Temporary Takings and Rails-to-Trails:
The Supreme Court's *Arkansas Game and Fish Commission v. United States* Invalidates the Federal Circuit's *Ladd v. United States*

Introduction

Since the 1983 enactment of The National Trails System Act Amendments, 16 U.S.C. §§ 1241-1251 (2012), approximately 20,000 miles of former railroad tracks have been transformed into more than 1,600 public recreational trails across the country.[1] This transformation from rail to trail, known as "railbanking," allows railroads to discontinue rail service without abandoning an established right-of-way. Instead of abandonment, the National Trails System Act Amendments provide railroads the option to maintain the right-of-way by establishing interim trail use in order to "preserve established railroad rights-of-way for future reactivation of rail service, [] protect rail transportation corridors, and [] encourage energy efficient transportation use."[2] While the interim recreational trails have been positively welcomed into communities, the statute has simultaneously ignited great upset over the trails' impacts on abutting landowners' property interests, becoming the fastest-growing area of takings litigation in the country.[3] Heard almost exclusively by the Court of Federal Claims and the Court of Appeals for the Federal Circuit since the landmark *Preseault II* decision,[4] the analysis of a rails-to-trails takings claim generally proceeds within a well-established framework, *see infra* p. 4-8. However, one recent Federal Circuit case, *Ladd v. United States*, presented the novel question of whether the issuance

[1] *See generally*, RAILS-TO-TRAILS CONSERVANCY, http://www.railstotrails.org/index.html (last visited April 7, 2013).
[2] National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d) (2012).
[3] Outline from James D. Gette, Fifth Amendment Takings Claims In the Context of the Rails-to-Trails Program, 1 (Nov. 5, 2010) (on file with Vermont Law School) (presented at The 13th Annual Conference on Litigating Takings and other Legal Challenges to Land Use and Environmental Regulation).
[4] Preseault v. United States (*Preseault II)*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc).

of a Notification of Interim Trail Use (NITU) that ultimately did *not* result in the development of a recreational trail constitutes a temporary physical taking of the abutting landowners' reversionary property interests.[5]

This paper argues that the Federal Circuit's holding in *Ladd* has been invalidated by the recent U.S. Supreme Court decision in *Arkansas Game and Fish Commission v. United States*.[6] Part I will review the development of the Federal Circuit's rails-to-trails takings analysis. Part II will discuss the Federal Circuit's holding in *Ladd*. Part III will examine the Supreme Court's recent opinion in *Arkansas Game and Fish Commission* and argue that the opinion clarifies the proper treatment of temporary physical takings claims under a multi-factor balancing test. Finally, Part IV will demonstrate that the circumstances presented in *Ladd* do not constitute a temporary physical taking under the *Arkansas Game and Fish Commission* test, and furthermore, *Arkansas Game and Fish Commission* effectively nullifies the Federal Circuit's bright-line rule that a taking occurs at the issuance of a NITU, voiding *Ladd's* precedential value.

I. Background Principles: The Federal Circuit's Treatment of Rails-to-Trails Takings

In 1990, the U.S. Supreme Court upheld the National Trails System Act Amendments of 1983 as valid under the Commerce Clause.[7] However, in dicta, the Court suggested that the railbanking process might constitute a Fifth Amendment taking depending on the nature of the railroad's property interest in the right-of-way.[8] Following this decision, the Federal Circuit

[5] Ladd v. United States, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g denied*, 646 F.3d 910 (Fed. Cir. 2011).
[6] Ark. Game and Fish Comm'n v. United States, 133 S. Ct. 511 (2012).
[7] Preseault v. Interstate Commerce Comm'n (*Preseault I*), 494 U.S. 1, 4 (1990).
[8] *Id*. at 8 (indicating that the language of the Trails Act implicates the Fifth Amendment Takings Clause where it provides that interim trail use "shall not be treated, for any purpose of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes"). The

examined whether a Fifth Amendment taking had occurred under the facts presented.[9] At the lower court level, the Court of Federal Claims determined that the federal government's authorization of the trail represented a temporary not a permanent physical invasion where the state's trail use agreement limited the trail lease to a maximum of thirty years.[10] Following the *Loretto v. Teleprompter Manhattan CATV Corp.* rationale,[11] the court determined that the per se permanent physical takings rule did not apply where the invasion was temporary, and instead analyzed the taking under the traditional *Penn Central Transportation Co. v. New York City*[12]

