Docket No. 2019-1793

In the

United States Court of Appeals

For the

Federal Circuit

WILLIAM C. HARDY, BERTIE ANN HARDY,
DOROTHY SCHAEFFER and EMMA TRIMBLE,
For Themselves and As Representatives of a Class of Similarly Situated Persons,
Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in Case No. 1:14-cv-00388-MMS · Chief Judge Margaret M. Sweeney.

BRIEF OF APPELLEES

THOMAS S. STEWART, ESQ.
ELIZABETH MCCULLEY, ESQ.
STEWART, WALD & MCCULLEY, L.L.C.
2100 Central, Suite 22
Kansas City, Missouri 64108
(816) 303-1500 Telephone
(816) 527-8068 Facsimile
stewart@swm.legal
mcculley@swm.legal

Attorneys for Plaintiffs-Appellees,
William C. Hardy, Bertie Ann Hardy,
Dorothy Schaeffer and Emma Trimble

September 19, 2019

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

William C. Hardy, et al. **v.** United States

Case No. 19-1793

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

_____

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
See attached list	None.	None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
None.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

9/19/2019
Date

/s/ Thomas S. Stewart
Signature of counsel

Please Note: All questions must be answered

Thomas S. Stewart
Printed name of counsel

cc: Elizabeth A. McCulley

1. Full Name of Party Represented by Me
George W. Hart, Jr.
Mary Jon Barnes Hart
Irene R. Smith
Homer "Grier" Holifield, III
Tami L. Ansley & Karen L. Brown
W. Kent Campbell
Kathryn P. Bouchillon
Larry Dale Kennon & Emily Day Kennon
Mark Sanders & Getra Thomason Sanders
Betty R. Bellairs
Bertie Ann Hardy
Estate of Betty W. McIntosh
Michael W. Lassiter
Drapac Group 28 LLC
Thomas A. Rape, Jr.
Noel & Valerie T. Brown
Rudolph D. & Sandra Long
Mildred F. Palmer
Richard M. & Mary J. Miller
Mark L. & Sally K. Anderson
Kellcion Consolidated, Inc.
Donald & Teresa Johnson
Charles & Mai Takada Jackson
Dorothy E. Schaeffer
Gary Smith & Maxine Romeo-Smith
Florence Alfred
Sharon Conway-Adderly
Lorenzo & Geraldine Moore
Michael & Janice Solomon
Jeremiah & Kawanda C. Frazier
Jeff & Sara Tamayo
Golfside Develoment Group, LLC
Indian Creek Golf Club LLC
Theresa Robinson
Christopher B. Johnson
Ronnie & Ingrid L. Richardson
Bryant & Felicia Sharpe
Antonia M. Anthony
Emma Bell Trimble
Fritz & Marie Pierre
Rodney & Bridgette Williams
Mauricio D. & Beverly Brewster
Michelle Y. Pinckney
William Scott & Debra R. Childers

Frances Ginn Stark Elizabeth Ginn Alford Stephanie Ginn Fortson
Michelle A. Ready
Jerry Luckie Ward & Gail W. Ward
Patricia J. Alexander
Ronald W. & Debra J. Ray
Gordon Brown
James O. & Jane Greer Anderson
Laura Butler
Renea Anglin
Karen K. Parham
Guy & Carol S. McGiboney
Pamela Jane Mitcham
William Bowen & Samantha L. Frix
Danny J. Wyatt
Walter O. Savage
Jack H. Morgan, Jr. & Melody B. Morgan
Fredrick J. Neely, Jr. & Patricia Neely
Steven L. Cowan
James E. & Mary H. Pinson
Phyllis Burchett
Barbara J. Palmer
Anthony N. Sinyard
Cary M. & Frankie B. Warren
Hayston Farms, LLLP
Fred W. Greer, Jr. & Peggy M. Greer
Virginia Woodall
Estate of Thoman N. Fulton, III
JOMBY, Inc.
U.T. Smith, Jr.
Davis Family Revocable Trust
Thomas H. Smith
Jeana Hyde
Willard V. & Alta M. Payne
Barbara P. Sowell
Lamar B. Hays Estate
Fontainne W. Schonefield
C. Jerry Prosser & Carol Prosser Biggers
Beaver MFG Co., Inc.
Wayne Blackwell
Wilson Lamar Adams, Jr.
John Michael Roquemore
Charlotte R. Epps
Margaret Harker
Hy-Line Indian River Co.
Global Signal Acquisition IV LLC

George Randall Haymons d/b/a Timberlake Farms
Charles Kirkland
Gary & Mary Hardeman
James Jackson
Philip S. & Beth Downs
Warren & Betty Henning
Zell Heard Hart
K. Lee Durden
Henry W. Anderson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Statutes and Authorities

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 47.5(a), counsel states that no appeals in or from this action were previously before this Court or any other appellate court. Pursuant to Circuit Rule 47.5(b), counsel states that one case pending before the CFC, *Jackson v. United States,* Case Nos. 14-397L and 15-194L, could be directly affected by this Court's decision in this pending appeal and the CFC's liability decision at issue is reported as *Jackson v. United States,* 135 Fed. Cl. 436 (Fed. Cl. 2017).

INTRODUCTION

In *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"), this Court explained that whether a Plaintiff is entitled to compensation in a Rails-to-Trails case is subject to a three-prong test: (1) who owned the strip of land involved, specifically did the Railroad acquire only easements, or did it obtain fee simple estates; (2) if the railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as a public recreational trail; and (3) even if the grants of the railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements. *See Preseault II,* 100 F.3d at 1533. In this case,

the government is now only contesting a subset[1] of the original source conveyance deeds to the railroad under prong 1.[2]

The CFC correctly found that the deeds at issue conveyed an easement to the railroad. The CFC's Opinion was based on Georgia's governing statute, § 1689, the fact that the deeds were entitled "Right-of-Way Deed," the fact that the stated purpose for each deed was "for the railroad's right-of-way," and the fact that the consideration was nominal, all of which meant that the deeds conveyed easements to the railroad based on over a century of controlling precedent from the Georgia Supreme Court.

The government incorrectly asserts that the deeds at issue conveyed a fee simple interest to the railroad. In doing so, the government completely ignores and even fails to cite the applicable Georgia statutes that apply and also incredibly omits portions of the deeds at issue, including language in the deeds that demonstrates that the applicable governing statute applies, the fact that the deeds are titled "Right-of-Way Deed," and the fact that the deeds utilize "right-of-way" in the body of the deed to describe the purpose. The CFC's conclusion that the deeds at issue conveyed an easement to the railroad was correct based on Georgia's

---

[1] The government previously stipulated that many of the original source conveyances to the railroad granted easements under prong 1 of *Preseault II* such that this appeal only applies to certain deeds.

[2] Prong 2 of *Preseault II,* scope of the easement, and prong 3 of *Preseault II,* state law abandonment, are not at issue in this appeal.

governing statute and the applicable and pertinent language within the deeds themselves.

STATEMENT OF THE CASE

This is a Rails-to-Trails class action where 112 landowners contended that they own real property adjacent to a railroad corridor in Newton County, Georgia. Plaintiffs asserted that the railroad held easements for railroad purposes adjacent to their land under prong 1 of *Preseault II* and the CFC agreed. The railroad decided to abandon their easement, the railroad purposes easement was converted to a hiking and biking trail easement pursuant to the Trails Act[3] and, under well-established precedent from this Court, the issuance of the Notice of Interim Trail Use ("NITU") coupled with the ultimate trail use agreement resulted in a taking that violated the Just Compensation Clause of the Fifth Amendment to the United States Constitution.[4]

This case has been the subject of four reported opinions from the CFC. The CFC's original liability ruling is *Hardy v. United States,* 127 Fed. Cl. 1 (Fed. Cl.

