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**FIFTH AMENDMENT TAKINGS CLAIMS
IN THE CONTEXT OF
THE RAILS-TO-TRAILS PROGRAM**

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In the 1920s, the nation's rail system reached its peak with over 270,000 miles of active rail lines. By 1990, that number had shrunk to approximately 140,000 miles. In the 1970s, faced with the ever-shrinking system of national railroad corridors, Congress began making efforts to preserve those corridors. Those efforts culminated in the passage of the National Trail System Act Amendments of 1983 (Trails Act), 16 U.S.C. § 1247(d) and the establishment of the Rails-to-Trails program, which has succeeded in preserving thousands of miles of railroad corridor for future use. It has also spawned what is, today, the fastest growing area of Fifth Amendment takings litigation against the United States.

I. THE STATUTORY BACKGROUND OF THE RAILS-TO-TRAILS PROGRAM

A. Historical Control of the Nation's Railroad System:

1. **STB Has Authority Over the Nation's Railroad System:** Stemming from the Interstate Commerce Act of 1887, the Transportation Act of 1920 (41 Stat. 477-78), and subsequent statutes, the Interstate Commerce Commission (ICC) gained exclusive and plenary authority over the construction, operation, and abandonment of virtually all of the nation's rail lines. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981); *see also RLTD Ry. v. STB*, 166 F.3d 808, 810 (6th Cir. 1999) (general discussion of the history of railroad regulation). In 1996, the Surface Transportation Board (STB), as successor agency to the ICC, assumed authority over railroads. *See* 49 U.S.C. § 702.
2. **Seeking Permission to Discontinue Railroad Service:** As a result of the STB's plenary authority, railroads cannot be relieved of their legal obligation to offer railroad service on a particular line without first obtaining the express consent of the STB. *See Colorado v. United States*, 271 U.S. 153, 165 (1926); *Nat'l Ass'n of Reversionary Prop. Owners v. STB*, 158 F.3d 135, 137 (D.C. Cir. 1998) (*NARPO*). Historically, railroads have terminated rail service by one of two mechanisms:
 - a. **Discontinuance:** First, a railroad can apply for permission to discontinue service pursuant to 49 U.S.C. § 10903. This authority allows the railroad "to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Preseault v. ICC*, 494 U.S. 1, 6 n.3 (1990) (*Preseault I*); *see also NARPO*, 158 F.3d at 137 n.1 ("A line

that is no longer in use, but has not been officially abandoned, may be reactivated later and is termed ‘discontinued.’”). While service is discontinued, the railroad retains financial and managerial responsibility, as well as liability for the right-of-way under all applicable state laws.

- b. Abandonment: Second, also pursuant to 49 U.S.C. § 10903, a railroad may seek permission to terminate its service over a corridor through an abandonment proceeding. If authority to abandon is granted by the STB, and the railroad “consummates” the abandonment, the rail line is removed from the national transportation system and the STB’s jurisdiction generally comes to an end. *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984); *Preseault I*, 494 U.S. at 6 n.3; *Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996).

B. Initial Attempt to Preserve the Nation’s Ever-Shrinking Rail System:

1. In the 1970s, Congress recognized the need to preserve the significant investment that had created the nation’s railway system and the potentially prohibitive cost of reassembling the system if it was allowed to continue to dwindle. *Preseault I*, 494 U.S. at 5; *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973). Thus, in 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. 94-210, 90 Stat. 144 (codified as amended at 49 U.S.C. § 10906 (1982)).
2. Intent of the 4-R Act: The 4-R Act contained “provisions aimed at promoting the conversion of abandoned lines to trails.” *See Preseault I*, 494 U.S. at 5-6.
3. Delay of Abandonment: The 4-R Act allowed the ICC to delay a railroad’s consummation of abandonment by up to 180 days to allow for the sale of the rail line for public purposes. It did not, however, allow for the preemption of abandonment under state law if a voluntary transfer of the property was achieved.