Takings Clause is implicated by this provision of the Act because "many railroads do not own their own rights-of-way outright but rather hold them under easements or similar property interests." *Id*. The Court reasoned that "[w]hile 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." *Id.* The Court ultimately suggested that where a railroad owned a right-of-way in fee simple or held an easement that did not revert to abutting landowners even upon the railway's transformation to an interim recreational trail, no taking had occurred. *See id* at 16. However, a taking might have occurred where the railroad held only an easement for railroad purposes that reverted to abutting landowners upon the railway's transformation to an interim recreational trail. *See id*. at 8. Any alleged taking claim should be filed under the Tucker Act, "provid[ing] jurisdiction in the United States Claims Court for any claim against the Federal Government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract." *Id*. at 12 (citing 28 U.S.C. § 1491(a)(1) (1982)).

[9] Preseault v. United States (*Preseault II*), 27 Fed. Cl. 69, 95 (Fed. Cl. 1992) *aff'd in part, vacated in part*, 66 F.3d 1167 (Fed. Cir. 1995) *reh'g en banc granted, judgment vacated*, 66 F.3d 1190 (Fed. Cir. 1995) and *on reh'g en banc,* 100 F.3d 1525 (Fed. Cir. 1996) *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996).

[10] *Preseault II*, 27 Fed. Cl. 69, 95 (Fed. Cl. 1992) (subsequent history omitted).

[11] Loretto v. Teleprompter Manhattan CATV Corp*.,* 458 U.S. 419 (1982) (holding that when a government action is a *permanent physical occupation* of property, the government action is a taking without regard to the action's public benefit or the action's minimal economic impact on the property owner).

[12] Penn Cent. Transp. Co. v. New York City (*Penn Central*), 438 U.S. 104 (1978) (holding that when a government regulatory action has impaired a property owner's use of property, the Court must weigh the character of the action against the nature and extent of the interference and the owner's reasonable investment-backed expectations to determine whether a taking has occurred).

balancing test.[13] The court held that no taking had occurred because the Preseaults had no reasonable investment-backed expectations of reversion.[14]

The Court of Appeals for the Federal Circuit ultimately reversed the Court of Federal Claims' decision, providing little factual analysis but finding the trail represented a per se physical taking.[15] Without addressing whether the trail use represented a permanent or temporary invasion, the court of appeals issued a plurality opinion holding that the trail conversion constituted a physical taking under two different legal theories.[16] First, the court's analysis of the threshold issue, the nature of the railroad's property interest in the right-of-way, concluded that the railroad neither owned the right-of-way in fee simple nor possessed an easement broad enough to include recreational trail use.[17] Instead, the court found that the railroad's easement strictly for railroad purposes terminated when it authorized the sale of the right-of-way to the city of Burlington, Vermont for recreational trail use and triggered the land's reversion to the abutting landowners.[18] Consequently, the court ruled that "[w]hen the City, pursuant to federal authorization, took possession of [the right-of-way] and opened [it] to public use, that was a per se physical taking of the right to exclusive possession that belonged to the Preseaults as an incident of their ownership of the land."[19] Alternatively, the court determined that the railroad's abandonment of the railroad easement ten years prior to federal authorization to convert the right-of-way to a recreational trail terminated any property interest the railroad had in the right-

[13] Preseault v. United States, 27 Fed. Cl. at 95 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n. 12 (1982)).
[14] *Id.*
[15] *Preseault II,* 100 F.3d at 1550-51.
[16] *Id.*
[17] *Id.* at 1550.
[18] *Id.*
[19] *Id.* at 1550-51.

of-way, triggering a reversion of fee simple ownership to abutting landowners.[20] The City's establishment of a recreational trail, following this abandonment and reversion, also constituted a per se physical taking.[21]

Preseault II and its progeny established a solid framework for assessing whether railbanking activity triggered a per se physical taking.[22] In *Preseault II*, the court of appeals categorically rejected the government's background principles 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."[23] The court therefore boiled the takings analysis down to three threshold questions that turn on the application of state property law principles to the specific facts presented:

> 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 uses 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 fee simple unencumbered by the easement (abandonment of the easement).[24]

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[20] *See id.*

[21] *Id*. Without intensive analysis into the rationale behind the finding of a per se physical taking in *Preseault II*, it remained unclear whether the court decided that 1) the thirty-year deprivation of the Preseault's reversionary interest was too long to be considered temporary and therefore represented a per se permanent physical taking, or 2) all physical invasions, regardless of their longevity, should be treated as a per se taking. *See id*. Subsequent rails-to-trails decisions, particularly *Ladd*, suggest that the court regarded the *Preseault II* taking as permanent. *See* Ladd v. United States, 630 F.3d 1015, 1025 (Fed. Cir. 2010) (reasoning that seven-month delay in reversion differed from typical rails-to-trails takings claims where the construction of a recreational trail represented a permanent physical taking).