[3] *See* National Trail System Act ("Trails Act"), 16 U.S.C. § 1247(d).

[4] *See Preseault II,* 100 F.3d at 1533; *Caldwell v. United States*, 391 F.3d 1229 (Fed. Cir. 2004), *cert. denied,* 547 U.S. 826 (2005); *Toews v. United States,* 376 F.3d 1371 (Fed. Cir. 20096); *Barclay v. United States,* 443 F.3d 1368 (Fed Cir. 2006), *cert. denied,* 549 U.S. 1209 (2007); *Illig v. United States,* 274 Fed. Appx. 883 (Fed. Cir. 2008), *cert. denied,* 129 S. Ct. 2860 (2009); *Ellamae Phillips v. United States,* 564 F.3d 1367 (Fed. Cir. 2009); *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010).

2016) ("*Hardy I*") (Appx0001-0023).[5] The CFC's second reported Opinion followed the Plaintiffs' motion for reconsideration and is *Hardy v. United States,* 129 Fed. Cl. 513 (Fed. Cl. 2016) ("*Hardy II*") (Appx0024-0033). The CFC's third reported Opinion followed the government's motion for reconsideration and is *Hardy v. United States,* 131 Fed. Cl. 534 (Fed. Cl. 2017) ("*Hardy III*") (Appx0035-0041). The final reported Opinion by the CFC followed a valuation trial conducted over 8 days in Atlanta, Georgia and is *Hardy v. United States,* 141 Fed. Cl. 1 (Fed. Cl. 2018) ("*Hardy IV*").

The original railroad, the Eatonton & Machen Railroad Company, was chartered in September 1889 and was given the right to "construct, lay out, maintain, equip, and operate a line of railroad."[6] The railroad's Charter incorporated § 1689(l) of the Georgia Code which allowed the railroad to acquire the necessary right-of-way for the construction of the railroad by and through condemnation proceedings. Shortly thereafter, the Eatonton & Machen Railroad was changed to the Middle Georgia & Atlantic Railway Company ("MGAR")[7] and the MGAR received grants to construct their railroad between 1890 and 1894. At the time of the NITU, the MGAR was owned and operated by Central of Georgia

---

[5] The CFC's liability opinion in *Jackson* is also directly related to and will be directly affected by this Court's decision in this appeal.

[6] *See Jackson,* 135 Fed. Cl. at 441.

[7] *Id.* The government refers to most of the deeds at issue as the "MGAR form deeds."

Railroad Company ("CGA"), a subsidiary of the Norfolk Southern Railway Company.[8]

MGAR acquired its right-of-way between 1890 and 1894 and did so through a combination of standard form deeds and condemnations.[9] MGAR used a form deed labeled "Right-of-Way Deed" and left blanks to be filled in for the size of the parcel and the consideration. Since the vast majority of the deeds at issue are similar in terms of form and construction, the parties and the CFC referred to them as the "MGAR form deeds."

CGA decided that it no longer needed the railroad line at issue and submitted a Notice of Exemption from formal abandonment proceedings to the STB on July 1, 2013. Appx0106-0156. The Newton County Trail Path Foundation ("Foundation") filed a Petition with the STB on July 26, 2013 announcing that it wished to negotiate a trail use agreement and the STB issued the NITU on August 19, 2013. Appx0173-0176. The railroad and the Foundation negotiated several extensions of time to negotiate the trail use agreement and, on September 28, 2016, CGA and the Foundation signed a railbanking/interim trail use agreement. Appx1500-1502.

The parties cross-moved for summary judgment on the issue of whether the railroad acquired an easement or owned fee simple. Plaintiffs argued that the

[8] *See Hardy I,* 127 Fed. Cl. at 6 (Appx0003).
[9] *Id. See also Jackson,* 135 Fed. Cl. at 441.

deeds at issue, all of the MGAR form deeds, the Lee deed, and the deeds for County Road 213, all conveyed easements. The government argued that most of the deeds at issue conveyed a fee interest to the railroad and that County Road 213 was held in fee.[10] The CFC, in a lengthy analysis, ruled in favor of the Plaintiffs.[11]

Both parties moved for reconsideration of certain aspects of the CFC's decision. Plaintiffs moved for reconsideration concerning the Lee deed and other deeds that were similar and the government moved for reconsideration concerning those parcels beyond milepost 65.80. The CFC, in another well-reasoned and lengthy analysis, reconsidered its conclusion with respect to the Lee deed, ruling that the Lee deed conveyed an easement to the railroad, but confirmed its earlier ruling with respect to other deeds that were similar to the Lee deed.[12] Following the government's motion for reconsideration, the CFC confirmed its original ruling concerning all of the parcels beyond milepost 65.80.[13]

After extensive pre-trial discovery and valuation reports from competing expert appraisers, the CFC conducted a valuation trial in Atlanta, Georgia from September 25-October 4, 2017. After extensive post-trial briefing and argument,

[10] *See* Govt's Br., ECF No. 16, at 10.
[11] *See Hardy I,* 127 Fed. Cl. at 10-12 (Appx0010-0012). *See also Jackson,* 135 Fed. Cl. at 455-460.
[12] *See Hardy II,* 129 Fed. Cl. 513 (Appx0024-0033).
[13] *See Hardy III,* 131 Fed. Cl. 534 (Appx0035-0041).

the Court entered its Opinion and Order on December 14, 2018.[14] Judgment was entered on February 19, 2019. Appx0042.

The government filed its Notice of Appeal on April 19, 2019. Appx1781. Although the valuation trial was hotly contested and addressed a variety of issues,[15] the government's appeal only pertains to the issue of easement or fee for a subset of all of the original source conveyances to the railroad, both the MGAR form deeds and the Lee deed, the deeds to the State of Georgia concerning County Road 213, and the parcels beyond milepost 65.80, based on the CFC's rulings in *Hardy I, Hardy II,* and *Hardy III*.

SUMMARY OF THE ARGUMENT

The primary issue in this appeal is whether the deeds conveyed an easement or fee simple interest to the railroad, so Georgia law governs. *See Preseault v. Interstate Commerce Comm'n.,* 494 U.S. 1, 20 (1990) ("*Preseault I*"). The issue depends on Georgia's common law and statutes at the time that the deeds were executed. *See Preseault II,* 100 F.3d at 1534.

[14] *See Hardy IV,* 141 Fed. Cl. 1.

[15] *Id.* The government contested the issue of whether the hiking and biking trail was a "general benefit" or a "special benefit," whether the landowners retained any rights in the right-of-way once the hiking and biking trail was constructed, and all aspects of valuation methodology, including the selection of comparable sales, the verification of comparable sales, and "proximity damages."

Georgia Code § 1689 properly informed the CFC's interpretation of all the MGAR form deeds at issue.[16] Yet, the government failed to even cite Ga. Code § 1689. In addition, even though it is of paramount importance to review the "instrument as a whole," the government set forth a purported generic deed without setting forth all of the provisions of the purportedly generic deed,[17] including the fact that the deeds were issued "along the line of recent survey made by said [railroad]," thereby attempting to ignore that the MGAR form deeds were obtained pursuant to § 1689 and the railroad's eminent domain authority. In essence, the government specifically omitted language from their purportedly generic deed that established that each deed was granted to the railroad pursuant to § 1689 and granted an easement.

