 U.S.C. § 10502 (2006) (original version at 49 U.S.C. § 10505 in materially similar form, repealed by I.C.C. Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803 (1995)).

14. Cf. *Hayfield N. R.R. Co. v. Chi. & 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 49 U.S.C. § 10903).

15. E.g., *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006).

16. 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 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; *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313 (1981).

17. See *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 8 (1990); see also *id.* at 5–8 (chronicling history of Trails Act and related authority).

18. 49 C.F.R. § 1152.29 (2009).

19. *Caldwell v. United States*, 391 F.3d 1226, 1228–29 (Fed. Cir. 2004).

20. § 1152.29(a)(3).

Certificate of Interim Trail Use or Abandonment (CITU).²¹ The NITUs and CITUs (collectively, “NITU”) 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.²² Because the CITUs are issued pursuant to petitions filed under the abandonment process,²³ which is typically more onerous, NITUs are more common in the Trails Act takings cases.

Finally, as part of the Trails Act scheme, trail managers are required to attest to the intent to “railbank”—that is, preserve—the right of way for potential future railroad use.²⁴ For this reason, trail operators’ statements, pledging their 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. *The Preseault I Case*

The Preseaults owned property situated alongside Lake Champlain in Burlington, Vermont, through which ran a railroad right-of-way. In 1981, the Preseaults filed a quiet title claim in Vermont state court, predicated on the fact that the railroad had long since abandoned the right of way and had pulled up tracks and ties, and that the right-of-way easement had thus been extinguished, vesting the Preseaults in the full fee title to their land.²⁵ The trial court dismissed the Preseaults’ claim, finding the court had no jurisdiction because the Interstate Commerce Commission (ICC) had not authorized abandonment of the line, and thus maintained exclusive jurisdiction over the question of abandonment; the State Supreme Court affirmed the holding.²⁶ The Preseaults next petitioned for a certificate of abandonment from the ICC, contending the right of way had been de facto abandoned.²⁷ The ICC denied the Preseaults relief, and instead authorized the City of Burlington to implement a rails-to-trails conversion and dedicate the right of way to recreational trail use.²⁸ The

21. §§ 1152.29(c)–(d).

22. § 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 allowed, the NITU “will convert into an effective notice of exemption, permitting the railroad to abandon the line immediately.” *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).

23. § 1152.29(c); 49 U.S.C. § 10903 (2006).

24. § 1152.29(a)(3).

25. *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 9 (1990).

26. *Id.*

27. *Id.*

28. *Id.* at 9–10.

Preseaults appealed the ICC decision to the United States Court of Appeals for the Second Circuit, contending that the Trails Act was unconstitutional on its face by taking private property without providing for just compensation, and that the Act was not a valid Congressional exercise under the Commerce Clause.²⁹

a. The Second Circuit's Opinion: No Taking Occurred

The Second Circuit held the Trails Act was constitutional and that the Preseaults were unharmed. In reaching the holding, the court reasoned that no taking could occur so long as railbanking was intended.³⁰ 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 [C]ongress has recently delegated to the ICC, and it is, as discussed 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 [C]ongress'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.³¹

b. The Supreme Court's Opinion: Conflation of Federal Powers with Fifth Amendment Principles

The United States Supreme Court affirmed the Second Circuit in a unanimous opinion.³² Justice O'Connor wrote separately, however, to explain that while the Court affirmed the lower court's ultimate holding—the Trails Act *is* constitutional—the reasoning underlying that holding was flawed.³³ Justice O'Connor explained that the Second Circuit's line of reasoning was in error because, while state law (or federal law in the case of federal grants) determines the nature of the original interests the landowner held, federal

29. *Id.* at 10.

30. *See* Preseault v. Interstate Commerce Comm'n, 853 F.2d 145, 151 (2d Cir. 1988), *aff'd*, Preseault I, 494 U.S. 1 (1990).

31. *Id.*

32. Preseault I, 494 U.S. 1 (6–3 majority-concurring). Justice O'Connor concurred, joined by Justices Scalia and Kennedy, explaining that, while the court affirmed the Second Circuit's decision that the Trails Act was constitutional, the Second Circuit's holding that the Trails Act did not effect a taking was misplaced and conflated Congress' power to regulate commerce with the fundamental principles guiding a takings analysis. *Id.* at 20–25.

33. *Id.* at 20.

takings doctrine would dictate the analysis of “whether the Government must compensate petitioners for the burden imposed on any property interest they possess.”³⁴ 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. . . . Indeed, if the Second Circuit’s approach were adopted, discussion of the availability of the Tucker Act remedy would be unnecessary.³⁵

2. *The Government’s Misguided Application of Preseault I*

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 traverses the property while being preserved for future use, which in itself is a railroad purpose.³⁶

Justice O’Connor’s pronouncements concerning “traditional takings doctrine”³⁷ and review of the Court’s takings jurisprudence relevant to the issue,³⁸ however, disprove the government’s arguments. The Court recognized

34. *Id.*

35. *Id.* at 23.