[22] *See, e.g,* Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009).

[23] *Preseault II*, 100 F.3d at 1530 (determining that federal legislation did not create a background principles defense to a takings claims pursuant to the National Trails System Act).

[24] *Ellamae Phillips Co.,* 564 F.3d at 1373.

In *Caldwell v. United States*[25] and *Barclay v. United States,*[26] the Federal Circuit attempted to simplify, but in fact complicated, the determination of when a takings claim accrues in the railbanking process. In order to settle questions the government raised regarding alleged takings claims filed outside the six-year statute of limitations as provided by the Tucker Act, the court needed to determine the exact point in the railbanking process where a taking might occur.[27] The railbanking process involves three of four key steps: 1) the railroad's request from the Surface Transportation Board (STB) for leave to abandon railroad use of a rail line; 2) the STB's issuance of a Notice of Interim Trail Use (NITU), providing a cooperative railroad and proposed trail operator 180 days to negotiate a trail use agreement; 3) if the railroad and proposed trail operator agree to interim trail use, a trail-use agreement authorizes the transfer of the right-of-way to the trail operator; or 4) if no trail use agreement is settled, the railroad may abandon the right-of-way, restart railroad use of the line, or request an extension to file for abandonment.[28] The court of appeals determined that a potential takings claim accrued at the issuance of the NITU (step 2), reasoning 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."[29] Several problems immediately arise from this holding.[30] First, the rule directly contradicts the court's determination in *Preseault II* that a per se taking occurs when a trail operator "t[akes] possession

[25] Caldwell v. United States*,* 391 F.3d 1226 (Fed. Cir. 2004).
[26] Barclay v. United States*,* 443 F.3d 1368 (Fed. Cir. 2006).
[27] *See Barclay,* 443 F.3d 1368, 1373 (Fed. Cir. 2006); *Caldwell,* 391 F.3d 1226, 1233 (Fed. Cir. 2004).
[28] *See Caldwell*, 391 F.3d at 1233-34.
[29] *Id.* at 1233-34 (emphasis in original); *see also*, *Barclay*, 443 F.3d at 1373.
[30] *See Barclay*, 443 F.3d at 1378-80 (Newman, J., dissenting); *Caldwell*, 391 F.3d at 1236-39 (Newman, J., dissenting).

of [the right-of-way] and open[s] [it] to public use."[31] Second, the rule ignores the character of the NITU.[32] The NITU is always prospectively temporary in effect, providing only delay in abandonment, and *may possibly, but not definitely* give rise to a trail agreement.[33] Until *Ladd*, the Federal Circuit did not address the question of how the issuance of a NITU, that ultimately did *not* result in the development of a recreational trail, would be treated under this rule.[34]

II. *Ladd v. United States*

In *Ladd*, plaintiffs owned individual property interests abutting a railroad corridor in southern Arizona.[35] Pursuant to the railroad's petition to abandon the corridor in October 2005 and the STB's subsequent issuance of a NITU in July 2006, plaintiffs alleged a taking of their reversionary interest in the right-of-way by claiming the railroad held an easement that was limited to railroad purposes only.[36] Unlike the typical rails-to-trails takings claim, the issuance of the NITU (and a thirty-day extension for a portion of the right-of-way) did *not* result in the construction of a recreational trail. Instead, the railroad eventually filed a notice of consummation to abandon a portion of the corridor in January 2007 and postponed the deadline to consummate abandonment of the remaining portion.[37] However, plaintiffs asserted, that according to the Federal Circuit's holdings in *Caldwell* and *Barclay*, a physical taking of their