The CFC also correctly determined that the deeds conveyed an easement based on over 100 years of precedent from the Georgia Supreme Court. Under that precedent, because all of the deeds were titled "Right-of-Way Deed" and all of the deeds granted a "right-of-way" for "railroad purposes," all of the deeds granted an easement for railroad purposes. Once again, the government failed to even provide the complete text of their purported generic deed, including that each deed was titled "Right-of-Way Deed," and either ignored or misinterpreted the "instrument

[16] *See Hardy I,* 127 Fed. Cl. at 8 (Appx0005-0006); *Hardy II,* 129 Fed. Cl. at 518 (Appx0029); *Jackson,* 135 Fed. Cl. at 453-454.
[17] *See* Govt's Br. at 19-20.

as a whole," because the CFC correctly determined that each deed conveyed an easement pursuant to overwhelming precedent from the Georgia Supreme Court.

The Lee deed also conveyed an easement to the railroad. The deed was similar to the MGAR form deeds but it did not describe the width of the right-of-way with any particularity, only described the grant "that was necessary for Railroad purposes for said Railroad," and was issued pursuant to a condemnation whereby the grantor was awarded damages pursuant to Georgia's statute.[18] These facts, once again, were omitted from the government's brief.

The government also appeals 8 parcels that are separated from the right-of-way by County Road 213. The CFC correctly concluded that County Road 213 is also a mere easement under Georgia law and that the 8 impacted parcels have valid claims because they own to the centerline of the right-of-way. Once again, although the government purportedly set forth the applicable deed language of a prototypical conveyance deed pertaining to County Road 213, the government studiously omitted pertinent language from the applicable deeds that establishes that the applicable deeds conveyed an easement. Each deed is entitled "Right-of-Way Deed" and each grant was granted as a "state aid road" pursuant to Georgia's statute, which is the grant of an easement under Georgia law.[19]

---

[18] *See Hardy II,* 129 Fed. Cl. at 517-518 (Appx0028-0029); *see also Jackson,* 135 Fed. Cl. at 460-461.

[19] *See Hardy I,* 127 Fed. Cl. at 15-17 (Appx0014-0017).

Finally, the government also contests the CFC's conclusion of a temporary taking for 11 parcels beyond milepost 65.80. The government argues that there was no taking because there was a mistake in the NITU with respect to the exact location of the end of the trail, which was later corrected, and that the United States cannot be liable for a temporary taking because the parcels at issue were not affected by the NITU. The CFC correctly noted that the government's argument was contrary to binding precedent from this Court in *Preseault II, Caldwell, Barclay, Illig,* and *Ladd,*[20] because the issuance of a NITU effects a taking regardless of the events that follow and regardless of the railroad's intent to abandon the rail line.[21]

ARGUMENT

I. ALL OF THE DISPUTED DEEDS CONVEYED AN EASEMENT TO THE RAILROAD

A. The Government Failed to Even Cite the Georgia Code Provision Which Applies to the Proper Interpretation of the Deeds at Issue

Whether the Plaintiffs have a property interest in the land underlying and abutting the railroad's right-of-way depends upon the language of the original conveyances to the railroad. *See Ellamae Phillips,* 564 F.3d at 1373-74; *Toews,* 376 F.3d at 1376. Because property rights arise under state law, Georgia law

[20] *See Preseault II,* 100 F.3d at 1533; *Caldwell*, 391 F.3d at 1233-1234; *Barclay,* 443 F.3d 1374; *Illig,* 274 Fed. Appx. at 884; *Ladd*, 630 F.3d at 1023.
[21] *See Hardy III,* 131 Fed. Cl. at 537-539 (Appx0038-0040).

governs whether the landowners have a compensable property interest. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984); *Preseault I,* 494 U.S. at 20.

Since the Plaintiffs asserted that the deeds conveyed easements and the government contended that the deeds conveyed property in fee simple, the CFC had to examine the deeds at issue in light of Georgia's statutes and common law at the time that the deeds were executed. *See Preseault II,* 100 F.3d at 1534. In Georgia, with respect to the construction of deeds:

> [T]he crucial test [for whether a deed creates an easement or fee] is the intention of the parties. **In arriving at this intention, we must look to the whole deed**, and not merely upon disjointed parts of it. The recitals in the deed, the contract, the subject-matter, the object, purpose, and the nature of restrictions or limitations, **and the attendant facts and circumstances of the parties at the time of making the deed**, are to be considered.

See Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 538 S.E.2d 107, 109 (Ga. App. 2000) (*citing Jackson v. Rogers*, 54 S.E.2d 132 (Ga. 1949)) (emphasis added). Given this, it is incredible that the government failed to even cite or acknowledge the applicable Georgia code provision, Ga. Code § 1689, that properly informed the CFC's interpretation of the deeds at issue.

Georgia Code § 1689 was incorporated by reference into the railroad's charter and limited the railroad's property interest. The pertinent provision of Georgia's statute, entitled "Powers of the Corporation," states:

> [A corporation] shall be empowered, first, to cause such examinations and surveys to be made of the proposed railroad **as shall be necessary to the selection of the most advantageous route, and for such purposes to be empowered by its officers, agents, servants or employees, to enter upon the land or water of any person for that purpose**. Second, to take and hold such voluntary grants of real estate and other property as may be made to it, **to aid in the construction, maintenance and accommodation of its road, but the real estate received by voluntary grant shall be held and used for the purpose of such grant only**. Third, to purchase, hold and use all such real estate and other property **as may be necessary for the construction and maintenance of its road, and the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of its incorporation**, and to sell, lease or buy any land **necessary for its use**.

See Ga. Code § 1689(i) (1882) (emphasis added).[22]

The statute also stated that the purposes of the railroad's articles of association were constructing, maintaining, and operating a railroad for public use or maintaining or operating a railroad already constructed. *Id.* at § 1689(a).[23] Further, Georgia law also provided that "[w]henever the corporation or person shall cease using the property taken for the purpose of conducting their business, said property shall revert to the person from whom taken."[24]

The statute also expressly granted the railroad eminent domain authority:

> In the event of any company organized under the provisions of this section does not procure from the owner or owners thereof, by

[22] *See Hardy I,* 127 Fed. Cl. at 8 (Appx0005); *see also Jackson,* 135 Fed. Cl. at 453.
[23] *See Jackson,* 135 Fed. Cl. at 453-454.
[24] *See Hardy I,* 137 Fed. Cl. at 8 (citing Ga. Code § 5233 (1910)).

> contract, lease or purchase, the title to the lands, or right of way, or other property necessary or proper for the construction or connection of said railroad and its branches or extensions…, it shall be lawful for said corporation to construct its railroad over any lands belonging to other persons, or over such rights of way or tracks of other railroads as aforesaid, upon paying or tendering to the owner thereof, or to his or her legally authorized representative, just and reasonable compensation for the right of way….

See Ga. Code § 1689(l).[25]

These provisions reflect that the Georgia legislature balanced its grant of eminent domain authority to railroads with a corresponding limitation upon the interest a railroad could obtain when it acquires a right-of-way under that authority. *See Preseault II,* 100 F.3d at 1534 ("[T]he question of what estates in property were created by these turn-of-the century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and [state] statutes… then in effect"). While the statute does not obviate the fundamental requirement for the CFC and this Court to examine the language of the original deeds, the CFC afforded the statute significant weight in interpreting these conveyances at issue[26] and it is incredible and noteworthy that the government's brief does not consider the impact of the statute.[27]

---

[25] *See Hardy II,* 129 Fed. Cl. at 518 (Appx0029-0030); *see also Jackson,* 135 Fed. Cl. at 454.

[26] *See Hardy I,* 127 Fed. Cl. at 8 (Appx0005); *see also Jackson,* 135 Fed. Cl. at 453-454.

[27] *See* discussion related to the MGAR form deeds in Section I.C *infra*.