36. The Federal Circuit has heard and rejected this argument more than once. Most recently, in early September 2010, when the government repeated this argument to that court, 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 at 12:37, *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010) (No. 2010-5010), available at <http://oralarguments.cafc.uscourts.gov/Audiomp3/2010-5010.mp3>.

*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 at 42:27, *Preseault I*, 494 U.S. 1 (1990) (No. 88–1076), available at http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/ argument (statement of Chief Justice Rehnquist).

37. *Preseault I*, 494 U.S. at 20.

38. *Id.* at 20–23.

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 was issued, all thanks to the implementation of the Trails Act.³⁹ 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.⁴⁰

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 takings claim so long as the plaintiff can claim title to the underlying property.

The remainder of this Article sets out a brief checklist for deciding whether a takings claim should be brought, and next turns to the fundamental principles guiding the takings analysis.

II. ASSESSING POTENTIAL RAILS-TO-TRAILS TAKINGS CLAIMS: INITIAL ELEMENTS

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 Part III.C, *infra*.

The checklist for determining whether to bring a Trails Act taking claim concerns the following: (1) abandonment; (2) the statute of limitations; and (3) date of ownership on the day the taking accrued.

A. *Abandonment*

In the vast majority of instances, a Trails Act rails-to-trails conversion takes place pursuant to a NITU or CITU, where there has been no legal abandonment of the right of way prior to the conversion. But, as discussed below, if the STB *has* authorized abandonment and the railroad consummated the abandonment, or, even in the absence of an STB order, if the right-of-way segment at issue has in some fashion been cut off from the interstate commerce network of corridors so that it has been de facto abandoned, then the plaintiff may wish to pursue a quiet title action rather than a Tucker Act claim.

39. *E.g., id.* at 17–20.

40. *Id.* at 22.

1. *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.⁴¹ 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.⁴² 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 conversion, as the NITU may be the only order issued by the STB authorizing the abandonment.⁴³

2. *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 railroad carrier may nonetheless have de facto abandoned a line. If the STB determines there has been de facto abandonment, it may conclude that it no longer has jurisdiction to authorize a rails-to-trails conversion.⁴⁴

B. *If in Doubt Concerning the Abandonment, Assume 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.⁴⁵ Unless there has been a final judgment on the question of abandonment and the STB's jurisdiction, the practitioner should take all steps necessary to preserve a taking claim and/or clarify whether the STB still retains jurisdiction over a line. The practitioner should, of course, do so before the applicable limitations period to file suit has expired, rather than merely assuming the right of way had been abandoned for purposes of bringing the takings claim.

41. *Fritsch v. Interstate Commerce Comm'n*, 59 F.3d 248, 250 (D.C. Cir. 1995); *see also Birt v. Surface Transp. Bd.*, 90 F.3d 580, 588 (D.C. Cir. 1996) (requiring railroad to "exhibit an intent to abandon at a time when it was authorized to do so by the Commission").

42. *See Fritsch*, 59 F.3d at 253.

43. *See supra* note 22.

44. *RLTD Ry. Corp. v. Surface Transp. Bd.*, 166 F.3d 808, 812 (6th Cir. 1999).

45. 28 U.S.C. § 2501 (2006).

Under current law, the statute of limitations starts to run on the date the original NITU was issued.⁴⁶ This is 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 trains are still operating on the line.⁴⁷ Indeed, there have been instances in which more than six years have transpired and the original NITU was re-opened or extended.⁴⁸ For this reason, regardless of the circumstances, including whether a trail has actually been established or not, the landowner must file her taking claim within six years from the issuance of the *first* NITU or CITU to avoid missing the six-year limitations period deadline.

C. *Did the Landowner Own the Property on the Date of the Taking?*

A plaintiff must have owned the property at issue on the date the taking accrued to have a valid taking claim. Ownership can include inheriting the property from an owner, or 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.

Finally, in some instances, a fourth item may be added to the initial checklist: the underlying interest in the right of way. Sometimes it may be clear whether the railroad company acquired the railroad right of way in fee simple absolute. If the right of way was acquired in fee simple absolute, then the landowner has no colorable action—the landowner does not own the right of

46. *Caldwell v. United States*, 391 F.3d 1226, 1233 (Fed. Cir. 2004). In a decision concerning not accrual but ripeness, the Federal Circuit recently affirmed the status quo of the current law discussed herein, namely that a rails-to-trails takings claim accrues on the issuance of the first NITU/CITU. *Ladd v. United States*, 630 F.3d 1015, 1023 (Fed. Cir. 2010). The United States petitioned for a rehearing en banc, which the court denied, but with Judges Gajarsa and Moore dissenting, opining that the *Ladd* decision should have been subject to an en banc review, in order to revisit the *Caldwell* bright-line rule. *See Ladd v. United States*, 646 F.3d 910 (Fed. Cir. 2011). In affirming that a taking case accrues at the issuance of the first NITU/CITU, the *Ladd* panel expressed little enthusiasm for the court's earlier "bright line" holding that a taking accrues upon the first governmental action in the absence of the actual rails-to-trails conversion itself. 630 F.3d at 1023 ("Whether we agree with the *Caldwell* bright-line rule, it is settled law."). A Catholic University Law School Journal comment addresses the infirmities of the *Caldwell* bright-line rule. Bridget Tomlinson, Comment, *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*, 56 CATH. U. L. REV. 1307 (2007). Accordingly, for now a Trails Act taking accrues at the point the STB issues a NITU/CITU.