C. The Trails Act:

1. In 1983, Congress passed the National Trail System Act Amendments of 1983, 16 U.S.C. § 1247(d).
2. Intent of the Trails Act: Like its predecessor, the 4-R Act, the intent of the Trails Act was “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,” as well as to promote the development of recreational trails. Pub. L. No. 98-11, § 208, 97 Stat. 42, codified at 16 U.S.C. § 1247(d); *see also Preseault I*, 494 U.S. at 17-18.

3. Railbanking: To achieve the desired preservation of railroad corridors, the Trails Act provided a new option to railroads that wished to discontinue rail service along a specific rail line. This option is known as “railbanking.” The term railbanking refers to “the preservation of [a] railroad corridor for future rail use.” *Neb. Trails Council v. STB*, 120 F.3d 901, 903 n.1 (8th Cir. 1997).
4. Interim Trail Use: In addition, the Trails Act established a 180-day period in which the railroad may negotiate with a state or local government or qualified private organization for interim trail use. This negotiating period commences when the STB issues a notice of interim trail use (NITU). The Trails Act requires any trail operator to assume financial and managerial responsibility for the right-of-way. During any period of interim trail use, the STB retains jurisdiction so that the corridor may be returned to active railroad use in the future. Railbanking provides an alternative to abandonment. *See RLTD Ry.*, 166 F.3d at 811. It is treated like a discontinuance and allows the “right-of-way [to be] ‘banked’ until such future time as railroad service is restored.” *Caldwell v. United States*, 57 Fed. Cl. 193, 194 (2003), *aff’d*, 391 F.3d 1226 (Fed. Cir. 2004); *see also Grantwood Village v. Mo. Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996). Interim trail use is voluntary on the part of the railroad, *see Nat’l Wildlife Fed’n v. Interstate Commerce Comm’n*, 850 F.2d 694, 702 (D.C. Cir. 1988), but, if the railroad indicates that it is willing to negotiate a trail use agreement, the STB is required to issue the NITU, *see Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1153 (D.C. Cir. 2001). The STB is not involved in negotiations between railroads and interested trail groups, does not build or manage any trails, and has no authority to require or impose interim trails use on a corridor. The Trails Act does not authorize or require trail use.
5. Interim Trail Use Not an Abandonment: The Trails Act provides that “[I]n 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, **if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.**” It is this language that creates the potential for federal takings liability.

II. THE RESULTS

- A. The Good: The Rails-to-Trails Conservancy (RTC), a non-profit organization based in Washington, D.C. has established a database to track railbanking and the creation of recreational trails throughout the country. *See generally* www.railstotrails.org.
1. Railbanked: The RTC reports that hundreds of railroad corridors have been railbanked, thereby preserving thousands of miles of rail lines.
 2. Re-initiated or Continuing Rail Use:
 - a. Reactivation: Because the primary purpose of the Trails Act is to preserve rail corridors for future railroad use, the RTC also tracks reactivation of lines for rail service. To date, at least nine previously railbanked corridors have been authorized to return to active rail service.
 - b. Mass Transit: In addition to corridors that have been reactivated for freight rail use, several railbanked corridors have been acquired by local jurisdictions, which have developed “rail with trails” projects, in which a light rail or other transit line is placed side-by-side with a trail.
- B. The Bad: Along with the preservation of thousands of miles of railroad corridors, the Trails Act has also spawned an explosion in takings litigation.
1. Number of Cases: Approximately 60 Fifth Amendment takings cases related to the application of the Trails Act are pending in the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims (CFC), and various United States District Courts. Because some of the pending cases are consolidated actions, these cases actually represent the filing of over 70 separate complaints.
 2. Number of Properties: It is estimated that more than 10,000 properties are at issue in the pending litigation.
- C. The Ugly: In recent years, the number of new cases asserting Fifth Amendment takings claims against the government has sky-rocketed with no apparent end in site. More than 2/3 of the active rails-to-trails cases have been filed in the past three years.