[31] *Preseault II*, at 1550; *see also, Caldwell*, 391 F.3d at 1236-37 (Newman dissent) (arguing that the majority's holding caused the statute of limitations to begin accruing "from a date before the Caldwell property was 'taken' in Fifth Amendment terms" because the government's liability is not "fixed" until the right-of-way is transferred from the railroad to the trail operator).
[32] *See Barclay*, 443 F.3d at 1378 (Newman, J., dissenting) (explaining that a taking "cannot occur simply upon issuance of a NITU, because the deprivation of the reversion has not yet occurred," and "may never occur").
[33] *See id*.; *see also*, 49 C.F.R. § 1152.29(d) (2012).
[34] *See* Ladd v. United States, 630 F.3d 1015, 1019 (Fed. Cir. 2010).
[35] *Id.* at 1017.
[36] *Id.* at 1018.
[37] *Id*.

reversionary interest occurred pursuant to the NITU's issuance regardless of whether the government actually constructed a recreational trail on the right-of-way.[38] Conversely, the United States contended that any alleged taking could only be regulatory in nature and therefore must be subject to analysis under the *Penn Central* factors because neither a permanent nor temporary physical taking could have occurred without a government-authorized *physical invasion* of the right-of-way.[39]

At the trial court level, the United States succeeded with its argument that a physical taking could not be established where the federal government had not authorized a physical invasion of the right-of-way and the plaintiffs' claims arose only from the delay the NITU placed on the railroad's abandonment of the corridor.[40] On appeal, the court of appeals reversed the trial court's decision and held that the bright-line rule asserted in *Caldwell* and followed in *Barclay* required the court to consider the issuance of a NITU as a compensable taking, regardless of whether it resulted in the construction of a recreational trail.[41] The court of appeals reasoned that because *Caldwell* and *Barclay* established that a "takings claim accrues on the date the NITU issues, events arising after that date – including entering into a trail use agreement and converting the railway to a recreational trail – cannot be necessary elements of the claim."[42] Moreover, the court determined that because "physical takings are compensable, even when temporary," the issuance of a NITU that did not result in the construction of a recreational trail

[38] *Id.*
[39] *Id.* at 1022-23. Note that the government did not contend that the facts in *Ladd* would support a finding of a regulatory taking under the *Penn Central* test and, in fact, argued that the facts would not support such a finding. *Id.* at 1023.
[40] Ladd v. United States, 90 Fed. Cl. 221, 222 (Fed. Cl. 2009).
[41] *Ladd*, 630 F.3d at 1019.
[42] *Id.* at 1024.

constituted a compensable, temporary physical taking.[43] In short, the court determined that where a railroad does not own a corridor in fee simple or does not hold an easement broad enough to include trail use, the issuance of a NITU that does not lead to the construction of a recreational trail is a per se temporary physical taking of an abutting landowner's reversionary interest.[44] Effectively, the court of appeals' opinion proposed that a physical taking can occur without a physical invasion and that both a permanent and temporary physical taking are per se takings not subject to the *Penn Central* balancing test.[45]

III. Temporary Physical Takings Analysis under *Arkansas Game and Fish Commission*

The development of regulatory and physical takings analysis has proven to be difficult in application;[46] this is no more evident than in the context of temporary physical takings. However, the U.S. Supreme Court's December 2012 opinion in *Arkansas Game and Fish Commission* provides much needed clarification regarding the proper analysis of temporary physical takings claims.[47] *Arkansas Game and Fish Commission* remedies the inconsistencies as to the proper treatment of temporary physical takings claims by establishing a multi-factor balancing test similar to the *Penn Central* regulatory takings test.[48]

While a comprehensive analysis of the relevant case law is beyond the scope of this paper, it is necessary to establish the inconsistent treatment of temporary physical takings as the background for the *Arkansas Game and Fish Commission* decision. Until recently, two distinct

[43] *Id.* at 1025.
[44] *See id.*
[45] *See id.*
[46] *See, e.g.,* Hansen v. United States, 65 Fed. Cl. 76, 80-81 (describing takings jurisprudence as a "Serbonian Bog").
[47] *See* Ark. Game and Fish Comm'n vs. United States*,* 133 S. Ct. 511, 522 (2012).
[48] *See id*.

