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Federal Railroad Rights of Way

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Federal Railroad Rights of Way

Summary

During the drive to settle the western portion of the United States, Congress sought to encourage the expansion of railroads, at first through generous grants of rights of way and lands to the great transcontinental railroads between 1862 and 1871, and later through the enactment of a general right of way statute. The 1875 General Railroad Right of Way Act permitted railroads to obtain a 200-foot federal right of way by running tracks across public lands. Some railroads also obtained rights of way by private purchase or through the exercise of state or federal powers of eminent domain. Therefore, not all railroad rights of way are on federal lands, and the property interest of a railroad in a right of way may vary. The courts have characterized the interest held by a railroad pursuant to a federally granted right of way variously: as a "limited fee" in the case of a land grant right of way, or as an easement in the case of a right of way under the 1875 Act.

As railroads closed rail lines, questions arose as to the disposition of the lands within the former rights of way. Many individual instances were resolved in separate legislation. In 1922, Congress enacted a general law to provide that federal railroad rights of way on federal lands become the property of the adjacent landowner or municipality through which the right of way passed. This law is unclear in several respects — for example, as to what procedures are sufficient to constitute an abandonment of a right of way, and on what authority Congress could provide for the establishment of highways within the right of way *after* abandonment of the rail line. In 1988, in what is popularly known as the Rails to Trails Act, Congress opted to bank rail corridors, keeping them available for possible future use as railroads and making them available for interim use as recreational trails.

Some cases have held that Rails to Trails results in takings of private property when non-federal easements were involved. In the context of federal rights of way, recent cases have held that the federal government did not retain any interest in federal railroad rights of way when the underlying lands were conveyed into private ownership, and therefore if an abandoned rail corridor is held for interim trail use, compensation is owed the adjacent landowners. However, Congress has legislated numerous times over the years regarding federal railroad rights of way, as though Congress believed it had continuing authority over their ultimate disposition. Issues may continue to arise surrounding the disposition of federal railroad rights of way, possibly involving, for example, the authority of Congress over the rights of way, the nature of the interest held by the railroad, the validity of attempts by the railroad to convey all or part of that interest, and disputes between adjacent landowners over perceived entitlements to lands within a particular right of way.

This report discusses the history of federal railroad rights of way and some of the cases addressing them. It will be updated from time to time as circumstances warrant.

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Federal Railroad Rights of Way

Introduction

Congress facilitated the development of railroads, especially railroads in the West, through various forms of federal assistance. Primary among this assistance was the granting of rights of way across the public lands. Not all of these grants were the same, but some arguably contemplated a retained interest in the United States. As the continued operation of certain railways became less practicable and portions of rail lines were sold or closed, attention increasingly turned to title issues and the nature and scope of the authority of Congress to dispose of rail corridors. This report discusses the history of the federal railroad rights of way grants, the various forms such grants have taken, and the provisions Congress has enacted to govern disposition of railroad rights of way. This report will be updated as circumstances warrant.

Background

The middle of the nineteenth century witnessed a burst of federal legislation fostering the construction of railroads in America.[1] Many factors contributed to this legislative initiative, among them the discovery of gold in California, the American civil war, the absence after secession of opposing votes by southern states, and a desire to encourage the settlement and development of the vast new western territories, thereby increasing tax revenues, opening markets, and providing more adequately for the defense of the West. It was also felt that transcontinental rail lines could not be built without substantial Federal assistance. The grants sometimes consisted only of a right of way across public lands, but sometimes also included a greater subsidy in the form of additional grants of land, financial support, or both. Some land grants were made to states to be conveyed by them to a railroad company upon completion of specified segments of line. Other grants were made to railroad corporations directly. Usually this latter course was followed if the route was to cross territories rather than states. Typically, in this latter instance, a federally chartered corporation was created by the same legislation that established the land grants.

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[1] See J.B. SANBORN, CONGRESSIONAL GRANTS OF LAND IN AID OF RAILROADS (1899); P.W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, ch. XIV (1968).

Several transcontinental railroads were authorized in a ten-year period, including the Union Pacific/Central Pacific in 1862 and 1864,[2] the Northern Pacific in 1864,[3] the Atlantic and Pacific in 1866,[4] and the Texas Pacific in 1871.[5] The terms of grants varied, but all of these railroads received a right of way and additional land grants. These lands were typically granted in a "checkerboard" layout — blocks of railroad lands alternated with government-retained lands — with the intent that the railroads would sell their lands to settlers to finance the railroad, and the presence of the railroad would make the retained government lands more valuable. Other, non-transcontinental railroads also received federal grants to begin operation.

By the time the fourth transcontinental line was authorized in 1871, vehement opposition was developing to the railroads that only a few short years before had received enthusiastic support. As one historian put it, when the West "saw evidence that railroads were not prompt in bringing their lands on the market and putting them into the hands of farm makers, the West turned from warm friendship to outright hostility to railroads."[6]

This hostility was reflected in a cessation of congressional land grants to railroads.[7] Congress did, however, wish to continue to encourage the expansion of railroads across the western lands. Special acts continued to be passed that granted a right of way through the public lands of the United States to designated railroads, but this piecemeal approach was burdensome. In 1875, Congress enacted a statute known as the "General Railway Right of Way Act (GRRWA),"[8] that granted a right of way two hundred feet wide across public lands and, as codified at 43 U.S.C. § 934, states in pertinent part:

> The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine stops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

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[2] Act of July 1, 1962, ch. 120, 12 Stat. 489 and Act of July 2, 1864, ch. 216, 13 Stat. 356.