Instead of properly citing § 1689, the government instead focuses much of its brief on establishing the false premise that Ga. Code. § 44-6-21 mandates that any and all deeds, no matter the subject matter or attendant facts and circumstances, are presumed to convey the fee simple in land unless specifically indicating conveyance of a lesser estate.[28] This is simply untrue. The statute relied on by the government, § 44-6-21, is unremarkable and does not lend any assistance to the issues in this appeal.

Section 44-6-21 has been in place since 1868 and has remained relatively unchanged since that time:

> **The word "heirs" or its equivalent is not necessary to create an absolute estate. Every properly executed conveyance shall be construed to convey the fee unless a lesser estate is mentioned and limited in that conveyance**. If a lesser estate is expressly limited, the courts shall not, by construction, increase such estate into a fee but, disregarding all technical rules, shall give effect to the intention of the maker of the instrument, as far as the same is lawful, if the intention can be gathered from the contents of the instrument. If the court cannot gather the intention of the maker from the contents of the instrument, it may hear parol evidence to prove the maker's intention.

See Ga. Code § 44-6-21 (emphasis added).

The statute was primarily intended to remove the requirement of words of inheritance, such as "heirs," within fee transfers in order to reduce the confusion at

[28] The government mistakenly refers to a "presumption" that the deeds at issue convey a fee interest in their Statement of the Issues and that theme is then repeated throughout their brief. *See* Govt's Br. at 3, 17, 21, 24, 27 and 34.

discerning intent to transfer fee simples or life estates. *See Ford v. Gill*, 35 S.E. 156, 158 (Ga. 1900) (explaining that "no words of inheritance are required to create a fee-simple estate, and a conveyance without words of inheritance will ordinarily carry the fee simple estate and not a life estate"); *Hill v. Terrell*, 51 S.E. 81, 84 (Ga. 1905) (repeating the rule that "heirs" or its equivalent is not required to transfer an absolute estate, and the instrument under review "was not expressly limited to a life estate").

It is telling that, although the government's premise of a purported presumption of fee is repeated at least five times in its brief,[29] the government fails to provide any instance among the wealth of Georgia cases on the subject of transfers to railroads that provides that a presumption exists in favor of fee transfers to railroads. Logically, since a railroad only requires an easement to establish and operate its railway, the opposite is true. Indeed, it is well known that a railroad only requires an easement to conduct its railroading operations[30] because a railroad's easement is considered to be a substantial thing, having the "attributes of the fee, perpetuity and exclusive use and possession…."[31] As a result, § 44-6-21 is simply not applicable to railroads because there is nothing to be gained by creating fee simple ownership in rights-of-way with railroads.

---

[29] *Id.*

[30] *See Great N. R. Co. v. United States*, 315 U.S. 262, 272 (1942) ("a railroad may be operated though its right of way be but an easement").

[31] *See New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898).

Instead of a presumption of fee ownership, the Court's focus must be on the entire deed and the attendant circumstances in order to ascertain the intent of the grantor. *See Altman v. Pilcher*, 740 S.E.2d 866, 869 (Ga. App. 2013) ("It is a cardinal rule of contract construction that a court should, if possible, construe a contract so as not to render any of its provisions meaningless and in a manner that gives effect to all of the contractual terms"). This concept is repeated time and again in all of the cases decided by the Georgia Supreme Court. If a presumption of fee ownership actually existed, the cases would say so and would rely on § 44-6-21 and its prior incarnations to explicitly state that a presumption exists.[32] The Georgia cases simply do not support the concept of a presumption of fee ownership and, to the contrary, no presumption of fee ownership has ever existed in Georgia. Rather, the cases from the Georgia Supreme Court recite that the "crucial test" requires an analysis of the deed as a whole, the language of the deed, and "the attendant facts and circumstances." *See Rogers*, 54 S.E.2d at 136 (*citing* Ga. Code § 29-109); *Latham Homes*, 538 S.E.2d at 109.

[32] The lone case cited by the government in support of its presumption theory, *Dep't of Transp. v. Knight*, 232 S.E.2d 72 (Ga. 1977) ("*Knight*"), did not deal with a conveyance to a railroad. *See also* discussion of *Knight* in Section II *infra.*

B. The Georgia Supreme Court Has Routinely and Consistently Held that a Grant to a Railroad of a "Right-of-Way" or a "Strip of Land for Railroad Purposes" Grants an Easement Only Under Georgia Law

As early as 1904, in *Gaston v. Gainesville & D. Electric Ry. Co.,* 48 S.E. 188 (Ga. 1904), the Georgia Supreme Court confirmed the basic common law of Georgia that a grant of "all the land necessary" to a railroad granted only an easement even when the deed at issue utilized the words "fee simple." The deed at issue in *Gaston* conveyed "all the land necessary for road-beds and other earth to construct said railroad… for railroad purposes, forever in fee simple." *See Gaston*, 48 S.E. at 188-189. The Georgia Supreme Court held that "the right to construct the railroad over the right-of-way granted is absolute, and the tenure of the grantee's title is limited only to the use of the land 'for railroad purposes'" even though land was granted in fee simple. *Id.* at 189.

Again, in 1921, in *Atlanta, Birmingham and Atlantic Railway Co. v. County of Coffee*, 110 S.E. 214 (Ga. 1921) ("*Coffee County*"), the Georgia Supreme Court held that a deed specifying the words "right-of-way" provide evidence of the grantor's intent to grant an easement only. In *Coffee County*, the deed granted:

> "**One hundred feet in width of right of way**… said one hundred feet in width of right of way being more fully described by a sketch or plat of same hereto… [t]o have and to hold the said bargained and described right of way unto the said party of the second part, its successors and assigns, forever in fee simple.

See Coffee County, 110 S.E. at 215 (emphasis added).

It is important to note the Court stated the words "forever in fee simple" do not necessarily convey fee title to the railroad and, since a "right-of-way" was granted, an easement was granted despite the words "fee simple." The Court also noted that the words "right-of-way" do not merely mean the right of passage but "they are sometimes used to mean the mere intangible privilege of crossing, and sometimes used to indicate that strip of land which the railroad appropriates for its use and upon which it builds its roadbed or track." *Id.* Moreover, the Court held that "where there is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest fee in the company, but vests such an estate—an easement—as is requisite to effect the purposes for which the property is acquired." *Id.* at 216. Thus, the grant of a "right-of-way" grants only an easement, despite additional language that the grant is either "forever" or in "fee simple," and the easement is limited to railroad purposes only.

Again, in 1930, in *Duggan v. Dennard,* 156 S.E. 315 (Ga. 1930), the Georgia Supreme Court confirmed that the grant of a "right-of-way" is an easement. The deed in *Duggan* conveyed "[t]he right of way upon which a railroad has been located… said right of way to be one hundred feet wide and to extend fifty feet on each side from the center of the road-bed of said railroad," with nominal consideration of one dollar. *See Duggan,* 156 S.E. at 315. The Court

noted that the use of the land was denominated as a right-of-way, no other use was mentioned except for the construction and equipment of the railroad and, even though the used words **for all other purposes**," the deed still conveyed a mere easement. *Id.* at 317 (emphasis added). Thus, it is important to the Georgia Supreme Court that the words right-of-way were used and the words "for all other purposes" were merely meant to convey any and all railroad purposes and an easement limited to railroad purposes.

The fourth case from the Georgia Supreme Court, decided in 1936, is *Rogers v. Pitchford*, 184 S.E. 623 (Ga. 1936) ("*Pitchford*"). The deed at issue granted "a strip of land through the property… for a railroad right of way." *See Pitchford*, 184 S.E. at 623. The Georgia Supreme Court, citing *Coffee County* and *Duggan,* held that the deed at issue to the railroad conveyed a mere easement for the additional reasons that the deed contained "a reservation of the right to farm on the land conveyed until needed for railroad purposes" and because the consideration was nominal. *Id.* at 624.