47. *Barclay v. United States*, 443 F.3d 1368, 1379 (Fed. Cir. 2005).

48. *See S. Pac. Transp. Co.—Abandonment Exemption—Wendel-Alturas Line in Modoc and Lassen Cntys., CA*, No. AB-12 (Sub-No. 184X), 2004 WL 1941838 (Surface Transp. Bd. 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 Cnty., PA*, Decision, No. AB-55 (Sub-No. 568X), 2005 WL 189881 (Surface Transp. Bd. Jan. 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 Cntys., TX*, CITU, No. AB-39 (Sub-No. 12), 2002 WL 383570 (Surface Transp. Bd. March 12, 2002) (trail use reached after eight years on part of line; other part abandoned per the CITU).

way and therefore no property interest was taken. More often than not, the answer is unclear. If unclear, the matter can be addressed as part of the takings action, as explained below.

III. 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 simple unencumbered by the easement (abandonment of the easement).⁴⁹

State or federal law determines the first issue—"who owns the strip of land involved"—which concerns whether the railroad acquired full fee title in the strip or, instead, acquired a lesser estate which would inure to the benefit of the landowner upon full abandonment.⁵⁰ The issue is analyzed 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.⁵¹ Thus, federal law will apply to the analysis if the strip was acquired as part of a federal grant;⁵² state law applies if not.⁵³ In short, applicable state or federal law "determines what property interest petitioners possess."⁵⁴

The second issue, "scope of the easement," is more complex. The initial 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 (for example, 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

49. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (parentheticals in the original).

50. Courts and parties tend to refer to the issue as the "fee versus easement" issue.

51. *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1553 (Fed. Cir. 1996) (Rader, J., concurring); *Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

52. See *Ellamae Phillips*, 564 F.3d 1367 (strip acquired through a federal grant).

53. See *Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring).

54. *Id.*

other controlling or persuasive sources, other uses had been deemed to be included in the original grant. This inquiry is *substantive* rather than *temporal*, looking at *types* of permitted uses.

Importantly, “*traditional takings doctrine*”⁵⁵ is integral to this scope of the easement analysis. Traditional takings jurisprudence, according to the Federal Circuit, requires a “reality test.”⁵⁶ In rails-to-trails takings cases, under the Federal Circuit’s reality test, recreational purposes are fundamentally different from railroad purposes. Thus, under controlling law from the Federal Circuit, it is “beyond cavil”⁵⁷ that easements granted for the purpose of operating a railroad cannot be “transmogrif[ied]”⁵⁸ into “linear parks”⁵⁹ without payment of just compensation to the injured landowner.

Finally, the third issue, “abandonment of the easement,” provides an *alternative* ground to establish the government’s liability if the scope of easement question is not dispositive. This third issue generally does not apply because, while anomalies exist in the decisional law,⁶⁰ 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.⁶¹

These three issues are addressed below.

A. *Fee Simple versus Easement*

The initial step in a rails-to-trails takings case is to determine whether the railroad acquired full fee title in the strip of property or instead obtained merely an easement. Railroads acquired their interests in right-of-way segments through either federal railway grants or under state law. This section briefly summarizes both federal and state law analysis.

1. *Federal Grant: The 1875 Act Granted Merely Easements.*

In the 1800s Congress passed various acts that granted rights of way to railroad companies.⁶² With the Civil War as a catalyst, and later the push to settle vast, unpopulated territories, Congress transferred millions of acres of land from the public to railroad companies as an incentive to construct rights of

55. *Id.* (emphasis added).

56. *Toews v. United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004).

57. *Id.* at 1376–77.

58. *Id.* at 1377.

59. *Id.* at 1379.

60. *See Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1544 (Fed. Cir. 1996) (affirming trial court’s finding that abandonment of easement occurred before the trail-conversion); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373–74 (Fed. Cir. 2009) (concluding that *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) did not reach the scope of easement question but did find the Government liable and therefore necessarily found liability under the alternative, abandonment theory).

61. *Cf. supra* note 42; *supra* note 44.

62. *E.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 672 (1979).

way for transportation of troops, commerce, and civilians.⁶³ Initially, the grants were “lavish,” resulting in the transfer of millions of acres of land, but congressional policy changed after 1872, thereafter granting only rights of way.⁶⁴ Congress thus passed a general right of way grant statute, the Right of Way Act of 1875,⁶⁵ which resulted in railroads crisscrossing public lands nationwide.