[3] Act of July 2, 1864, ch. 217, 13 Stat. 365.

[4] Act of July 27, 1866, ch. 278, 14 Stat. 292.

[5] Act of March 3, 1871, ch. 122, 16 Stat. 573.

[6] GATES, supra note 1, at 380.

[7] See Cong. Globe, 42d Cong., 2d Sess. 1585 (1872).

[8] Act of March 3, 1855, ch. 200, 10 Stat. 683, and Act of July 26, 1866, ch. 262, 14 Stat. 253, R.S. 2477.

At times, railroads also acquired some rights through the exercise of state power of eminent domain and through the exercise of federal power of eminent domain. In addition, some rights of way were simply purchased by the railroads from non-federal owners. In the latter instance, the railroad obviously could hold full title to the right of way lands and the federal government none. By contrast, in those instances in which the right of way was obtained by an exercise of the federal power of eminent domain, one would have to examine the particular authority for that exercise and also the particular condemnation proceedings to determine the scope and conditions of the title the railroad obtained.

This report does not address privately-owned railroad rights of way but discusses railroad rights of way granted by the federal government, either as part of a land grant or under the 1875 right of way statute.

Legal Nature of "Rights of Way"

The courts have interpreted the right of way interests conveyed to railroads in various ways, and it has become increasingly difficult to reconcile the sequence of congressional enactments and judicial holdings into a coherent body of law. A complete review of the extensive enactments, litigation, and interpretations is beyond the scope of this report, but some of the principal cases and issues are set out.

The Supreme Court has said that a pre-1871 right of way granted to a land grant railroad was a "limited fee,"[9] while the right of way granted under the 1875 statute was an easement.[10] More recent cases seem to indicate that the terminology may not be of vital importance; the significance of the terms used depends on the context in which an inquiry arises.[11] However, the "rail banking" provisions of the Rails to Trails Act (discussed below) have again resulted in a focus on the exact nature of the right of way interest and the authority of Congress over rail corridors. To encourage settlement of the West, Congress not only enacted railroad rights of way grants but also statutes that authorized the conveyance of lands to private citizens. The railroads crossed these lands and whether the "banking" of the rail corridors once trains no longer operate results in a taking of private property for which compensation is owed under the 5th Amendment to the Constitution has been addressed in several recent cases discussed later in this report.

A review of property law terms may be helpful. Usually when land is granted to another owner, the conveyance is complete and final. If the interest conveyed is complete and includes all rights associated with the property, it is a "fee simple." It

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[9] Northern Pacific Railway Co. v. Townsend, 190 U.S. 267, 271 (1903), *modified in* United States v. Union Pacific. Railroad Co., 353 U.S. 112 (1957).

[10] Great Northern Ry. Co. v. United States, 315 U.S. 112 (1957).

[11] See Marshall v. Chicago and Northwestern Transp. Co., 31 F.3d 1028 (10th Cir. 1994); Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir. 1990); Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979); but see Aberdeen v. Chicago and Northwestern Transp. Co., 602 F.Supp. 589 (D.S.D. 1984).

is possible, however, to convey less than all property rights, or to convey title to a grantee so that title may revert to the grantor in some circumstances. If the interest conveyed is only the right to use the land of another for a particular purpose (such as the right to cross the land of another), the interest is an easement. There can be a gradation of interests between fee title and an easement depending on the exclusivity of possession granted, the duration of the interest granted, and the completeness of the rights granted. A right of way interest may be structured and conveyed in such a manner that the grantor retains a "reversionary" interest in the property, which means that the property may in some circumstances revert to the grantor.

A fee grant may be made so that it continues only so long as some use or circumstance continues, and if that use or circumstance ceases, then title reverts automatically to the grantor. This is called a determinable grant. Or a fee grant may be interpreted as being made on the condition that if "x" occurs, then the grantor may reenter the property, and title may revert to the grantor. This is called a grant on a condition subsequent. Both of these could be characterized as "limited fees," since they are less than full fee title.

The principal difference between these two types of grants is that in the former instance, no action on the part of the grantor is necessary to reassert title; title reverts by action of law as soon as the envisioned use or circumstance ceases. In contrast, if the grant is deemed to be a grant on a condition subsequent, the grantor must take some action to reassert title upon the breach (or fulfillment) of the condition (depending on whether the grant and condition were worded positively or negatively). This action usually takes the form of a judicial proceeding to determine that the terms of the condition have in fact been met or breached.

If the right of way is a mere easement, at common law when the easement use ceases, the easement simply disappears and the "servient" estate — the land burdened by the easement — no longer is so burdened. (Therefore, it usually is not technically correct to speak of a "reversionary interest" in connection with a common law easement.)