III. *PRESEALT V. ICC, THE GENESIS OF FIFTH AMENDMENT TAKINGS CLAIMS*

A. The Property: The Preseaults owned valuable property near the shores of Lake Champlain in Burlington, Vermont. The Rutland-Canadian Railroad had acquired a right-of-way across the property in 1899. Sometime thereafter, the State of Vermont acquired the right-of-way. Following the passage of the Trails Act, the state railbanked the corridor and leased it to the City of Burlington, which instituted interim recreational trail use. *See Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

B. *Preseault v. ICC*, 494 U.S. 1 (1990) (*Preseault I*)

1. Constitutional Challenge to the Trails Act: The Preseaults initially challenged the constitutionality of the Trails Act in district court as violating both the Fifth Amendment Takings Clause and the Commerce Clause. That case ultimately made its way to the Supreme Court, which held that the Trails Act was constitutional under the Commerce Clause. The Supreme Court concluded that it did not need to address the constitutional challenge under the Fifth Amendment because, even if the Trails Act gave rise to a takings claim, compensation was available under the Tucker Act (28 U.S.C. § 1491(a)(1)).
2. Supreme Court Ruminates on Potential Fifth Amendment Taking: In its opinion, the Court suggested that a Fifth Amendment taking might exist by operation of the Trails Act, depending upon the nature of the property interest held by the railroad in the corridor.
 - a. The Court stated that the language of the Trails Act – providing that interim trail use “shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes” – raises a question of takings liability because “many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.” *Preseault I*, 494 U.S. at 8.
 - b. While refusing to decide whether a taking had occurred in *Preseault I*, the Court also, however, made clear that not all utilization of a right-of-way for interim trail use would result in a taking. “[U]nder any view of takings law, only some rail-to-trail conversions will amount to takings. Some rights-of-way are held in fee simple [by the railroad]. Others are held as easements that

do not even as a matter of state law revert upon interim use as nature trails.” *Preseault I*, 494 U.S. at 16.

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

1. Federal Circuit Holds that Issuance of a NITU Resulted in a Taking: Following the decision of the Supreme Court in *Preseault I*, the Preseaults filed a Fifth Amendment takings claim in the Court of Federal Claims. The CFC found in favor of the government and dismissed the case. The dismissal was initially upheld by a panel of the Federal Circuit (66 F.3d 1167), but later, sitting *en banc*, the Federal Circuit reversed. The court, in a plurality opinion, found that the Trails Act results in a compensable Fifth Amendment taking: “When state-defined property rights are destroyed by the Federal Government’s preemptive power in circumstances such as those here before us, the owner of those rights is due just compensation.” *Preseault II*, 100 F.3d at 1552.
2. Not All NITUs Result in a Taking: Like the Supreme Court earlier, the Federal Circuit noted that not “every exercise of authority by the Government under the Rails-to-Trails Act necessarily will result in a compensable taking. Obviously if the railroad owns the right-of-way in fee simple, there is no owner of a separate underlying property interest to claim the rights of the servient estate holder. And even if an easement rather than fee title is the nature of the property interest held by the railroad at the time of the conversion to a public trail, if the terms of the easement when first granted are broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.” *Preseault II*, 100 F.3d at 1552.
3. Physical Taking: The Federal Circuit treated the taking as a physical taking, despite the fact that there was no physical occupation of the property by the federal government and the only governmental act was regulatory in nature. *See Preseault II*, 100 F.3d at 1540, 1550-51 (“When the City, pursuant to federal authorization, took possession of Parcels A, B, and C and opened them to public use, that was a physical taking of the right to exclusive possession that belonged to the Preseaults as an incident of their ownership of the land.”).
4. Government’s Background Principles Argument Rejected: The Court rejected the government’s argument “that general federal legislation providing for the governance of interstate railroads, enacted over the years of the Twentieth Century, somehow redefined state-created property rights and destroyed them without entitlement to compensation.” *Preseault II*, 100 F.3d at 1530.