The Georgia Supreme Court revisited the issue once again in 1943 in *Byrd v. Goodman*, 25 S.E.2d 34 (Ga. 1943). The deed in *Byrd* granted a "right-of-way" and the Georgia Supreme Court reaffirmed the longstanding principle that the grant of a right-of-way conveyed an easement only:

> The deed from J.M. Spurlin to the Atlanta & Hawkinsville Railroad Company, a copy of which was attached to Goodman's

> suit, conveyed only a right of way or an easement, which terminated by abandonment or nonuse when the successor railroad company ceased to use the land for railroad purposes. Such is the only reasonable interpretation of the instrument under consideration.

See Byrd, 25 S.E.2d at 40 (emphasis added) (citations omitted). *Byrd* emphasized that the grant of a "right-of-way" granted an easement only. The Georgia Supreme Court also noted, however, that the restriction or limitation of termination by abandonment or nonuse indicated that the grant was an easement.

The long string of cases continued in 1954 in *Askew v. Spence*, 79 S.E.2d 531 (Ga. 1954). The deed granted "a strip of land" with the width being whatever is necessary for railroad purposes, not to exceed 200 feet, and stated that the property "conveyed to said company to be used by it for railroad purposes, either as a right-of-way or depot grounds." *See Askew,* 79 S.E.2d at 531-532. The deed also gave the railroad the right to cut timber for railroad purposes and also contained a reverter clause. *Id.* The Court analyzed the factors evidencing the grantors' intent and held that an easement for railroad purposes was conveyed because a "right-of-way" was granted on and over the land and because the property was conveyed for railroad purposes only. *Id.* at 532.

The Georgia Supreme Court went even further in 1956 in *Jackson v. Sorrells,* 92 S.E.2d 513 (Ga. 1956) ("*Sorrells*"). *Sorrells* concerned a deed that did not specifically grant a right-of-way, did not mention "right-of-way" anywhere in

the deed, and said that the parcel was granted "forever in fee simple," yet the Court still concluded that the deed granted an easement for railroad purposes only. *Id.* at 515. The deed at issue granted "all the land… through which said Railroad may be constructed…Reserving the right to cultivate up to road bed… for Railroad purposes, forever in fee simple." *Id.* at 513. Because the grantor reserved the right to cultivate the land not in actual use as a right-of-way, because the consideration was nominal, and because the deed was executed for the construction, operation and use as a railroad, the Court had no difficulty declaring that it was clearly the intention of the parties to grant an easement limited to railroad purposes only. *Id.* at 514.

Consistent with the pronunciation from the Georgia legislature in § 1689, the Georgia Supreme Court has been consistent in ruling that the railroad received an easement for their railroad purposes when the deed granted a "right-of-way" or indicated the land was to be used "for right-of-way" or "railroad purposes." In fact, the Georgia Supreme Court has consistently and routinely ruled that an easement was granted even if the deed conveyed language referencing "fee simple" and/or when the deed stated that the railroad could use it for any other purpose. *See Sorrells,* 92 S.E.2d at 214.

In this case, since the deeds at issue grant a strip of land "for a right-of-way" or "what is necessary for railroad purposes for said Railroad as a right-of-way" to

the railroad, it should be clear that the railroad received an easement. Such a result is mandated by the Georgia legislature and overwhelming authority from the Georgia Supreme Court.

C. All of the "MGAR Form Deeds" Conveyed a Strip of Land For a Right-of-Way and Therefore Granted Easements for Railroad Purposes Only Under Georgia Law

The government first contests 27 deeds called "MGAR form deeds."[33] It is indeed most telling, just like the government's failure to even cite Ga Code § 1689, and even though it is of paramount importance to review the "instrument as a whole,"[34] that the government has failed to even present the deeds as a whole to this Court in two very important respects. First, the government set forth a purportedly generic deed that purportedly represents all of the deeds in this category that "take the following form" when, in fact, the government failed to include any information concerning the title of the deed and the fact that it is specifically designated as a "Right-of-Way Deed."[35] Second, after setting forth the granting clause of the purported generic form deed, and after including the language that the grant is "more particularly described as follows," the government

---

[33] *See* Govt's Br. at 19-30. The deeds at issue were originally called "MGAR form deeds" in *Jackson.* *See Jackson,* 135 Fed. Cl. at 441, 455. The MGAR form deeds at issue in this case were originally called the "Armstrong deed and substantially similar deeds." *See Hardy I,* 127 Fed. Cl. at 10-13 (Appx0007-0011).

[34] The government ostensibly concurs with this basic rule of construction. *See* Govt's Br. at 16.

[35] *See* Govt's Br. at 19-20.

placed an "[X]" in place of the description[36] and specifically excluded the fact that 19 of the 27 deeds were described "along the line of recent survey made by said Middle Georgia & Atlantic Railway Company," thereby attempting to ignore the obvious fact that 19 of the 27 deeds at issue were obtained for limited railroad purposes under Georgia's statute and the railroad's eminent domain authority.

Although the government is now contesting 27 deeds in this category,[37] the government's purported "generic" deed for the group of 27 deeds is incomplete

---

[36] *Id.*

[37] *See* Govt's Br. at 20-21, fn. 5. The 27 deeds, excluding the Lee deed which will be discussed in Section D *infra*, are:

1) Petty (Appx0473–0478);
2) S.G. Morgan (Appx0516–0519);
3) A.R. Morgan (Appx0520–0523);
4) Rhebergh (Appx0434–0437);
5) Robinson & Hardeman (Appx0559–0562);
6) John Roquemore (Appx0582–0585);
7) J.H. Roquemore (Appx0571–0575);
8) Jackson (Appx0545–0548);
9) Epps (Appx0524–0527);
10) Banks (Appx0499–0502);
11) Armstrong (Appx0563–0566);
12) A.S. Hays (Appx0549–0553)
13) W.J. & B.F. Hays (Appx0775–0778);
14) Skinner (Appx0662–0665);
15) Pitts (Appx0603–0604);
16) J.C. Anderson (Appx0755–0761);
17) Stanton, Hays & Hays (Appx0689–0694);
18) Corley (Appx0704–0706);
19) Pace (Appx0715–0721);
20) Wright (Appx0724–0727);
21) Simms (Appx0728–0731);
22) Bagby (Appx0651–0654);

and grossly misleading. Instead of actually utilizing a purported "generic" deed "as a whole," the government presented an incomplete and non-generic deed. Plaintiffs will utilize the Armstrong deed as a typical deed in this category,[38] which states as follows:

Ref. No. 1
DEED
FROM
H. H. Armstrong
TO
Middle et al. Atlantic Ry

DATED
May 1, 1890
Newton County,
477 __ District,
Lot No. _____
Recorded July 21, 1891
Book X Folio 426-427

DESCRIPTION OF CONVEYANCE IN BRIEF:
Right of Way 25 ft
Wide on East side
Of Center of Track

RIGHT OF WAY DEED

GEORGIA, NEWTON COUNTY

---

23) White (Appx0805–0808);
24) Childs (Appx0830–0833);
25) Terrell (Appx0834–0835);
26) Ozburn (Appx0836–0837); and
27) J.H. Roquemore (Appx0838–0842).

[38] The Armstrong deed was used as a typical deed in this category by the CFC. *See Hardy I,* 127 Fed. Cl. at 10-12 (Appx0008-0010).