In *Hash v. United States*, the Federal Circuit construed the 1875 Act in a Trails Act taking case in order to identify the nature of the interest Congress had granted to railroads in these rights of way.⁶⁶ The *Hash* court rejected the government’s argument that the United States, not the landowner, held a “reversionary” interest in the 1875 Act grants.⁶⁷ 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.⁶⁸ The United States Court of Federal Claims had reached the same result just one month earlier in *Beres v. United States*.⁶⁹

The government later challenged the reach of *Hash* in a different case, *Ellamae Phillips Co. v. United States*, contending, inter alia, that the decision

63. See *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79–82 (1875) (offering a detailed history of the period leading to land and railroad right-of-way grants); see also *United States v. Union Pac. R.R. Co. (Union Pacific)*, 353 U.S. 112, 125 (1957) (Frankfurter, J., dissenting) (“During this period ‘there passed into the hands of western railroad promoters and builders a total of 158,293,000 acres, an area almost equaling that of the New England states, New York and Pennsylvania combined.’”) (citation omitted); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 356–77 (Public Land Law Review Commission, 1968) (describing the history of land grants to railroads).

64. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273–75 (1942) (describing the history of land and right of way grants).

65. General Railroad Right of Way Act of 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)).

66. *Hash v. United States*, 403 F.3d 1308, 1313 (Fed. Cir. 2005).

67. The court explained that the United States had presented various arguments that the federal government purportedly held a “reversionary” interest in the former railroad right of way:

The government’s position in the district court was that it owns the reversionary interest on abandonment of the right-of-way. In *Preseault*, 100 F.3d at 1533, this court explained that having the “reversionary interest” in an easement is the same as having the fee in the land occupied by the easement burdened by the easement itself. On appeal the government argues various modifications of this theory, to the effect that whatever the rights acquired by the Railroad and by the landowners, on abandonment of the right-of-way the United States owns the reversionary interest and thus owns the rail corridor in fee.

Hash, 403 F.3d at 1313. Thereafter, given the government’s characterization of the interest it claimed it held, the *Hash* court referred to the government’s contentions as that of owning the “fee” title in the land. In *Preseault II*, the court noted that an easement is not a “reversionary” interest—namely, is not a possessory interest in land as is a reversionary interest—but rather is a present estate in fee simple subject to a burden of an easement. *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1533 (Fed. Cir. 1996). Still, some courts use the term “reversionary” as a short-hand device for referring to the abandonment of easements in Trails Act taking cases. *E.g.*, *Rogers v. United States*, 90 Fed. Cl. 418, 428 (2009) (quoting *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004)).

68. *Hash*, 403 F.3d at 1313–18; see *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373–74 (Fed. Cir. 2009).

69. 64 Fed. Cl. 403 (2005).

was limited to the facts in *Hash*—that is, to that case alone.⁷⁰ 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.⁷¹ Thus, 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. Recently, the Seventh Circuit addressed the nature of interests granted under the 1875 Act and agreed with the *Hash* and *Beres* decisions, finding those cases to be better reasoned than earlier decisions that may have reached a contrary result.⁷²

The *Ellamae Phillips* court, however, agreed with the Government that *Hash* had not disposed of the scope of easement issue.⁷³ Back on remand in *Ellamae Phillips*, the Court of Federal Claims recently held the original scope was limited to railroad purposes, and found the United States liable for a Fifth Amendment taking when the government authorized the conversion of those easements to trail use.⁷⁴ The same issue is currently pending in the Court of Federal Claims in the *Beres* case.⁷⁵

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 the applicable state law in which the interests were originally created.⁷⁶ This process requires ascertaining the method by which the railroad acquired the interest—typically by private deed, adverse possession, prescriptive easement, or by condemnation.⁷⁷ In some situations the analysis is fairly straightforward and the government may end up stipulating to the interest as being merely an easement. In other situations it may choose to litigate the question.

The application of state law varies widely. In some instances, the issue may involve construing simply one deed,⁷⁸ but in other instances, such as in class actions, several hundreds (if not thousands) of parcels may be at issue, requiring categorization of the various source interests so that the parties may either stipulate to or litigate the fee versus easement question.⁷⁹ The Court of

70. *Ellamae Phillips*, 564 F.3d at 1373–74.

71. *See id.* at 1373.

72. *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, No. 09-2876, 2011 WL 2417020, at *3 (7th Cir. June 17, 2011).

73. *See Ellamae Phillips*, 564 F.3d at 1373–74.

74. *Ellamae Phillips Co. v. United States*, No. 04-1544L, 2011 WL 2466201 (Fed. Cl. June 21, 2011).

75. Plaintiff's Response and Cross-Motion for Summary Judgment, *Beres v. United States*, No. 1:03-CV-00785 (Fed. Cir. filed July 1, 2011).

76. *E.g.*, *Hash v. United States*, 403 F.3d 1308, 1312–13 (Fed. Cir. 2005).

77. *See id.*

78. *E.g.*, *Toews v. United States*, 376 F.3d 1373 (Fed. Cir. 2004).