IV. THE TYPICAL RAILS-TO-TRAILS CASE

- A. Who Are the Plaintiffs?: Rails-to-trails cases are brought by individuals who own property adjoining a railroad corridor, which has been railbanked and often, but not always, is being used as an interim recreational trail. The property owners are typically successors to the individuals who initially conveyed a property interest to the railroad, often over a century ago, to create the rail line.
- B. Claims Usually Asserted:
1. The railroad acquired only an easement over the property, not a fee interest.
 2. Any easement acquired by the railroad is limited to “railroad purposes,” and that railbanking and interim trail use are not railroad purposes. Under this theory, plaintiffs argue that the NITU imposed a new easement on plaintiffs’ property for railbanking and interim trails use purposes.
 3. In cases in which the easement originally acquired by the railroad was broad enough to allow for trail use, plaintiffs may argue that the railroad abandoned its easement under state law prior to the issuance of the NITU. Under this theory, plaintiffs argue that the railroad’s interest in the right-of-way already reverted to the underlying fee owner before the government act, and the NITU imposed a new easement on plaintiffs’ property.
- C. Defenses Usually Raised
1. The railroad possessed a fee interest in the right-of way.
 2. If, however, the railroad acquired only an easement, the railroad had not abandoned its easement at the time the NITU was issued and the NITU did not interfere with or preclude operation of state law of abandonment.
 3. The Trails Act does not impose any new easements on plaintiffs’ property for any purpose, including interim trail use purposes. But even if the Trails Act could impose a new easement on plaintiff’s property, the easement is broad enough to encompass railbanking and interim trail use.

V. THRESHOLD ISSUES IN RAILS-TO-TRAILS TAKINGS CASES

A. Claim Accrual

1. The Process: After *Preseault II*, the government argued in several cases that the claims had been brought to late under the Tucker Act's six-year statute of limitations. To determine the claim accrual date, courts were called upon to determine when a takings claim accrued. The following process generally occurs:
 - a. Request to Abandon: The railbanking process begins when a railroad seeks from the STB leave to abandon a rail line. *See* 49 U.S.C. § 10903 (abandonment application); 49 U.S.C. § 10502 (exemption from abandonment application).
 - b. Issuance of Notice of Interim Trail Use: If a state or local government or qualified private organization and the railroad both express a willingness to railbank the corridor and convert it to interim trail use, the STB then issues a Notice of Interim Trail Use (NITU), which provides to the railroad and the proposed trail operator 180 days in which to negotiate a trail use agreement. 49 C.F.R. § 1152.29(c)-(d).
 - c. Trail Use Agreement Reached: If the railroad and the proposed trail operator reach a trail use agreement the railroad typically executes a quit claim deed in favor of the trail sponsor.
 - d. Trail Use Agreement Not Reached: If the potential trail operator and the railroad are not able to reach a trail use agreement, the NITU "converts into an effective notice of exemption, allowing the railroad to 'abandon the line entirely and liquidate its interest.'" *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006), quoting *Preseault I*, 494 U.S. at 7. Once the negotiating period comes to an end, if no trail use agreement is reached, the railroad may:
 - (i) exercise its authority to abandon the rail line by filing a notice of consummation thus terminating the STB's jurisdiction and removing the line from the national transportation system (49 C.F.R. §§ 1152.29(d)(1), (e)(2); *NARPO*, 158 F.3d at 139 & n.7);
 - (ii) re-initiate rail service on the line; or
 - (iii) file a request for an extension of time to consummate abandonment (49 C.F.R. § 1152.29(e)(2)).

2. *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) – While the issuance of a NITU, as set forth above, does not necessarily result in a corridor being railbanked or converted to interim trail use, the Federal Circuit has held that “[t]he issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way.” *Caldwell*, 391 F.3d at 1233-34 (emphasis in original); *see also Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006).
3. “[W]here no trail use agreement is reached, the taking may be temporary.” *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010). Because the NITU is “the only *government* action the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interest in the right-of-way,” *Caldwell*, 391 F.3d at 1233-34 (emphasis in original), “that is the extent of the Government’s taking of Plaintiffs’ property.” *Farmers Cooperative v. United States*, 98 Fed. Cl. 797, 808 (2011). With the expiration of the NITU, “there is no longer any action by the United States . . . that impedes the realization of any property interests [plaintiffs] would otherwise obtain under state law.” *Farmers Cooperative v. United States*, 2011 WL 4362896 at *5 (Fed. Cl. Sept. 20, 2011).