However, Art. IV, § 3, cl. 2 of the Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." When *Congress* grants a property interest, the grant is both a grant of property and a law and Congress is free to specify terms or elements different from those that otherwise would apply either by virtue of the common law or in other statutes. This fact seems to have been lost in some of the discussions of congressional railroad grants. A railroad grant may also be both a grant of a property interest and a contractual agreement between the federal government and the railroad.[12]

One of the earlier cases in which the Supreme Court considered the title taken by a land-grant railroad was *Schulenberg v. Harriman* in 1874, in which the Court said: "A legislative grant operates as a law as well as a transfer of the property, and

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[12] United States v. Northern Pacific Railway Co., 256 U.S. 51 (1921).

has such force as the intent of the legislature requires."[13] Considering all the conditions and provisos that in the legislation granted lands to the railroad in question, the court found the interests granted to the railroad to be a fee on condition, and that breach could only be asserted by the government as grantor. In this respect, the Court clearly distinguished between what could happen at common law where the two private parties were involved from these congressionally created property interests where one party was the sovereign government and must enforce the terms of the property grant either by judicial proceedings or by legislative assertion that was the equivalent — "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government."[14]

Another early case interpreted a land grant railroad right of way as a limited fee, made on an implied condition of reverter in the event that the company ceased to use the land for railroad purposes.[15] In this case, the Court also said: "No express provision for a forfeiture was required to fix the rights of the Government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to reenter in case of a breach of such conditions."[16] It is important to note that this case involved private persons who had been patented lands over which the train tracks ran, and the Court voided those patents on the ground that they could not convey the block of lands they purported to convey due to the fact that the railroad held limited fee title to the right of way strip of land.

In 1875, Congress approved the general railroad right of way grant (GRRWA) *using the same language* as in some of the land-grant rights of way grants: "The right of way through the public lands of the United States is hereby granted to any railroad company ...."[17] The Supreme Court held in *Great Northern Railway Co. v. United States* that this language clearly granted only a surface easement rather than the strip of land right of way.[18] In reaching this conclusion, the Court looked to other language of GRRWA, to administrative interpretations, and to subsequent enactments by Congress that referred to the "easements" given by the 1875 Act. The Court pointed to § 4 of the Act as especially persuasive in that it states that once each right of way is noted on plats in the local land office, "thereafter all such lands over which such right of way shall pass shall be disposed of *subject to the right of way.*" (Emphasis added.) "Apter words to indicate the intent to convey an easement would be difficult to find."[19] As will be discussed, however, it is possible that Congress did not intend by this language to relinquish its authority over the ultimate disposition of the rail corridor.

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[13] 21 Wall. 44, 62 (1874).

[14] *Id*. at 63-64. (Footnote omitted.)

[15] Northern Pacific Railway Company v. Townsend, 190 U.S. 267, 271 (1903).

[16] Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, 427-428 (1897).

[17] Act of March 3, 1875, ch. 152, 18 Stat. 482, formerly codified at 43 U.S.C. § 934; repealed by P.L. 94-579.

[18] Great Northern Railway Co. v. United States, 315 U.S. 262 (1942).

[19] *Id*. at 271.

The *Great Northern* case illustrates the mixture of facts and terminology that renders harmonizing the various judicial holdings difficult. In *Great Northern*, the United States sued to enjoin the plaintiff Railway Company from drilling for oil and gas beneath an 1875 right of way. The railroad owned the adjacent lands and hence at common law could have been the owner of underlying estate. No evidence of title in the United States was introduced; but the court allowed the parties to stipulate that "the United States has retained title to certain tracts of land over which petitioner's right of way passes ...."[20] This stipulation avoided a resolution of issues involving the possible rights of adjacent landowners or the nature of possible retained authority of Congress.

In another case in which the government sued to enjoin a railroad company from drilling for oil and gas on the land-grant right of way granted it by the government, the Supreme Court ruled that the right of way grant did not include mineral rights because of other language in the Act that excepted out mineral lands — language the Court held applied to the entire statute and not just to grants of lands.[21] In reviewing the "limited fee" cases, the Court said that the most such cases decided was that "the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." This case has sometimes been regarded as holding that even land-grant rights of way were merely easements, but in fact the Court held only that the grant did not give the mineral rights to the owner of the right of way because nothing passed except what was conveyed in clear language; the grants were construed favorably to the government with doubts resolved in favor of the government; and oil and gas development was not within the railroad purposes of the right of way. Nevertheless, the Supreme Court did strongly suggest that all railroad rights of way were easements.

Although the courts have struggled at times to articulate the *nature and scope* of the interest held by a railroad, the cases are clear that the right of way interest, whether limited fee or easement, is conditioned on the continued use of the right of way for railroad purposes, although that phrase may be broadly construed.[22]

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[20] *Id*. at 280.

[21] United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957).

[22] The purposes of a railroad right of way may be interpreted broadly to mean any purpose of public transportation. See Wash. Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 544, 547 (Minn. 1983), *cert. denied* 463 U.S. 1209.