THIS INDENTURE WITNESSETH: That the undersigned H.H. Armstrong, has bargained, sold and conveyed the MIDDLE GEORGIA & ATLANTIC RAILWAY COMPANY, a corporation, of said State, the following property: **A strip of land** situated in the 477 _____ District of Newton County, Fifty feet wide, **the same being Twenty Five feed on each side the center line of said Railroad, for a right of way of said Railroad**, or for any other use, in the discretion of said Company, and more particularly described as follows:

Along a recent survey by said Rail Way Co. through my lands in said State & County.

THE CONSIDERATION of this Deed is the sum of seven 75/100 Dollars paid by said Company to the undersigned before the execution of these presents.

TO HAVE AND TO HOLD the said described land, with its members and appurtenances unto the said Middle, Georgia & Atlantic Railway Company, its successors and assigns, forever. And the said H.H. Armstrong will forever warrant and defend the title herby conveyed to the said Railroad Company against any and every person whatsoever.

IN WITNESS WHEREOF, The said H.H. Armstrong has hereunto set his hand and affixed his seal, and delivered these presents, this 1st day of May, 1890.

Signed, Sealed and delivered in presence of-

JM F _____)
) *H.H. Armstrong*
_____ B. Davis)

RIGHT OF WAY DEED

From H.H. Armstrong
TO
Middle Georgia & Atlantic Railway Co.

Georgia, Newton County,
Left for record at 10 am 1st day of
June 1891, and recorded
in Book X folio 426 & 427
21 day of July 1891
___ *B. Davis*, Clerk

See Appx0563-0566 (emphasis added).

In this case, as in *Preseault II,* the governing statute, § 1689(i) of the Georgia Code, strongly supports an interpretation that the MGAR form conveyances granted the railroad an easement. The statue first provided that the railroad could conduct a survey to determine "the most advantageous route," the railroad could acquire its right-of-way "to aid in the construction, maintenance and accommodation of its road, but the real estate received by voluntary grant shall be held and used for the purposes of such grant only," and the railroad could hold and use the right-of-way "as may be necessary for the construction and maintenance of its road." These provisions make it clear that the Georgia legislature expressed its intention to (1) authorize the railroad to "survey" the grantor's property and identify the land that would be taken for the railroad under eminent domain; (2) limit the railroad's acquisition of property rights to be "used for the purpose of such grant only;" and (3) limit the railroad's purchase of property necessary for the construction and maintenance of the railroad. *See* Georgia Code § 1689(i). These

statutory limitations are simply not consistent with a conveyance of the property to the railroad in fee simple.

The language of all of the MGAR form deeds fall squarely within the first limitation of the Georgia statute because all of the deeds describe the property conveyed as "[a]long the line of recent survey made by said Middle Georgia & Atlantic Railway Company." This is the language that the government conveniently forgot to include for 19 of the 27 deeds in this category.[39] Because the language in the MGAR form deeds referenced a "survey" of the grantor's property, these instruments were executed in the context of the railroad having

[39] The language pertaining to the "recent survey" pursuant to Georgia Code § 1689(i) is present within the following 19 deeds:

1) Petty (Appx0473–0478);
2) S.G. Morgan (Appx0516–0519);
3) A.R. Morgan (Appx0520–0523);
4) Rhebergh (Appx0434–0437);
5) Robinson & Hardeman (Appx0559–0562);
6) Jackson (Appx0545–0548);
7) Epps (Appx0524–0527);
8) Banks (Appx0499–0502);
9) Armstrong (Appx0563–0566);
10) A.S. Hays (Appx0549–0553)
11) W.J. & B.F. Hays (Appx0775–0778);
12) Skinner (Appx0662–0665);
13) J.C. Anderson (Appx0755–0761);
14) Corley (Appx0704–0706);
15) Wright (Appx0724–0727);
16) Simms (Appx0728–0731);
17) White (Appx0805–0808);
18) Terrell (Appx0834–0835); and
19) Ozburn (Appx0836–0837).

exercised its eminent domain power after having surveyed and located the railroad corridor across the grantors' land.

The language of the deeds also comports with the second statutory limitation which expressly restricts the estate given to the railroad to be used for the purpose of the grant only, in this case, railroad purposes. The statute limited the railroad to "take and hold such voluntary grants of real estate and other property as may be made to it to aid in the construction, maintenance and accommodation of its road," and continued that "the real estate received by voluntary grant shall be held and used for the purpose of such grant only."

The third limitation in the authorizing statute further supports an interpretation that these deeds conveyed easements limited to railroad use—the railroad could only purchase such property "as may be necessary for the construction and maintenance of its road" and "buy any land necessary for its use," which is a railroad use or limited to railroad purposes. In short, construing the MGAR form deeds in the context of this statute requires an interpretation that the railroad was granted an easement limited to the use of the land for railroad purposes.

All of the MGAR form deeds also contain several other hallmarks of easement conveyances based on over 100 years of precedent from the Georgia Supreme Court. First, the forms were titled "Right-of-Way" Deed, a fact the

government conveniently ignored. Second, in describing the land conveyed, the deeds also reiterated that the strip of land was "for a right-of-way of said railroad or for any other use in the discretion of said Company," which dictated that the conveyance was for railroad use or other use by the railroad company, which is a specific limitation on use and not an outright grant of the property.

This common-sense reasoning was at the forefront of the Georgia Supreme Court's decision in *Duggan*. In *Duggan*, the court reasoned that the statement in the deed at issue relating to how the property would be used "was not necessary" and "could not have been for the purpose of adding to complete title to the land embraced in the grant." *See Duggan,* 156 S.E. at 317. It only made sense that "it was not the intention of the grantor that his lot of land should be aliened in fee but that it should be used only for the purpose of the construction and equipment of the named railroad." *Id*.

This same reasoning led to a similar outcome in *Cole v. Thrasher*, 272 S.E.2d 696 (Ga. 1980). In *Cole*, the court considered a deed whereby the granting clause purported to grant the fee simple, which clause the lower tribunal held took precedence over subsequent language indicating the intent to convey a life estate. *Id*. at 697. The court reversed and provided the general rule that the terms of the whole instrument should be construed together, and further explained that "[i]f the grantor had not meant to convey a life estate, there would not have been **any**

reason for mentioning it or in dividing the remainder among the nieces and nephews." *Id*. at 697 (emphasis added). The reasoning in *Cole* applies here. Since it would have been completely unnecessary for the grantors of the MGAR deeds to designate how the land would be used, *i.e.*, "for a right of way," if the intent was to convey the fee, such statements, as well as all of the others that support construction of an easement, clearly demonstrate the parties' intent to convey easements in the land.

The language granting the railroad the right-of-way "for any other use" in its discretion does not authorize a purpose unrelated to railroad use. Although the government has not complained about or appealed the scope issue, prong 2 of *Preseault II,* the Supreme Court of Georgia held that a grantor conveyed an easement and not fee title in a deed that stated that the railroad could use the property in the construction of its railroad "as said party of the second part may hereafter elect and or all other purposes." *See Duggan,* 156 S.E. at 317. As the Supreme Court of Georgia pointed out in *Duggan,* the language "for all other purposes" only refers to "all other purposes 'proper in the construction and equipment'" of the named railroad. *Id.*

Similarly, the Supreme Court of Georgia's decision in *Sorrells* provides guidance in interpreting the MGAR form deeds. In *Sorrells,* the Court examined whether the interest conveyed to a railroad was an easement or title to the land in

fee and, in making its determination, the Court considered the following factors: The property in question was a "strip of land in the middle of the grantor's land; the deed 'recite[d] that the land [wa]s conveyed for use as a railroad'"; the grantor retained the right to cultivate the land not in use by the railroad; and the consideration was "nominal." *See Sorrells,* 92 S.E. at 514. Based on the totality of these factors, the Court concluded that the deed merely conveyed an easement to operate a railroad "over the land in question." *Id.*

The provisions in the MGAR form deeds are nearly identical to the language in the *Sorrells* deed. Specifically, each deed provided that a "strip of land" would be designated as a "right-of-way" for the railroad "or for any other use, in the discretion of said Company." Contrary to the government's argument, a deed that grants a railroad a strip of land for use as a "right-of-way" usually conveys an easement. *See Jackson v. Crutchfield,* 191 S.E. 468, 470 (Ga. 1937). In addition, the deeds at issue qualified how the designated land would be used, namely, for "a right-of-way of said Railroad" and, if the parties had intended to convey fee simple in the strips of land, they would have had no reason to specify how the land would be used in their respective habendum clauses. *See Duggan,* 156 S.E. at 317; *Latham Homes,* 538 S.E.2d at 109.