79. *E.g.*, *Hash*, 403 F.3d at 1312–13 (explaining the parties had identified fourteen different categories of source interests—comprising federal grants, private deeds, and adverse possession—to

Federal Claims has recently issued a number of decisions that have construed state-created railroad interests in Trails Act takings cases.⁸⁰

B. *Scope of the Easement*

If the railroad held merely an easement, the next issue is the scope of that easement. As explained by the Federal Circuit, the question of the government's liability will turn on whether the scope of the easement was limited, such that by converting the easement to recreational trail use the original scope is exceeded, thus giving rise to the government's liability.⁸¹

As addressed in the sections that follow, in both *Preseault I* and *Toews*, the Federal Circuit explained that, *as a fundamental matter*, nature trails, intended for recreational uses, are realistically different from railroad uses. Thus, if the original grants were easements for railroad uses, then the government must pay. As recently affirmed by the Federal Circuit in *Ladd v. United States*,⁸² it "is settled law" that if trail use is outside the scope of the original easement, then the government's action of authorizing the rails-to-trails conversion—e.g., the issuance of the NITU—"destroys" the property right, causing a Fifth Amendment taking.⁸³

As such, in litigating the question of the scope of the easement issue, the plaintiff should recognize that *Preseault II* and *Toews* provide precedent that transcends Vermont and California state law. Plaintiffs should thus rely on *Preseault II* and *Toews* rather than arguing as if no precedent on point exists. That thesis—no controlling law exists—is the government's theory, but should not be the plaintiff's, and should not be countenanced by any court that takes the time to understand the principles that have been laid out by the Federal Circuit.

The remainder of this Part discusses the arguments advanced by the government in furtherance of its efforts to weaken the precedential value of *Preseault II* and *Toews* and explains why such arguments are unavailing.

1. *The Preseault II Holding Regarding Scope Was Not Dicta*

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." The government reasons that the *Preseault II* scope of the easement analysis was merely dicta and only

which some had been stipulated); *Schneider v. United States*, Civ. No. 8:99CV0315, 2007 WL 2248050, at *1 (D. Neb. 2007) (explaining parties had distilled 3500 source interests to approximately twenty-eight categories for purposes of the fee versus easement determinations).

80. *Biery v. United States*, Nos. 07-693L, 07-675L, 2011 WL 2279653 (Fed. Cl., June 9, 2011) (Firestone, J.); *Capreal, Inc. v. United States*, No. 09-186L, 2011 WL 1740543 (Fed. Cl. May 6, 2011) (Wheeler, J.); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708 (2011) (Firestone, J.).

81. *See infra* note 86.

82. *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010).

83. *Id.* (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)).

tangential to the decision's alternative holding (the abandonment question), on which the government has insisted the case actually turned.⁸⁴

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."⁸⁵ Thereafter, the Federal Circuit has repeatedly affirmed that the scope of easement question drives a Trails Act taking analysis, contrary to the government's interpretation.⁸⁶

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 cases under similar circumstances, the holding of the case reflects the considered view of a *substantial majority* of the court.⁸⁷

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 was merely dicta. The decision itself, however, does not support the government's view.

84. For as long as the government persists in this strategy, plaintiffs should take the time to ensure the argument does not lead courts 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 *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009). The court's statement is somewhat ambiguous, but to the extent the court may have surmised the government conceded the scope of easement issue, that conclusion would be wrong.

85. *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1549 (Fed. Cir. 1996); see also *id.* at 1533; *id.* at 1541-44; *id.* at 1554 (Rader, J., concurring).

86. See *Toews v. United States*, 376 F.3d 1373, 1376-77 (Fed. Cir. 2004) ("The defining issue in this case is the question of the scope of the easements originally granted to the railroad."); see also *Ladd*, 630 F.3d at 1019 (holding that a taking occurs if trail use is outside the scope of original easement); *Ellamae 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); *Bright v. United States*, 603 F.3d 1273, 1275 (Fed. Cir. 2010) (observing that 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)).

87. *Toews*, 376 F.3d at 1380 n.6 (emphases added).

In *Preseault II*, the court explained that the issue of the government's liability turned on the scope of the easement.⁸⁸ 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."⁸⁹ The court disagreed, dedicating substantial discussion to the point.⁹⁰ Judge Rader, who dissented on the panel which had considered the case before it was reviewed en banc in *Preseault II*, explained he wished to write separately to distill the main issues of the case.⁹¹

Judge Rader emphasized three issues, including the question of the scope of the easement.⁹² 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.⁹³ By converting the easement to trail use, the easement automatically abandons and reverts, giving rise to a compensable claim.⁹⁴ This analysis adhered closely to the analysis in *Lawson v. State*,⁹⁵ which the *Preseault II* court had explained was "practically on all fours" with the circumstances presented before the court,⁹⁶ where in *Lawson* the Washington state court there had explained that the conversion of a railroad easement to trail use caused an automatic abandonment and reversion as a matter of law.⁹⁷

As is evident from the majority's discussion of the scope of easement issue and the holding itself, the scope of the easement analysis in *Preseault II* was not dicta, but rather was the issue upon which the government's liability turned, rendering it settled precedent for all Trails Act takings cases.

2. *Preseault II Did Not Turn Primarily on an Abandonment Theory*

As a closely-related alternative argument to its "dicta" theory, the government has contended that, even if the *Preseault II* decision had

88. *Preseault II*, 100 F.3d at 1533; *id.* at 1541–44; *id.* at 1554 (Rader, J., concurring).

89. *Id.* at 1530.