Conveyances by the Railroads

Congress has authorized the railroads to convey part of their rights of way for highway purposes. In 1920, Congress authorized railroads to convey to state, counties, or municipalities, portions of rights of way to be used as public highways or streets provided the conveyance would not diminish the railroad right of way to less than 100 feet. As codified at 43 U.S.C. 913, this provision reads:

> § 913 Conveyance by land-grant railroads of portions of rights-of-way to State, county, or municipality
>
> All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained.[23]

Section 16 of the Federal Highway Act of 1921[24] gave the consent of the United States to any railroad or canal company conveyance to the highway department of any state "any part of its right of way or other property in that State acquired by grant from the United States." Note that this provision did not mention the necessity for retaining the central right of way, and the legislative history offers no clarification on the point. The Federal Highway Act included language stating "all acts or parts of acts in any way inconsistent with the provisions of this act are hereby repealed ...," and courts that have addressed the issue have found that the 1921 enactment amended § 913, eliminating the requirement that the retained central core be 100 feet in width.[25] It is arguable, however, that because the railroad is only authorized to convey "property acquired" from the United States, neither a full fee title nor any retained interest of the United States could be conveyed. Under such reasoning, the railroad must continue to use the right of way for railroad purposes or, if that use ceased, the railroad could not convey the central core. In addition, if the railroad were legally abandoned, the public highway exception in section 912 would still allow one year for any abandoned portion of a right of way to be "embraced in a public highway."[26]

Controversies have arisen as to the authority of the railroads to convey all or part of their interest in the rights of way aside from the highway context, and as to the

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[23] Act of May 25, 1920, ch. 197, 41 Stat. 621.

[24] Act of November 9, 1921, ch. 119, 42 Stat. 212, codified at 23 U.S.C. 316. The Act of August 27, 1958, P.L. 85-767, 72 Stat. 915, which revised Title 23, added the words "or its nominee" after "of any State" "so that in those instances where the county or other political subdivision is the proper party to hold title to the right-of-way, such action can be effected." H.Rept. 1938, 85th Cong. 2d Sess. 107 (1958).

[25] Mauler v. Bayfield County, 204 F.Supp. 2d 1168, 1175 (W.D. Wis 2001), *aff'd* 309 F.3d 997 (7th Cir. 2002); Idaho v. Or. Short Line R. R. Co., 617 F.Supp. 219, 220 (D. Idaho 1985).

[26] 43 U.S.C. § 912.

authority of private citizens to obtain rights to property within the rights of way through adverse possession — what might be characterized as "squatter's rights."

The Supreme Court interpreted the grant of a federal right of way as a unit, no portion of which could be obtained for private purposes by adverse possession.

> By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, in the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant ....[27]

Similarly, the court has held that the right of way purposes would be negated by the existence of the power of the railroad to alienate the right of way or any portion of it.[28]

Despite the limitations on the alienability of federal rights of way, the railroads still purported to convey, and adjacent landowners continued to encroach upon, rights of way and claim rights thereto. Over the years, Congress has repeatedly legislated to legitimize particular conveyances and activities to alleviate the hardships to innocent purchasers.[29] In doing so, Congress has consistently asserted that Congress, not the railroads, had the authority to dispose of rail corridors. Many of the validation statutes involved land-grant railroad rights of way, which Congress repeatedly characterized as limited fee grants with a reversionary interest in the federal government.[30] Subsequent statutes interpreting and declaring the intent of

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[27] Northern Pacific Railway Co. v. Smith, 171 U.S. 260, 275 (1898); see also Northern Pacific Railway Co. v. Townsend, 190 U.S. 267 (1903); Kindred v. Union Pacific Railroad Co., 225 U.S. 582 (1912).

[28] Townsend,190 U.S. at 271.

[29] See, e.g., the Act of April 28, 1904, ch. 1782, 33 Stat. 538 (legalizing, validating, and confirming "all conveyances heretofore made" by the Northern Pacific Railroad Company of land forming a part of the right of way granted by the government provided that the conveyances did not diminish the right of way to less than two hundred feet); and the Act of June 24, 1912, ch. 181, 37 Stat. 138 (legitimizing conveyances made by the Union Pacific Railroad and certain others of lands within the right of way granted the Union Pacific, and permitting adverse possession claims against the railroad in accordance with the laws of the state in which the land is situated).

[30] See S.Rept. 108-305 at 2 (2004) re H.R. 1658, which became Priv. L. 108-2. Congress noted in this report that on at least one hundred occasions the Central Pacific Railroad Company's successors, the Central Pacific Railway Company and the Southern Pacific Transportation Company, had attempted to convey parcels of the 1862 right of way land grant to others even though the companies did not have the legal authority to do so and the "conveyances were made without regard to the Federal Government's reversionary interest in the land." The report also mentions three previous occasions on which Congress enacted legislation to validate conveyances: P.L. 95-586, 92 Stat. 2485; P.L. 99-543, 100 Stat. 3040; and Priv. L. 103-2, 108 Stat. 5057. See also H.Rept. 105-171 (1997) re H.R. 960, which became P.L. 105-195.

earlier statutes are entitled to be given great weight in statutory construction.[31] In this context, Congress has enacted statutes for more than a century that in text or committee reports refer to the reversionary interest of the United States, a point that will be discussed further below. A review of these enactments may shed light on the issues, although this consistent view of Congress that a residual interest remains in the United States has not figured prominently in judicial decisions thus far.