The Supreme Court of Georgia's decision in *Coffee County* also supports a finding that all of the contested MGAR form deeds conveyed an easement. The

deed at issue in *Coffee County* was similar to the MGAR form deeds and stated that the right-of-way was conveyed "to have and to hold the said bargained and described right-of-way unto the said party of the second part, its successors and assigns, forever in fee simple," with covenant of general warranty. *See Coffee County,* 110 S.E. at 215. Even though the deed in *Coffee County* purported to convey a right-of-way "in fee simple" to the railroad, the Supreme Court of Georgia found that the words "forever in fee simple" in the habendum clause were not controlling, since they refer to the duration of enjoyment of the easement. *Id.* Further, the Supreme Court of Georgia held that the use of the term "right-of-way" in this instance was not "a descriptive term only" and that the deed, taken as a whole, showed that the intention of the parties was to convey an easement.

The amount of consideration described in all of the MGAR form deeds at issue also points to a conclusion that the railroad received an easement. The consideration described in all of the deeds was typically either $1 or $5, with some exceptions, and as the CFC specifically concluded, "these amounts are small."[40] Taking all of the factors together, the CFC correctly concluded that the grantors intended to convey easements and not fee simple interests in the strips of land that were to be utilized for the railroad's right-of-way for railroad purposes only. *See Askew,* 79 S.E.2d at 532; *Sorrells,* 92 S.E.2d at 514; *Duggan,* 156 S.E. at 317.

[40] *See Hardy I,* 127 Fed. Cl. at 12 (Appx0010-0011).

The government, by making the arguments that the granting clause is a "strip of land," the term "right-of-way" is only used in a descriptive sense, and the habendum clause conveys land to the grantors' successors and assigns forever, is merely attempting to isolate and divorce specific individual phrases contained within the deeds at issue from the context of the governing statute and a review of the entire deed. Although such language read in isolation and divorced from the context of the governing statute might suggest a conveyance of fee simple, all of the other language within the deeds and the title for each deed, indicates that a "right-of-way" was being conveyed "for railroad use." These deeds must be read in the context of the railroad's exercise of eminent domain and the Georgia Code's mandate that the estate received by the railroad was "to aid in the construction, maintenance and accommodation of its road," and to "be held and used for the purpose of such grant only." *See* Ga. Code § 1689(i).

D. The Lee Deed Also Conveyed an Easement to the Railroad

The CFC originally ruled that the Lee deed conveyed fee title to the railroad.[41] Although the Lee deed contained even more indicia of an easement than the MGAR form deeds, the consideration was $150.[42] After Plaintiffs' motion for

[41] *Id.* at 13-14 (Appx0011-0012).
[42] *Id.*

reconsideration (Appx1433-1457), the CFC correctly ruled that the Lee deed also conveyed an easement to the railroad.[43]

The standard MGAR form deeds, including the Armstrong deed, described the conveyance as follows:

> ***a strip of land*** *situated in the* 462nd *District of* Newton *County*, twenty five *feet wide, the same being* twelve and a half feed [sic] **on *each side the centre line of said Railroad, for a right of way of said Railroad****, or for any other use in the discretion of said Company, and more particularly described as follows*:
>
> **Along the line of recent survey made by said Middle Georgia & Atlantic Railway Company**.

The language of the Lee deed, although similar, was slightly different because it did not describe the width of the right-of-way with any particularity:

> **A strip of land** located in the 462nd G.M. District of Newton County the with [sic] to be, **what is necessary for Railroad purposes for said Railroad as a right of way**, more particularly assembled as follows- **This right of way is in the City of Covington**, and in the south eastern portion of the City limits, passing through the eastern portion of the lot bought by said Wm. B. Lee from Jos L. Sibley.

Although the standard MGAR form deeds described the "strip of land" as a specific width "for a right-of-way of said railroad," the Lee deed does not describe the land using objective numerical measurements of width but, instead, specifies the width as that "necessary for Railroad purposes for said Railroad as a right-of-way." Where the strip of land or tract of land to be used by the railroad is not

[43] *See Hardy II,* 129 Fed. Cl. at 517-518 (Appx0028-0029).

described with precision, such is an indication of the parties' intent to convey an easement. *See Latham Homes*, 538 S.E.2d at 109.

Similarly, if the land conveyed is a strip out of the middle of the grantor's tract with no access across, this indicates easement. *See Sorrells*, 92 S.E.2d at 514. This concept was explained in *Latham Homes*: "[The grantor] did not intend to convey anything more to the railroad than an easement… because [the deed] specified only a quantity of land affected, 100 feet on either side of the tracks … [and] left the location of the right-of-way to be later determined by the railroad…." *See Latham Homes*, 538 S.E.2d at 109. The Court further explained that "[t]his discretion to pick the land conveyed after the execution of the deed would be **inconsistent** with conveyance of title, but **would not be inconsistent** with an easement that is only an encumbrance on the land." *Id*. (emphasis added).

The strip of land granted in the Lee deed was simply described as being limited to encompassing only the land that was necessary for the railroad's right-of-way. This linking of the width of the conveyed property to railroad use strongly indicates that the land was to be used for railroad purposes and therefore reflects the grantor's intent to convey an easement.[44]

The Lee deed also contained the following provision:

> We the undersigned a committee of arbiters selected by a citizens Committee of the City of Covington and W.B. Lee to assess the

[44] *See Jackson,* 135 Fed. Cl. at 460.

> damage sustained by him on account of the right of way of the Middle Ga & Atlantic Railroad passing through his property in the said City, after examination and deliberation award him damages to the amount of one hundred and fifty dollars ($150.00).[45]

The language within the deed which states that the amount of consideration was determined by a committee of arbiters which were selected to assess the damage sustained by Mr. Lee on account of the right-of-way of the railroad passing through his property, indicates the grant was an easement with the fee simple remaining with the grantor, not an outright conveyance to the railroad. In other words, the Lee deed concluded a condemnation. *See* Ga. Code § 1689(1) (providing that a railroad unable to obtain title to land or a right-of-way may "construct its railroad over any lands belonging to other persons" upon paying "just and reasonable compensation" and that the "damage done" to the property "sought to be condemned" is determined by a committee of citizens from the community).[46] Under Georgia law, as the parties agreed, a condemnation by a railroad results in an easement for railroad purposes only. *See Coffee County,* 110 S.E. at 215 (holding that land acquired by a railroad via condemnation reverts to the original owner when railroad use ceases).

Based on the description of the conveyance as a piece of land "the width to be what is necessary for Railroad purposes for said Railroad as a right-of-way" and

---

[45] *See Hardy II,* 129 Fed. Cl. at 518 (Appx0029); *Jackson,* 135 Fed. Cl. at 460.
[46] *Id.*

the language providing that "a committee of arbiters selected by a citizen's Committee of City of Covington and W.B. Lee to assess the damage sustained by him on account of the right-of-way… passing through his property," the CFC correctly concluded that the Lee deed granted an easement to the railroad. In addition, however, the land description clause in the Lee deed also refers to the grant as a "right-of-way," which was actually the second such reference in the deed, the first being in the granting clause, and the grant of a right-of-way has always conveyed an easement to the railroad under more than a century of precedent from the Georgia Supreme Court.