B. Class Actions

1. Unlike other forms of Fifth Amendment takings cases, courts have been receptive to certifying these cases as class actions.
 - a. CFC: In the Court of Federal Claims, the Court relies exclusively on **opt-in** class actions.
 - b. District Courts: District Courts, on the other hand, rely exclusively on **opt-out** class actions, but claims are limited to \$10,000 each.
2. Mass Joinder: In cases in which class certification is not sought, mass joinder is often used to bring claims on dozens or hundreds of properties in a single action.
3. Pleading Requirements: In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the Supreme Court recently held that the named plaintiffs in a class action “must affirmatively demonstrate” compliance with the requirements of Fed. R. Civ. P. 23, and must make a “rigorous analysis” of whether the named plaintiff has made a sufficient demonstration, which often “will entail some overlap with the merits of

the plaintiff's underlying claim." *But see Geneva Rock Products, Inc. v. United States*, 2011 WL 4099150 (Fed. Cl. Sept. 15, 2011).

- C. Certification of Questions to State Courts: The Supreme Court of several states have determined that they have jurisdiction to accept certified question of state law from the Court of Federal Claims. *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 666 P.2d 1144, 1147-48 (Id. 1983); *Mosley v. State*, 908 N.E.2d 599 (Ind. 2009); *Tyson v. State*, 622 N.E.2d 457, 461 (Ind. 1993); *Haley v. University of Tennessee*, 188 S.W.3d 518, 522-23 (Tenn. 2006); *contra Biery v. United States*, No. 102,006 (Kan. Sept. 30, 2010).

VI. PRINCIPLE LIABILITY ISSUES IN RAILS-TO-TRAILS LITIGATION

A. Threshold Issue: Applicable Law:

1. State Law: The nature of the property interest and the question of abandonment are routinely determined based upon state law. State law will generally control when the railroad acquired its property interest by purchase, adverse possession, and eminent domain. *See Preseault I*, 494 U.S. at 20 ("state law determines what property interest petitioners possess . . .") (O'Connor J. concurring).
2. Federal Law: The exception to the general reliance on state law is in instances in which the property was acquired by the railroad pursuant to a federal land grant. "The construction of grants by the United States is a federal not a state question." *United States v. Oregon*, 295 U.S. 1, 28 (1935); *see also Beres v. United States*, 64 Fed. Cl. 403, 410 (2005) (citing *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979)) ("In the case before this court, the railroad company's right-of-way was granted under the 1875 Act, not by a private land transfer. Therefore, defining the intentions of Congress as to the property interests impacted by the federal statute is an issue of federal law."). *See also State of Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985); *Whipps Land & Cattle Co. v. Level 3 Commc'ns., LLC*, 658 N.W.2d 258, 264 (Neb. 2003); *Marlow v. Malone*, 734 N.E.2d 195, 205 (Ill. App. Ct. 2000).

B. What Is the Nature of the Railroad’s Property Interest?: Fee Versus Easement

1. As presaged by the justices in *Preseault I*, the question of the property interest is important in ruling out instances in which no taking could have occurred as a result of the Trails Act. The railroad may have acquired its interest in the property through several different means:
 - a. Purchase (deed);
 - b. Federal land grant;
 - c. Adverse possession under state law; or
 - d. Exercise of eminent domain authority under state law.
2. If the railroad holds fee interest in the property there is no taking. *Preseault II*, 100 F.3d at 1552 (“Obviously if the railroad owns the right-of-way in fee simple, there is no owner of a separate underlying property interest to claim the rights of the servient estate holder.”).