Congressional Disposition of Underlying Federal Interests

Congress legislated specially to provide for the final disposition of particular rights of way no longer being used for railroad purposes, and in 1922 also enacted a general statute.[32] As codified at 43 U.S.C. § 912, the 1922 statute provides that upon forfeiture or abandonment, the lands granted to any railroad company for use as a right of way for its railroad etc. would pass to a municipality if the right of way passed through one, or to adjacent landowners, except that a highway could be established within the right of way within one year after the date of a forfeiture or abandonment. The provisions state:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment[,] be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine and remove same.

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[31] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969).

[32] Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912.

Note that this statute begins by referring to grants of *lands* for railroad rights of way, and at least two fundamental elements of section 912 remain integral to disposition of railroad rights of way — the concept of abandonment and the public highway exception.

Under section 912, as amended, certain rights vest upon abandonment.[33] A finding of abandonment must also be declared by a court of competent jurisdiction or by an act of Congress.[34] What constitutes abandonment remains, however, somewhat uncertain. The relevant statutes do not define abandonment, and no single court decision has definitively resolved the question. Likewise, the congressional debate on the statute was limited and does not provide clarification of the intended meaning.[35] The courts that have addressed the abandonment requirement have often looked to common law principles in interpreting the term. A particularly influential case has read § 912 to require a present intent to abandon as well as physical abandonment, evidenced by the cessation of tax payments related to the property, discontinuation of service and other railroad-related use, and removal of tracks.[36] Additional requirements, however, vary from circuit to circuit. The major point of dissension appears to be the status of abandonment determinations by the Interstate Commerce Commission ("ICC") or, for cases arising after the termination of the ICC, by the Surface Transportation Board ("STB").[37] The Tenth Circuit has consistently found such a determination a prerequisite to abandonment.[38] However, in the Ninth Circuit, an ICC or STB determination of abandonment may not always be necessary. As stated in *Vieux v. East Bay Regional Park District*, "a railroad could abandon without any involvement from the I.C.C., if there is no injunctive action brought [by the I.C.C., the U.S. or state government] and if a court decrees that the railroad has abandoned the line. The I.C.C. regulation and process determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred."[39]

Section 912 also established a public highway exception. A state or local agency has the right to include portions of any railroad right of way in a public

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[33] 43 U.S.C. § 912; 16 U.S.C. § 1247(d); 16 U.S.C. § 1248(c).

[34] 43 U.S.C. § 912; See, e.g., Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1339 (9th Cir. 1990), *rehearing denied, cert. denied* 498 U.S. 967.

[35] See, e.g., King County v. Burlington Northern Railroad Co., 885 F.Supp. 1419 (W.D.Wash. 1994).

[36] Idaho v. Oregon Short Line Railroad Co., 617 F.Supp. 213, 218 (D.Idaho 1985).

[37] For ICC termination and STB assumption of railroad-related functions, see ICC Termination Act, P.L. 104-88, 109 Stat. 803.

[38] Phillips Co. v. Denver and Rio Grande W. R.R. Co., 97 F.3d 1375, 1376 (10th Cir. 1995).

[39] Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1339 (9th Cir. 1990), *rehearing denied, cert. denied* 498 U.S. 967.

highway within one year of its legal abandonment, thus eliminating other title claims.[40] The relevant committee report indicates:

> It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.[41]

Two cases have held that the United States retained a reversionary interest in railroad rights of way, including those established after 1871 (i.e. non-land grant railroad rights of way), and that the adjacent landowners had non-vested reversionary rights that were cut off when recreational trail uses were properly established as public highways under state law within the one-year public highway exception set out in §§ 912 and 913.[42]

The 1922 Act and the report language explaining it reveal an important point that arguably has not received adequate attention. Clearly, Congress believed that it had retained the authority to provide for the disposition of railroad rights of way, whether because Congress continued to hold some traditional property interest, such as a reversionary interest (note the reference to Congress' understanding that the rights of way were "strips" of land), or because its retained authority over the termination of the rights granted *was an element of the property interests granted*. If the railroad rights of way exactly paralleled some common law property interest such as an easement, how can Congress make an alternative disposition of the underlying lands other than that which would otherwise apply at common law? The one-year window within which highways could be established in an abandoned rail corridor only makes sense if Congress retained the authority to deviate from common law property rights with respect to termination of the grants. Recalling that the railroad grants were both grants of a property interest and a law, the argument could be made that Congress intended as a matter of law to retain authority over the

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[40] See Nicodemus v. Union Pacific Railroad Co., 318 F.3d 1231, 1237 n. 8 (10th Cir. 2003); Fitzgerald v. City of Ardmore, 281 F. 2d 717 (10th Cir. 1969); Wyoming v. Andrus, 602 F.2d 1379, 1384 (10th Cir. 1979); Marshall v. Chicago and Northwestern Transp. Co., 31 F.3d 1028, 1031 (10th Cir. 1994); Mauler v. Bayfield County, 309 F.3d 997, 999 (7th Cir. 2002), King County v. Burlington Northern R.R. Co., 885 F. Supp. 1419, 1422 (W.D.Wash. 1994).