90. *See id.* at 1541–44; *id.* at 1553–54 (Rader, J., concurring).

91. *See id.* at 1552–53 (Rader, J., concurring).

92. 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 (Rader, J., concurring). 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.* at 1554 (Rader, J., concurring); *see also* *Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 22–23 (1990) (O'Connor, J., concurring) (noting that railbanking is immaterial to liability).

93. *Preseault II*, 100 F.3d at 1554 (Rader, J., concurring).

94. *Id.*

95. 730 P.2d 1308 (Wash. 1986) (en banc).

96. *See Preseault II*, 100 F.3d at 1543.

97. *Id.* (explaining *Lawson*).

precedential value, a majority of the judges on the Federal Circuit believed liability turned primarily on the abandonment theory.⁹⁸

The government's argument that *Preseault II* turned on an abandonment theory relies on "abandonment" references found in the concurrence. At first blush, the references seem to support the argument. Judge Rader writes in concurrence, "In the continuing evolution of this litigation, the court now correctly sets its sights on the question of abandonment."⁹⁹ 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 limited in its meaning as has been argued by the government. Instead, after ensuring that the original easement had been limited to railroad purposes, and after agreeing there were indicia of abandonment of the easement in the case,¹⁰⁰ Judge Rader repeatedly expressed his view that exceeding the scope of the easement renders the easement abandoned (irrespective of any abandonment in fact), triggering reversion as a matter of law.¹⁰¹ The following excerpts from Judge Rader's opinion demonstrate this holding:

- "[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."
- "[P]roperty condemned for a narrow transportation use crumbled when [the State] converted that property to a recreational use."
- "[If] present use of that property [is] inconsistent with the easement[,] [t]hat conversion demands compensation."¹⁰²

Accordingly, the concurrence opined that if the interests were easements and were originally limited to railroad purpose, even if that purpose included "transportation" uses,¹⁰³ then recreational trail use exceeds the original scope, causing an automatic abandonment and reversion, and effecting a taking.¹⁰⁴ In

98. In so arguing, the government has suggested that questions of abandonment should replace the scope of easement issue as the primary inquiry in determining whether there is a taking.

99. *Id.* at 1553 (Rader, J., concurring).

100. The lower court's opinion had relied on that ground. *See Preseault II*, 100 F.3d. at 1553–54 (Rader, J., concurring) ("I cannot say that the grant of summary judgment on that issue is in error.").

101. *Id.* at 1554 (concurring).

102. *Id.* at 1554 (Rader, J., concurring) (emphases added in all bullet points).

103. 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 "railroad use" did not include transportation use under state law; 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 Preseault II*, 100 F.3d at 1544, with *id.* at 1554 (Rader, J., concurring). 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 found the government liable using similar reasoning to the *Preseault II* concurrence, 100 F.3d at 1554 (Rader, J.). *See Toews v. United States*, 376 F.3d 1373, 1381 (Fed. Cir. 2004).

104. *See* 100 F.3d at 1554 (Rader, J., concurring).

this respect, the concurrence agreed 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.”¹⁰⁵

This approach is consistent with Justice O’Connor’s reasoning in *Preseault I*. Federal law expressly prevents abandonment of the right of way and *mandates* the railbanking when easements are converted to linear recreational parks, unless the railroad consummates abandonment within one year from the issuance of a NITU.¹⁰⁶ In that regard, abandonment is beside the point in the vast majority of cases.¹⁰⁷

In sum, “[t]he defining issue . . . is the question of the scope of the easements originally granted to the railroad.”¹⁰⁸

3. *The Scope of the Easement Analysis Clearly Resolves the Question of the Government’s Liability*

The government’s tenacious effort to avoid the scope of easement issue, as discussed, 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 and resolve the issue of the government’s liability in rails-to-trails cases. This Part explores the government’s typical argument that recreational use does not exceed the scope of the railroads’ easements, and then demonstrates that recreational use of the easements is distinct from railroad use.

a. *The Nature of the Recreational Use Is Distinct from the Railroads’ Use*

The government will argue that recreational trail use is not distinct from railroad use. The Federal Circuit, however, has unequivocally held that the transportation of property and people is manifestly different from recreational trail use. For example, the court in *Preseault II* explains,

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

105. See *id.* at 1543 (explaining reasoning in *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (en banc)); 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*, 730 P.2d 1308).

106. See 16 U.S.C. § 1247(d) (2006); 49 C.F.R. § 1152.29(a)(3) (2009) (holding 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”).

107. See *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 22–23 (1990) (O’Connor, J., concurring) (noting the argument that the railroad interests were merely inactive and were being preserved for future use was immaterial to the takings analysis).

108. *Toews*, 376 F.3d at 1376.