approaches to analyzing temporary physical takings clouded the proper treatment of such claims. First, a line of cases that considered the U.S. government's physical invasion of private property during World War II firmly asserted that temporary physical takings could be compensable.[49] Reasoning that one such physical deprivation, although not perpetual, was nonetheless a total, permanent taking of an "estate or tenancy for years," the U.S. Supreme Court determined the interference was compensable without analyzing 1) the duration of the invasion; 2) the burden the property owner sustained as a result of the invasion, or; 3) whether or not a public purpose justified the invasion.[50] Instead, the U.S. Supreme Court applied a per se-like analysis in their consideration of temporary physical invasions, assuming a taking occurred and just compensation was due where a government-authorized physical invasion substantially interfered with the owner's full enjoyment and/or use of the property.[51] Second, in the landmark 1982 *Loretto* decision, the Supreme Court made its first explicit reference to a "temporary physical taking," indicating that temporary physical takings, unlike permanent physical takings, were subject to the *Penn Central* balancing test as opposed to per se analysis.[52] However, the Court did not make an explicit statement as to whether the WWII line of cases should be overruled in *Loretto*.[53] Moreover, some scholars have suggested the *Loretto* opinion's treatment of temporary

[49] *See* United States v. Pewee Coal Co., 341 U.S. 114 (1951); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 267 (1950); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Gen. Motors Corp., 323 U.S. 373 (1945).
[50] *Gen. Motors Corp.,* 323 U.S. 373, 378 (1945).
[51] *See id.; see also,* United States v. Causby, 328 U.S. 256, 265 (1946).
[52] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n. 12 (1982).
[53] *See id*.; *see also*, Dennis H. Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and An Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1194 (1997) ("Such an overruling seems to be very unlikely since the *Loretto* Court cites [*United States v.*] *Pewee Coal*, [one of the per se temporary physical taking cases], as instructive with respect to another issue in the case and even notes that the taking in *Pewee Coal* was of finite duration").

takings is "at least partially dicta" [54] and a problematic standard where the line distinguishing a permanent taking from a temporary taking is ambiguous.[55] Considered together, these two precedents do not present a clear rule regarding the proper analysis of an alleged temporary physical taking.[56]

Arkansas Game and Fish Commission clarifies the proper analysis of a temporary physical taking.[57] In *Arkansas Game and Fish Commission*, the Court analyzed whether periodic flooding of the petitioner's property authorized by the United States Army Corps of Engineers from 1993 to 2000 constituted a temporary physical taking.[58] Overruling the Federal Circuit's holding that flooding can be the basis of a takings claim only when the flooding is "permanent or inevitably reoccurring,"[59] the U.S. Supreme Court determined that "government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."[60] The unanimous Court insisted that the holding issued was narrow, "simply and only" serving to correct the Federal Circuit's mistaken categorical exception for takings claims arising from temporary flooding.[61] However, the Court's overview of temporary physical takings precedent and guidance to the Federal Circuit on remand effectively provide a much broader holding.[62] Indeed, the Court's overview of temporary physical takings precedent remedies previous

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[54] Long, *supr*a note 53.
[55] *See Loretto*, 458 U.S. at 442.
[56] *Compare id.* at 435 n. 12, *with* Gen. Motors Corp., 323 U.S. at 378. Without fully discussing this inconsistent treatment of temporary physical takings, the Federal Circuit's 2010 *Ladd* decision was issued under this murky precedent. *See* Ladd v. United States, 630 F.3d 1015, 1024-25 (Fed. Cir. 2010).
[57] Ark. Game and Fish Comm'n v. United States*,* 133 S. Ct. 511, 522 (2012).
[58] *Id.* at 515.
[59] Ark. Game and Fish Comm'n v. United States, 637 F.3d 1366, 1378 (Fed. Cl. 2011), *rev'd and remanded by*, 133 S. Ct. 511, 522 (2012).
[60] *Ark. Game and Fish Comm'n,* 133 S. Ct. 511, 522 (2012).
[61] *Id.* at 522.
[62] *Id.* at 522.

inconsistencies as to the proper analysis and provides a clear framework which must be applied when analyzing whether a specific situation gives rise to such a taking.[63]

Recounting previously established takings doctrine, the opinion emphasizes that despite two per se rules – mandating a taking where there is a permanent physical occupation of property, or where regulation permanently prohibits the property owner from all economically beneficial uses of his or her land – "most takings claims turn on situation-specific factual inquires" as asserted in *Penn Central*.[64] Without acknowledging any contradictions in previous treatment of temporary physical takings, the Court references the WWII cases as standing for the proposition that temporary physical takings "can be compensable," but do not always require compensation.[65] In one paragraph, the Court rejects any inconsistency between the WWII cases and *Loretto*.[66] Instead, the Court proposes that the test for temporary physical takings has always required a balancing analysis akin to the *Penn Central* test as indicated in footnote 12 of the *Loretto* decision.[67]