[41] S.Rept. 388, 67th Cong., 2d Sess. 1 (1922).

[42] Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1339 (9th Cir. 1990), *rehearing denied, cert. denied* 498 U.S. 967; see also Barney v. Burlington Northern Railroad Co., Inc., 490 N.W.2d 726, 732 (S.D. 1992) *cert. denied* 507 U.S. 914 (quoting Vieux, 906 F.2d at 1339).

termination of the property rights granted. Arguably, this principle has been embodied in the enactments of Congress for more than a century that provided for the disposition of the rights of way. The importance of this question has been highlighted by recent cases involving the Rails to Trails litigation.

"Rails to Trails"

Congress has established a National Trails System to designate and manage a system of national trails. Amendments in 1983[43] and 1988[44] authorized the banking of railroad rights of way to preserve them for possible future railroad use and to allow interim use of the rights of way corridors for recreation. As indicated in the legislative history, Congress intended the trails system to increase recreational opportunities, conserve natural resources, and, through the "Rails to Trails" provisions, preserve rapidly diminishing rail corridors for possible future railroad use.[45] Specifically, the Rails to Trails provisions were enacted to deal with the problem of state property laws providing for the expiration of easements upon abandonment.[46] As codified at 16 U.S.C. § 1247(d), Congress provided railroads wishing to discontinue service on a particular route an opportunity to negotiate with state, municipal, or private entities who were prepared to assume responsibility for conversion and management of the rail corridor as a trail.[47] If the negotiations were successful, the right of way would not be deemed abandoned; rather it was considered to be under an "interim use," with the possibility that rail service could be reinitiated in the future.[48] By avoiding final abandonment status, the railroad right of way did not pass under applicable state law or 43 U.S.C. § 912.

The 1988 amendment (16 U.S.C. § 1248(c)) provides for the retention by the federal government of any and all federal interests in railroad rights of way.[49] The statute provides

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[43] Act of March 28, 1983, P.L. 98-11, 97 Stat. 42.

[44] Act of October 4, 1988, P.L. 100-470, 102 Stat. 2281.

[45] H.Rept. 98-28 at 8 (1983); S.Rept. 100-408 at 3 (1988); see also 16 U.S.C. § 1241 (a); 16 U.S.C. § 1247(d).

[46] See Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Citizens Against Rails to Trails v. Suface Transp. Bd., 267 F.3d 1144 (D.C.Cir. 2001); and Grantwood Village v. Mo. Pac. R.R. Co., 95 F.3d 654, 658 (8th Cir. 1996). This system raised and continues to engender claims of Takings Clause violations. While the Congress may postpone reversions that would occur under state law, doing so does not eliminate the underlying property right. In these instances, the property interest held by the railroad vis-a-vis a party claiming a taking becomes integral to the determination of each one's respective rights. For a general discussion, see ROBERT MELTZ, DWIGHT H. MERRIAM, RICHARD M. FRANK, THE TAKINGS CLAUSE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION, ch. 27 (Island Press 1999).

[47] 16 U.S.C. § 1247(d) (2003).

[48] *Id.*

[49] 16 U.S.C. § 1248(c) (2003).

> Commencing on October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of way of the type described in the Act of March 8, 1922 (43 U.S.C. 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of way, or portions thereof, except to the extent that any such right-of way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.[50]

Section 1248(c) thus significantly changes the disposition of federal interests involved in federally-granted rail corridors over which trains no longer run, causing all interests to be retained by the United States rather than passing to adjacent landowners or municipalities. By its own language, section 1248(c) confirms the continuing force of the 1922 Act, specifically reinforcing the continued vitality of §912 public highway exception. Accordingly, courts have continued to recognize §912 in so far as it does not conflict with section 1248(c).[51]

5th Amendment Takings Cases

After the enactment of Rails to Trails, cases examined whether the retention of non-operating railroad rights of way for use as recreational trails constitutes a taking entitling the landowners to just compensation under the 5th Amendment to the Constitution. With respect to some privately granted rights of way, the Supreme Court in *Preseault* held that the law was constitutional because the "Tucker Act"[52] provided an avenue to obtain compensation if any were owed.[53] A subsequent case involving the same plaintiffs held that a compensable taking had occurred, but that not every exercise of authority by the United States under the Rails to Trails Act would necessarily result in compensable takings. The *Preseault* cases involved private fee-title landowners whose predecessors had sold an easement for railroad purposes to a railroad. Ultimately, the Court of Appeals for the Federal Circuit decided that use of the right of way for recreational purposes was beyond the scope

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[50] *Id.*

[51] E.g., Mauler v. Bayfield County, 204 F.Supp.2d 1168 (W.D. Wis 2001), *aff'd* 309 F.3d 997 (7th Cir. 2002); see also Vieux v. East Bay Regional Park Dist., supra. It should be noted that while the *Mauler* decision is based upon a well-reasoned interpretation of the various Rails to Trails provisions, it is not entirely apparent that §§ 912 and 1248(c) should have played the role they did in the court's determination. Importantly, the original grant of land was made by the federal government to the state of Wisconsin. State disposal could only be for railroad construction purposes, and such disposal obviously took place. Section 912 states that it applies, "[w]henever public *lands of the United States* have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind...." (Emphasis added.) Section 1248(c) refers to the "right, title, interest, and estate of the United States." This express statutory language could be read to require a direct right of way grant from the federal government without a state acting as middleman for §§ 912 and 1248(c) to apply.