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.*¹⁰⁹

This quotation underscores the point that *any* nineteenth-century party granting a railroad easement could not 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.”¹¹⁰

The court issued similarly strong pronouncements on point in *Toews*. Again, without reference to any particular state’s law, but instead grounded in the “reality test” required under federal takings jurisprudence, the court held that 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 railway—is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens.¹¹¹

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 rails-to-trails takings analysis.

b. Recreational Trails Are Not Merely Another Means of Public Transportation

Despite the Federal Circuit’s pronouncements concerning differences between trail and railroad use, the DOJ has been unwavering in its contention that, even if interim trail use is technically different from railroad use, recreational trails nonetheless provide a means of public transportation, just like a railroad, thereby absolving the government of liability for the trails conversion. Most recently, the government has avoided using the historical moniker for this argument, previously coined a “shifting public use”

109. *Preseault II*, 100 F.3d at 1542–43 (emphases added); *see also id.* at 1554 (Rader, J., concurring).

110. *Id.* at 1542–43 (emphasis added).

111. *Toews*, 376 F.3d at 1376.

doctrine.¹¹² Under any name, the Federal Circuit has twice rejected this argument.

First, the court in *Preseault II* considered the argument at length, reviewing state law. The government 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.¹¹³ Nonetheless, the court ultimately reasoned that a “shifting public use” doctrine was unavailable as a defense under Vermont law.¹¹⁴ Important to this holding was the court’s admonishment that “[t]he concept of ‘shifting public use’ must be anchored in established precedent.”¹¹⁵

The concurrence agreed with the holding that the shifting public use doctrine did not shield the government from liability. However, the concurrence reasoned that even if the “shifting public use” 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.¹¹⁶

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,¹¹⁷ 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

112. See *Toews*, 376 F.3d at 1377; *Preseault II*, 100 F.3d at 1541.

113. *Preseault II*, 100 F.3d at 1541.

114. *Id.* at 1544.

115. *Id.*

116. See *id.* at 1554 (Rader, J., concurring).

117. See *Toews*, 376 F.3d at 1376–79.

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.¹¹⁸

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 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."¹¹⁹ 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*."¹²⁰

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 laid out in *Preseault II* and *Toews*,¹²¹ and most recently crystallized in *Ladd*.¹²² That analysis establishes that the lower courts are bound by the Federal Circuit's analysis,¹²³ wherein, without equivocation or qualification, a right of way for

118. *Id.* at 1379.

119. *Id.*

120. *Id.* (emphasis added).

121. 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 the government's view in certain circumstances. Courts should be made aware that while it is true (as will be contended by the government) that the Federal Circuit "affirmed" this state court decision, the Federal Circuit did not deal with the merits of the issue. Rather, it certified questions to Maryland's highest court, accepted the State's court's answers, and thus affirmed the lower court's ruling, which had held 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) (noting parenthetically that 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 the reasoning by the Maryland court in *Chevy Chase*, it is evident that the Federal Circuit precedent simply holds contrary to the *Chevy Chase* second and alternative line of reasoning, wherein the Maryland court found that even if the original scope was limited, trail use was permissible. To that end, and importantly, the Federal Circuit specifically noted that it was not affirming or addressing the alternative holding. *See Chevy Chase*, 1999 WL 1289099, at *3.

122. *See discussion supra* Part III.B.

123. *E.g., Troha v. United States*, 692 F. Supp. 2d 550, 556 (W.D. Pa. 2010).

railroad purposes, even including for transportation purposes, is manifestly different in kind from a recreational trail or linear park.¹²⁴ In sum, and as so aptly put in *Toews*, “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.”¹²⁵

c. “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.” Under this line of reasoning, the government contends that a merely inactive status, coupled with 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, and 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.¹²⁶ 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.”¹²⁷

Once again, despite Justice O’Connor’s pronouncements and *Preseault II*’s rejection of the railbanking theory, the government advanced the “railbanking is railroad purposes” argument in *Toews*, and the Federal Circuit once again flatly rejected the argument as 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

124. See *Toews*, 376 F.3d at 1376–77; see also *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1542–43 (Fed. Cir. 1996) (“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.”).

125. *Toews*, 376 F.3d at 1376–77.

126. See discussion *supra* Part II.C.

127. *Preseault II*, 100 F.3d at 1554 (Rader, J., concurring).

*speculation does not provide a basis for denying protection to existing property rights under the Constitution.*¹²⁸

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 takes¹²⁹—is immaterial to the question of the scope of easement issue; the "railbanking" theory should be rejected as a red herring.

In summary, the government's liability will turn on the scope of easement issue. That issue is determined strictly by addressing the nature of the interest that was *originally* acquired by the railroad—whether the easement was limited to railroad use in such a fashion that recreational trail use falls outside of that scope. If the easement was so limited, the government's liability is fixed:

It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.¹³⁰

For this reason, railbanking is immaterial to the government's liability.

C. Abandonment

The Federal Circuit explains that if and only if the scope of the easement issue is *not* resolved, *then* the next step in determining the government's liability is through the question of abandonment: "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 simple unencumbered by the easement (abandonment of the easement)?"¹³¹ As explained below, this abandonment analysis should be undertaken only if apt, not as a pro forma, alternative argument if the scope of easement issue is dispositive of the question of liability.

128. *Toews*, 376 F.3d at 1381 (emphases added).

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

130. *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010).

131. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009).