Having cabined the WWII cases, the Court presents a succinct summary of the "situation-specific factual inquir[y]" necessary to determine whether a temporary physical taking has occurred.[68] Relying heavily on *Loretto*, the Court rejects any application of a per se test in the context of temporary physical takings and instead unquestionably affirms the application of a *Penn Central*-like balancing test.[69] "When regulation or temporary physical invasion by government interferes with private property…" the Court indicates that the factors that must be

[63] *See id* at 518, 522.
[64] *Id.* at 518.
[65] *Id.* at 519.
[66] *See id.*
[67] *See id.*
[68] *Id.* at 522.
[69] *Id.*

considered include "time," "the degree to which the invasion is intended or is the foreseeable result of authorized government action," "the character of the land at issue," "the owner's 'reasonable investment-backed expectations' regarding the land's use," and the "severity of the [government's] interference."[70] Moreover, the Court's discussion of takings doctrine consistently recognizes the difference between a regulatory and physical taking; the former occurs when federal or state legislation precludes a private property owner from some specific or all use of property, while the latter occurs when private property owners are denied property rights, generally characterized as the right to exclude, where the government "physically takes possession"[71] or "inva[des]" private property.[72] Finally, the Court's analysis provides some guidance in distinguishing a temporary invasion from a permanent one.[73] Without explicitly noting a distinction between the two, the Court implies that a permanent taking occurs where there is no discernible end point to the taking, while a temporary taking occurs where the taking has a defined end point.[74]

[70] *Id.*
[71] *Id.* at 518.
[72] *Id.* at 520.
[73] *Id*. at 519.
[74] *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) (holding that physical occupation of cable infrastructure on apartment building was a permanent physical taking where there was no prospective end date for the occupation), *with Ark. Game and Fish Comm'n*, 133 S. Ct. at 519.

IV. *Arkansas Game and Fish Commission* Nullifies the Federal Circuit's Bright-Line NITU Rule and Voids *Ladd*'s Precedential Value

A. Applying the *Arkansas Game and Fish Commission* multi-factor balancing test to the facts presented in *Ladd* does not support the Federal Circuit's finding of a temporary physical taking at the issuance of the NITU.

Pursuant to *Arkansas Game and Fish Commission's* guidelines, the application of the *Penn Central*-like balancing test to the facts presented in *Ladd* fails to establish that the issuance of the NITU constitutes a temporary physical taking. Analyzing the NITU's effect under each factor presented in *Arkansas Game and Fish Commission* does not tip the balance in favor of finding a taking where a NITU does *not* result in the construction of a recreational trail. The delay in abandonment and reversion resulting from the NITU in *Ladd*, while intentional, does not represent a severe, physical interference with the character of the land or with the owner's reasonable investment-backed expectations regarding the land's use.

The issuance of a NITU functions as a means to prevent abandonment and reversion of the right-of-way to the abutting landowner by allocating a finite time period (180 days, with the possibility of extension) to develop a trail use agreement.[75] Considering the duration of the NITU first, it is clear that the interference it has on the reversionary interest is *always* minimal in duration. In *Ladd*, the NITU interfered with abutting landowners' reversionary interests for 180 to 210 days, or six to seven months (a 30 day extension of the NITU was issued for a portion of the right-of-way in December 2006).[76] After the NITU expired, the STB certified abandonment of a portion of the railroad and issued an extension, still in effect, to consider abandonment for the remainder.[77] Where there existed no requirement for the railroad to ever abandon the right-of-way, a seven-month delay in reversion does not represent a major interference with property

[75] 49 C.F.R. § 1152.29(d) (2012).
[76] Ladd v. United States, 630 F.3d 1015, 1017 (Fed. Cir. 2010).
[77] *Id.*

rights landowners had waited to revert for 103 years.[78] In regards to the section of railroad still awaiting an abandonment decision, any alleged taking resulting from the more than six year delay in abandonment following the NITU's expiration must be attributed to the extension granted to the railroad to consider abandonment and not the NITU.