[52] 28 U.S.C. § 1491(a)(1).

[53] Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

of the easement granted and agreed to by the private parties, and hence the use of the corridor for those purposes constituted a taking.[54]

With respect to federal rights of way, early decisions after the 1988 statutory change concluded that, despite the absence of an explicit reservation of interest, the federal government did retain an implied interest when it patented (conveyed title to) lands crossed by federal railroad easements into private ownership, such that the retention of the rights of way for interim use as trails was not a taking, when a public highway was established under state law.[55] More recent cases have held the opposite.[56] There has not yet been a Supreme Court ruling in the federal right of way context.

In the *Hash* case,[57] landowners brought a class action challenging a conversion of a railroad right of way across their lands to a recreational trail. The federal district court for Idaho found no taking and plaintiffs appealed. The lower-court decision was vacated and remanded in light of an Idaho Supreme Court decision. The right of way in question was granted under the 1875 GRRWA, and the landowners argued that under the reasoning of *Preseault*, the application of the Trails Act after abandonment of railway use prevented the railroad easement from reverting to the owners of the servient estate and entitled them to compensation. This claim required the court to ascertain whether the federal right of way was an easement and the claimant landowners owned the underlying estate, or whether the underlying estate never left ownership by the United States, or whether the estate was deeded in fee to the railroad. There were various categories of landowners, but for purposes of this report, we shall address only those who obtained title to their lands from the federal government after the establishment of the railroad right of way, thereby raising the question of what § 4 of the GRRWA means when it states that subsequent land owners take "subject to" the right of way.

The court in *Hash* noted the previous cases that had held that the 1875 statute granted only easements, and further noted that the United States had failed to expressly reserve any interest to itself when conveying lands to homesteaders, except that settlers took lands "subject to" the railroad right of way. "We have been directed to no suggestion, in any land patent, deed, statute, regulation, or legislative history, that can reasonably be construed to mean that the United States silently retained the fee to the land traversed by the right-of-way, when the United States granted that land to homesteaders."[58] Similarly, the court did not find that language directing the railroads to share their rights of way with highways under either 43 U.S.C. § 912 or § 913 mandated the conclusion that the United States had retained the fee to the land

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[54] Preseault v. United States, 100 F. 3d 1525 (Fed. Cir. 1996).

[55] E.g., Mauler supra at 1001; see also, e.g., Vieux and Barney, supra.

[56] Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005), rehearing denied 2005 U.S. App. LEXIS 18611 (Fed. Cir. August 15, 2005); Beres v. United States, 64 Fed. Cl. 403, 428 (2005); Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996)(en banc plurality opinion).

[57] Hash v. United States, 403 F. 3d 1308 (Fed. Cir. 2005).

[58] *Id*. at 1317.

underlying the right of way after land patents including that land were granted to private persons. Similarly, the court found that § 913 (that authorizes highways within the right of way for up to a year after abandonment) does not weaken the position of the landowners because it required that the rights of the United States be conveyed to the private owner. However, this reasoning arguably does not adequately take into account the fact that if the United States could validly legislate regarding the one-year window for the establishment of the highways, Congress must have had *some* interest in the right of way. As discussed above with respect to the statutes validating railroad right of way conveyances, Congress has repeatedly enacted statutes premised on some legislative or proprietary interest over termination of the rights of way.

Similarly, the court stated that the statute requires the United States to convey *any* rights it has in the right of way, and that the statute does not indicate what rights the United States had. However, the statute actually directs that *all* right, title, and interest of the United States be conveyed, except for highways within the year after abandonment. "All" is not an equivocal word as "any" is, and arguably may indicate that Congress believed there was such right or interest held by the United States.

The *Beres* case also involved an 1875 right of way, and the Court of Federal Claims held that the right of way granted only an easement, so that when the right of way was no longer used for railroad purposes, the easement was lifted and no property interest reverted to the United States. When the underlying lands were patented, the court held, the government gave up all its interest in the land, including any reversionary interest. This case again did not take into account the years of enactments by Congress premised upon some retained interest or authority over the rights of way, nor the language of § 913 that on its face makes a disposition different from that which would pertain if the right of way were an easement at common law.

The government in *Beres* again argued that the United States had retained some interest in the railroad rights of way, quoting from *Whipps Land & Cattle Co. v. Level 3 Communications, LLC* in which the Nebraska Supreme Court stated that, "while the vocabulary of the common law of real property is often imported into the discussion of railroad rights-of-way, where those rights-of-way have been created by federal law, they are entirely creatures of federal statute, and their scope and duration are determined, not by common law principles, but by the relevant statutory provisions."[59] The government argued that even if the 1875 Act were an easement, Congress in the 1922 Act had affirmed its understanding that the United States had a reversionary interest in the rights of way even where the whole of the land traversed had subsequently been patented.