1. *Resist the Pro Forma Abandonment Analysis Unless It Is Actually Applicable*

As a realistic matter, if a trail agreement is implemented, then as a matter of law the Trails Act *prevents* the railroad from abandoning the line.¹³² For this reason, alternatively arguing for liability under an abandonment of easement theory in the typical Trails Act case where no abandonment has transpired will, at best, dilute what would ordinarily be a powerful argument under the scope of easement analysis. At worst, it could confuse the court and jeopardize the plaintiff's 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.¹³³

To be sure, if the plaintiff has similar facts to those found in *Fritsch* or *RLTD*,¹³⁴ where there was actual abandonment of the railroad lines so that a reversion of interests had transpired before trails were established, then the landowner may be in a better position to submit the "alternative" argument of abandonment.¹³⁵ Still, and unless the scope of easement issue is weak on the merits, the landowner should consider leaving the argument out entirely,¹³⁶ or at the least make sure the abandonment argument comes only after a thorough treatment of the scope of easement issue.

132. See discussion *supra* Parts II.C, III.A.

133. *E.g., Ellamae Phillips*, 564 F.3d at 1374 ("[W]e 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 v. United States*, 100 F.3d 1525, 1544 (Fed. Cir. 1996) (*Preseault II*). 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 recently 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, 432 (2009).

134. See *supra* notes 41, 44.

135. *Preseault II*, 100 F.3d at 1549.

136. Aside from whether the plaintiff may be conflating a true abandonment issue with one that speculates over whether the right of way would have been abandoned "but for" the NITU, the other concern with advancing a legitimate abandonment argument is that if the plaintiff wins the issue, then arguably he is in the wrong court, and should have brought a quiet title action instead of a takings action. *Cf. Fritsch v. Interstate Commerce Comm'n*, 59 F.3d 248 (D.C. Cir. 1995) (holding the right of way was abandoned before the trail conversion was attempted, and that the trail conversion was unlawful, thereby quieting title in the landowners); *RLTD Ry. Corp. v. Surface Transp. Bd.*, 166 F.3d 808 (6th Cir. 1999) (affirming the STB's ruling that because the right of way had been abandoned, the federal government therefore no longer had jurisdiction to impose recreational trail use).

2. *If “Abandonment” Is an Indispensable Issue, Place It Last*

Placing an abandonment argument last seems intuitively wrong: if the right of way really was abandoned before the STB authorized trail use, 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 that, as a legal matter, preempts state law and the technical abandonment of the line. Furthermore, as a practical matter, if the STB authorized trail use under the Trails Act, it follows it still held the authority to do so, and that there could not have been an abandonment under those circumstances.¹³⁷ In any case, “abandonment is not the defining issue,”¹³⁸ so it makes sense to start with the scope of easement question.

Regardless, if the initial analysis is mired in questions of whether there had been technical abandonment or whether there *would have been* an abandonment “but for” the Trails Act,¹³⁹ 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.¹⁴⁰ 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, when the court reaches the scope of easement issue, notions concerning “railbanking” and “shifting public use” benefits may have taken hold and distort what should have been a clean scope of easement analysis.¹⁴¹

137. See discussion *supra* note 136.

138. *Preseault II*, 100 F.3d at 1549.

139. The “but for” analysis was an early approach to the analysis, but it is fraught with problems and requires speculation about what might have happened—a tenuous basis for ruling by any court. For this reason, many courts have more recently avoided the analysis altogether, as should plaintiffs in most instances. Certainly, the Federal Circuit understands the “but for” approach is inapt since the abandonment issue concerns what *actually* happened *before* the NITU was issued: the abandonment test is whether “th[e] easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement.” *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009).

140. See *supra* note 35.

141. For example, in *Troha v. United States*, the United States District Court for the Western District of Pennsylvania ruled in favor of the government in summary judgment proceedings. 692 F. Supp. 2d 550 (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 *Moody v. Allegheny Valley Land Trust*, 976 A.2d 484 (Pa. 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. See discussion *supra* Part III.B.3.c.

CONCLUSION

Given that establishing the government's liability will make or break a plaintiff's case, and given that errant reasoning from one court may take root and grow,¹⁴² rails-to-trails plaintiff's counsel must be thoroughly versed in the *Preseault I*, *Preseault II*, and *Toews* analyses and holdings.¹⁴³ Those decisions, when properly understood and used, are devastating to the government's liability defense. On the trial court level, these decisions stand virtually alone to start up, drive, and end the liability analysis. For these reasons, it is incumbent on the plaintiff's attorney to resist the DOJ's preferred roadmap for the liability analysis, and instead to direct the court's focus on the issues that are material to the analysis, as has been repeatedly set out by the Federal Circuit.

142. *E.g.*, *Troha*, *Moody*, and *supra* note 141.

143. The subsequent Trails Act Federal Circuit cases discussed *supra* are also indispensable in underscoring the precedential value of these cases, as most recently distilled in *Ladd v. United States* when unequivocally pronouncing the rule of law—namely, that if the scope of the original easement does not include trails, the conversion of the railway easement into a recreational trail “destroys” property interests and causes a Fifth Amendment taking. 630 F.3d 1015, 1019 (Fed. Cir. 2010).

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