Second, in examining whether the interference was intended or foreseeable, it is quite evident that the NITU represents both an intentional and foreseeable government effort to delay reversion; indeed, the delay is the purpose of issuing a NITU.[79] Third, the character of the land at issue is a 100-foot wide railroad right-of-way abutting plaintiffs' property in varying degrees.[80] At the time the NITU was issued, plaintiffs' did not have property rights to the land in question for 103 years,[81] and any future use must have anticipated that a century of prior use as a railroad right-of-way may have substantially compromised that land's value. Additionally, the land impacted by the NITU represents only a small portion of the abutting landowners' total property interest.[82] Fourth, the majority of plaintiffs had little, if any, reasonable investment-backed expectation attached to the right-of-way in 2006. Plaintiffs who maintained a reversionary interest in the right-of-way subject to the railroad easement would have no expectation in gaining access or rights to the land until railroad use terminated and, additionally, any expectation that the railroad use would terminate or the right-of-way would be abandoned would be subject to the

[78] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999) *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000) *aff'd,* 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) and *overruled on other grounds by*, Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (finding that a thirty-two month moratoria on development of a lot did not represent a severe interference with owner's rights effecting a regulatory taking where "average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years.").
[79] *Supra* note 75.
[80] *Ladd*, 630 F.3d at 1017.
[81] *Id.*
[82] *Id.*

possibility of railbanking. Therefore, the abutting landowners could not have reasonably expected the right-of-way to revert back to their ownership at any given time. Indeed, the abutting landowners could have reasonably expected the right-of-way to *never* revert. Additionally, even where the railroad's October 2005 application to the STB to begin abandonment proceedings may have put landowners on notice about the possibility of reversion, they could have no reasonable expectation that abandonment would be a quick process or that the railroad's petition to consummate abandonment would actually result in abandonment and reversion. Without any guarantee of reversion, it would be entirely *unreasonable* for abutting landowners to expect reversion, albeit make any financial or other investment based on an expectation of reversion.

Finally, the degree of the invasion can hardly be described as "severe." A seven-month delay in reversion, following a period of 103 years without any reasonable expectation of reversion occurring, can only represent a minimal intrusion into the landowners' rights.[83] Certainly, after 103 years and no guarantee that reversion would ever occur, landowners would need at least seven months to even begin to fathom what they might do with their new acquisition. What is more, the delay the NITU caused is not a physical interference as characterized in *Arkansas Game and Fish Commission*.[84] The Court makes it clear that a physical taking requires the "government physically take[] possession of an interest in property"[85] or an "actual, [physical] invasion."[86] While the NITU signals the possibility of a prospective physical invasion, a recreational trail, the NITU itself does not authorize any

[83] *See Tahoe Sierra*, 34 F. Supp 2d at 1240.
[84] Ark. Game and Fish Comm'n v. United States*,* 133 S. Ct. 511, 518, 520 (2012).
[85] *Id.* at 518.
[86] *Id*. at 520.

physical invasion or occupation of property.[87] Because the NITU only authorizes a finite negotiating period that delays reversion of the right-of-way, the NITU's issuance alone can never constitute a *physical* taking.

B. Where *Arkansas Game and Fish Commission* denies the existence of a per se temporary physical taking and does not support a *Penn Central*-like temporary physical taking under the facts presented in *Ladd,* the Supreme Court's opinion nullifies the Federal Circuit's NITU rule and destroys *Ladd*'s precedential value.

The Court of Appeals for the Federal Circuit's holding in *Ladd* establishes the issuance of the NITU as constituting a per se temporary physical taking where the NITU does *not* result in the construction of a recreational trail, explaining that the NITU is the "only government action in the railbanking process that operates to prevent abandonment of the corridor and preclude the vesting of state law reversionary interest in the right-of-way."[88] However, *Arkansas Game and Fish Commission* effectively nullifies the Federal Circuit's rule and *Ladd*'s precedential value.[89] Under *Arkansas Game and Fish Commission*, the *Ladd* holding presents an unworkable rule in relation to the temporary physical takings framework.[90] First, where *Arkansas Game and Fish Commission* holds that a temporary physical taking must be analyzed under a multi-factor balancing test and is not subject to per se analysis, the per se rule in *Ladd* is nullified.[91] Second, where the application of the *Arkansas Game and Fish Commission* balancing test to the facts