However, the discussion by both the government attorneys and the court devolved into an attempt to fit the various congressional actions into some traditional property interest. The court stated the issue as being "whether the 1988 legislation can have retroactive effect on the transfer of land rights which occurred years earlier...." The 1875 Act appeared to the court to have "intentionally omitted any

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[59] 265 Neb. 472, 658 N.W. 2d 258, 264 (Neb. 2003) (citing Brown v. State, 924 P. 2d at 917).

words to create a reversionary right in the United States in grants of railroad rights of way, especially in light of the clarifying legislation in the 1922 Act, which specifically addressed the issue."

An argument can be made that all elements of the court's reasoning miss the mark in that *what* land rights might have been transferred years earlier is part of the question; it is possible that the 1875 Act did not need to expressly create a reversionary right in the United States; and the 1922 Act itself arguably reflects Congress' continuing belief that it had the power to dispose of part of the right of way in a manner different from what would pertain at common law.[60]

Under Art. IV, § 3 of the Constitution, Congress has the authority to

> dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ....

Perhaps an avenue by which the enactments to date can be reconciled is the possibility that Congress' actions were premised on its authority to legislate regarding the ultimate disposal of the rights of way, and that this continuing authority over termination and disposition was an intrinsic part of both the railroad rights of way and the land titles homesteaders and others received when title was patented "subject to the right of way." This retention of disposal authority makes sense of Congress' repeated and consistent enactments and accompanying committee reports regarding its "reversionary interest" in the rights of way. Perhaps Congress was using that term to indicate its reserved authority to articulate the disposition of the rights of way upon termination of rail service. As one court said when commenting on Congress' imprecise choice of words regarding another aspect of railroad land grants: "[y]et it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'"[61] Perhaps many of the recurring difficulties could be resolved if the courts focused less on contradictory property/title words and more on the intent of Congress evident from decades of congressional enactments, including the 1922 Act, premised on Congress' continuing authority to specify disposition of terminating federal rights of way.

There is analogous precedent for this approach in the "navigational servitude" context in which the government may sometimes take private property without compensation being owed under the 5th Amendment. Over the years, the rationale for this result has been articulated either as an navigational easement of some sort implicitly reserved to the government — i.e. a property interest — or as a constitutional authority of the government that is always a part of all property conveyances, and hence no compensation is owed when it is exercised within the

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[60] The court in the *Preseault* case before the Federal Circuit had reasoned that the private grant of the easement in that case had not contemplated recreational use of the narrow railroad right of way granted. However, in the case of federal rights of way, it is the grantor (Congress) who later said that certain interim uses of the railroad corridor it had previously granted could be made — an enactment that arguably sheds light on the scope of the original interest granted.

[61] United States v. Union Pacific Railroad Co., 353 U.S. 112, 118 (1957).

constitutional parameters. The rule of no compensation derives from the fact that the property damage "results from the lawful exercise of a power to which the property has always been subject."[62] Most recently, this concept might be worded that the power of the government to take property for navigation purposes is a background principle applicable to all title, and hence no compensation is owed because the owner never had a property interest not subject to that limiting background principle of property law.[63]

Similarly, the argument can be made that because Congress has the plenary power under Art. IV of the Constitution to provide for the regulation and disposal of the property of the United States, the power to control the ultimate disposal of federal rights of way was a part of the right of way title the railroads took and of the title homesteaders received to lands "subject to" the railroad right of way. Arguably, if Congress made an alternative disposition of the lands before the conditions were met that would have fully vested private title under the 1922 Act, no compensation would be owed.

Congress could of course give up this authority, but arguably it must be clear that it has done so. Again, in the context of the navigational servitude such a waiver "will not be implied, but instead must be surrendered in unmistakable terms,[64] and conferral by Congress of title to a streambed does not, without more, waive applicability of the navigational servitude.[65]

Whether the courts will consider such an argument, of course, is not yet clear. However, the cases to date do not seem to have adequately taken into account the numerous enactments by Congress over the last 100 years, in which Congress has legislated regarding disposition of federal railroad rights of way.

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[62] United States v. Cherokee Nation, 480 U.S. 700, 704 (1987).

[63] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

[64] United States v. Cherokee Nation, 480 U.S. 700, 707 (1987).

[65] *Id.* See also Confederated Tribes v. United States, 20 Cl. Ct. 31, 48-51 (1990) (Indian Claims Compensation Act did not waive servitude).

Conclusion

The legal status of land within any particular right of way depends on the interest held by a railroad or landowner, the general and particular applicable statutes, and the facts of a particular sequence of conveyances. Although Congress has on many occasions addressed the disposition of railroad rights of way, controversies may be expected to continue to arise because of issues as to the nature and scope of Congress' authority over the rights of way; the nature and scope of the interest of the railroad, the validity of attempts by the railroad to convey all or part of that interest, ambiguities associated with dating abandonment, disputes between adjacent landowners over perceived entitlements to lands within a right of way, and assertions that compensation is owed. Congress has from time to time legitimized conveyances that otherwise would be invalid, and in other legislation has permitted certain general types of conveyances. In particular, the conversion of federal rail corridors to recreational use under the Rails to Trails legislation may occasion further litigation as to the interests held by the United States and those of adjacent landowners.

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