C. Has the Easement Been Abandoned?

1. Abandonment is a Question of Fact: Abandonment is a question of fact, thus, regardless of the method by which the railroad acquired its easement, the issuance of a NITU or the use of the right-of-way as an interim trail cannot represent a *per se* abandonment. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 777 (2000).
2. Abandonment Is Typically a Question of Intent: Abandonment is most often determined based upon state law, except in cases of federal land grants. Pursuant to the law of several states, abandonment is based upon a demonstration of intent by the railroad to abandon use of the right-of-way, *see Chevy Chase Land Co. Of Mont. Cty. v. United States*, 37 Fed. Cl. 545, 576 (“abandonment [under Maryland law] is a question of intent”), *Glosemeyer*, 45 Fed. Cl. at 777 (same, applying Missouri law), typically combined with an affirmative act in furtherance of that expressed intent.
3. If, at the time the NITU is issued, the right-of-way has not been abandoned by the railroad pursuant to state law (or federal law if obtained by the railroad pursuant to a federal grant), then the lone Government action in the rails-to-trails process – the issuance of the NITU – did not impede the reversion of any property interest to the plaintiffs. The railroad still possessed a state law property interest that burdens the right-of-way.

D. How Broad Is the Scope of the Easement?

1. If the court concludes that the Trails Act authorizes a new use of the right-of-way as an interim trail – a proposition which the United States disputes – the scope of the railroad easement becomes important. “[E]ven if an easement rather than fee title is the nature of the property interest held by the railroad at the time of the conversion to a public trail, if the terms of the easement when first granted are broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.” *Preseault II*, 100 F.3d at 1552; *see also Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) (“The defining issue in this case is the question of the scope of the easements originally granted to the railroad.”).
2. In many states, and in instances of grants of federal land under federal law, concepts of shifting public use must be considered to determine whether railbanking and interim trail use are within the breadth of the easement.

VII. CURRENT ISSUES IN RAILS-TO-TRAILS LITIGATION

A. The Intersection of Class Actions and Claim Accrual:

1. The Decisions: *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010); *Fauvergue v. United States*, 86 Fed. Cl. 82 (2009)
2. The Facts: Plaintiff, Earleen Fauvergue, filed a rails-to-trails complaint on behalf of herself and a putative class of similarly situated property owners along a railroad corridor in Missouri and Kansas. The complaint was filed nine days before the running of the statute of limitations and a motion for class certification was filed only three days before the statute ran. None of the putative class members opted into the class before the running of the statute.
2. The CFC Opinion: The Court of Federal Claims held that “[p]utative members of an opt-in class action in the Court of Federal Claims must opt in before the expiration of [the Tucker Act’s six-year statute of limitation] 28 U.S.C. § 2501.” *Fauvergue*, 86 Fed. Cl. at 93. In so ruling, the court held that putative members attempting to **opt in** under the CFC rules did not enjoy the same right to statutory tolling as that enjoyed by putative members of an **opt out** class action in district court. *Id.*

3. The Federal Circuit Opinion: The Federal Circuit reversed, holding that in cases where the complaint and the motion to certify the class are both filed prior to the running of the statute of limitations, that the statute is tolled during the court process provided to allow putative class members to opt into the class. *Bright*, 603 F.3d at 1290. The Court did not reach the issue of whether the filing of only a class action complaint, without a motion to certify, before the running of the statute would result in the same outcome. *Id.* n. 9. *But see Toscano v. United States*, 98 Fed. Cl. 152 (2011) (holding that filing of a class action complaint is sufficient to toll the statute of limitations during the opt-in period); *Geneva Rock Products, Inc. v. United States*, 2011 WL 4099150 (Fed. Cl. Sept. 15, 2011) (same).

B. The Role of Abandonment in Takings Litigation. *See supra* at 11. This issue is relevant to both liability and just compensation determinations.

VIII. SUPREME COURT AND FEDERAL CIRCUIT RAILS-TO-TRAILS OPINIONS

- *Preseault v. ICC*, 494 U.S. 1 (1990)
- *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*)
- *Chevy Chase Land Co. v. United States*, 230 F.2d 1375 (Fed. Cir. 2000)
- *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004)
- *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004)
- *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005)
- *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006)
- *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009)
- *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)
- *Ladd v. United States*, 630 F.3D 1015 (Fed. Cir. 2010)

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