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[87] *Supra* note 75.
[88] Ladd v. United States, 630 F.3d 1015, 1025 (Fed. Cir. 2010); Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006); *see also*, Caldwell v. United States, 391 F.3d 1226, 1233-34 (Fed. Cir. 2004) (emphasis in original).
[89] *See Ark. Game and Fish Comm'n,* 133 S. Ct. at 518, 520, 522.
[90] *See id.*
[91] *See id.* at 518.

presented in *Ladd* does not support a finding of a temporary physical taking, *Ladd's* precedential value is destroyed.[92]

Arkansas Game and Fish Commission denies the existence of a per se temporary physical taking and instead establishes that the legal determination of a temporary physical taking turns on the application of a multi-factor *Penn Central*-like balancing test.[93] The multiple factors that must be considered include the duration of the physical interference, the degree to which the physical inference is intentional or foreseeable, the character of the land at issue, the owner's reasonable investment-backed expectations attached to the land, and the severity of the physical interference.[94] Contrary to this framework, *Ladd* extends the *Barclay* and *Caldwell* rule to determine that the issuance of a NITU that does not result in the construction of a recreational trail constitutes a temporary physical taking *simply because* the NITU delays the reversion of the right-of-way to the abutting landowner.[95] In reaching this conclusion, the court fails to consider the short duration of the NITU's interference, the limited size and potential use of the land at issue, the landowner's lack of reasonable investment-backed expectations, and the NITU's minimal interference with property rights.[96] Instead, the court merely presumes that a temporary physical taking has occurred based on a bright-line rule that establishes that a physical takings claim accrues at the issuance of the NITU.[97] In the absence of a situation-specific factual analysis, this presumption represents the establishment of a per se rule that concludes that a physical taking, although potentially only temporary in nature, occurs at the issuance of a

[92] *See* discussion *supra* Part II, p. 12-15.
[93] *See Ark. Game and Fish Comm'n,* 133 S. Ct. at 518, 522.
[94] *Id.* at 522.
[95] Ladd v. United States, 630 F.3d 1015, 1024-25 (2010).
[96] *See id.*
[97] *See id.*

NITU.[98] Because *Arkansas Game and Fish Commission* forbids the use of per se treatment when analyzing a temporary physical takings claim[99] and the *Ladd* decision proposes a per se treatment of such a claim,[100] *Arkansas Game and Fish Commission* nullifies the *Ladd, Barclay,* and *Caldwell* rule as applied to temporary physical takings claims.

Furthermore, where the application of the *Arkansas Game and Fish Commission* balancing test to the facts presented in *Ladd* does not support a finding of a temporary physical taking, *see supra* p. 12-15, *Ladd*'s finding of a temporary physical taking has no precedential value. Performing a situation-specific factual inquiry as to whether the circumstances presented in *Ladd* constituted a temporary physical taking fails to suggest that the seven-month, non-physical interference the NITU effected had a severe impact on the land or the owner's reasonable-investment backed expectations regarding the land's use.[101] Indeed, the seven-month delay appears to be only a minimal interference with the landowner's reversionary interest.[102] Where the facts presented in *Ladd* do not constitute a temporary physical taking under the *Arkansas Game and Fish Commission* guidelines and *Arkansas Game and Fish Commission* is now the law of the land, the *Ladd* holding will have no precedential value for future temporary physical takings claims filed due to the issuance of a NITU.

Conclusion

The U.S. Supreme Court's *Arkansas Game and Fish Commission* decision clarifies the proper framework to use when analyzing temporary physical takings claims. Where *Arkansas*

[98] *See Ark. Game and Fish Comm'n,* 133 S. Ct. at 518.
[99] *Id*. at 518, 522.
[100] *See Ladd*, 630 F.3d at 1024-25.
[101] *See* discussion *supra* Part II, p. 12-15.
[102] *Id.*

Game and Fish Commission holds that there is no per se temporary physical taking but only a *Penn Central*-like balancing of factors which includes the presence of a government-authorized physical invasion or occupation, the Federal Circuit's per se rule that a physical taking occurs at the issuance of a NITU is effectively nullified as applied to temporary physical takings, and *Ladd*'s finding of a temporary physical taking at the issuance of a NITU has lost any precedential value for similar future claims. Consequently, the Federal Circuit's future rails-to-trails analysis will need to reevaluate the railbanking process in relation to temporary takings claims.