E. The Government's Myopic Reliance on *Valdosta* is Misplaced

The government constantly and repeatedly cites the 1929 Opinion in *Johnson v. Valdosta Moultrie & Western Railroad Co.,* 150 S.E. 845 (Ga. 1929) as the supporting precedent for the conclusion that the original source deeds to the railroad in this case conveyed fee title.[47] The deed in *Valdosta* included the grant of "a strip of land 60 feet wide for a railroad right-of-way," an habendum clause that stated that the grantor will "truly warrant and defend… its successors and assigns, forever in fee simple," and included consideration of $400. The government basically takes this one case from 1929 out of the overwhelming authority from the Georgia Supreme Court and reaches the conclusion that all of

[47] *Valdosta* was cited by the government at least 11 separate times. *See* Govt's Br. at 17, 18, 22, 23, 24, 25, 28, 35, 36, and 39.

the deeds at issue in this case, other than the ones they have already admitted conveyed easement, are fee simple deeds. In any event, *Valdosta* was later specifically distinguished by the Georgia Supreme Court in *Pitchford, Askew,* and *Jackson* and should not even be considered as persuasive authority.

In *Pitchford,* which was decided by the Georgia Supreme Court seven years after *Valdosta,* the Court examined a granting clause for "a strip of land… for a railroad right-of-way," which was just like the granting clause in *Valdosta,* and the original opinion from the Georgia Supreme Court holding that an easement was granted cited and relied on *Coffee County* and *Duggan* and never mentioned *Valdosta. See Pitchford,* 184 S.E. at 624. Upon rehearing, the Georgia Supreme Court specifically cited to *Valdosta* and specifically distinguished *Valdosta.* Upon rehearing, the Georgia Supreme Court held that *Valdosta* was distinguished because the consideration in *Valdosta* was $400 compared to $1 in *Pitchford* and, most importantly, *Valdosta* involved a specific conveyance "forever in fee simple." *Id.* Even though the government never mentions the obvious fact that *Valdosta* was specifically distinguished, that fact is critical because none of the disputed deeds in this case have consideration anywhere near $400 and none of the deeds in this case say "forever in fee simple" either.

In 1954, 25 years after *Valdosta* and 18 years after *Pitchford,* the Georgia Supreme Court addressed the issue once again in *Askew.* The deed in *Askew*

involved the grant of a "strip of land extending 50 feet on each side and at right angles to the center of track or road bed of said line as the same may be located and established" and later stated that "[t]his property is conveyed to said company to be used for it by railroad purposes." Even though the deed at issue in *Askew* does not include the phrase "right-of-way" anywhere in the deed, the Georgia Supreme Court cited *Coffee County, Gaston, Duggan,* and *Pitchford* and, without ever mentioning or citing *Valdosta* at all, had no difficulty concluding that the deed granted an easement limited to railroad purposes.

The Georgia Supreme Court addressed the issue again two years later in *Sorrells.* In *Sorrells,* the granting clause did not convey "a strip of land" or a "right-of-way" but, instead, granted "all the land contained within 100 feet in width on each side of its track." The consideration for the deed was $10, unlike the $400 set forth in *Valdosta,* the grantor also reserved "the right to cultivate up to the road bed," and the deed granted the parcel of land to the railroad "for railroad purposes, forever in fee simple." The Georgia Supreme Court once again determined that the grant was an easement for railroad purposes and, even though *Gaston, Pitchford,* and *Askew* were cited with approval, the *Valdosta* Opinion is never even mentioned. As a result, even though the deed never mentioned "right-of-way" anywhere in the deed, the consideration was $10, and the purpose of the

deed was "for railroad purposes forever in fee simple," the Georgia Supreme Court easily and readily affirmed the result of an easement.

Since the disputed deeds at issue in this case grant a "right-of-way" or a "strip of land for a right-of-way" or a "strip of land for railroad purposes," and since the consideration for the deeds is either nominal or not even close to $400, and none of the deeds in this case utilize language like "forever in fee simple," all of the deeds are consistent with the results reached by the Georgia Supreme Court in *Gaston, Coffee County, Duggan, Pitchford, Askew,* and *Sorrells.* As a result, *Valdosta* is not applicable or controlling authority and the deeds at issue in this case should be easements limited to railroad purposes under longstanding authority from the Georgia Supreme Court.

II. COUNTY ROAD 213 IS ALSO A MERE EASEMENT UNDER GEORGIA LAW AND THE 8 IMPACTED PARCELS ALL OWN TO THE CENTERLINE OF THE RAILROAD'S RIGHT-OF-WAY

County Road 213 is a public road that separates the rail corridor and 8 parcels of land.[48] The government argues that County Road 213 was granted in fee to the county and because the 8 parcels do not adjoin the rail corridor the landowners lack a property interest in the railroad right-of-way. County Road 213 was originally conveyed by the owners of the private land to the state highway

[48] *See Hardy I,* 127 Fed. Cl. at 15 (Appx0014-0015). The 8 parcels are claims 81.A, 81.B, 81.C, 83, 84, 85.A, 85.B, and 85.C.

department of Georgia by and through "Right-of-Way Deeds" in March of 1958[49] and, because all of the deeds that pertain to County Road 213 conveyed an easement for the construction of the road under Georgia law, County Road 213 is a mere easement, just like the railroad's right-of-way, and each Plaintiff owns to the centerline of the railroad's right-of-way.

The government has once again attempted, unfortunately, a complete slight of hand argument on this issue. Although the government purportedly set forth the applicable deed language of a prototypical conveyance deed pertaining to County Road 213,[50] the government failed to even include the pertinent language from the applicable deeds that clearly establishes that the applicable deeds conveyed an easement. Specifically, the government failed to even mention that each deed was entitled "Right-of-Way Deed" and that each deed was specifically granted as a "state aid road" pursuant to Georgia's statute, which is the grant of a clear easement under Georgia law:

> State Highway Department of Georgia RIGHT OF WAY DEED ...
>
> WITNESSETH that U.T. Smith Jr., the undersigned, is the owner of a tract of land in said county **through which a state aid road, known as project No. SP 1982, on State Highway No. 213 between Starrsville and Mansfield has been laid out by the State Highway Department of Georgia as a part of the State Aid Road System of Georgia**, as provided by the Acts of General Assembly of Georgia of 1919 and 1921, said road being more

[49] *See* Appx1133.
[50] *See* Govt's Br. at 34.

> particularly described in a map and drawing of said road in office of the State Highway Department of Georgia, Atlanta Co., to which reference is hereby made.
>
> Now, therefore, in consideration of the benefit to my property by the construction or maintenance of said road, and in consideration of ONE DOLLAR ($1.00) in hand paid the receipt whereof is hereby acknowledged. I do hereby grant, bargain, sell and convey to said State Highway Department of Georgia, and their successor in office in such land in Lot no.—of the—Land District or—G.M. Distinct of said County **as to make a right of way for said road as surveyed and measured from the center line of the highway location as follows:** From Sta. 344/22 to Sta. 347/35 a strip 40 ft. wide Rt. & Lt. side. As shown in red on attached plat. **Said right of way is more particularly described according to a plat of the right of way through the property of U.T. Smith, Jr.** prepared by the State Highway Department of Georgia dated the 20 day of March 1958 and made a part of this description.

See Hardy I, 127 Fed. Cl. at 16-17 (emphasis added) (Appx0015-0017).

The government not only forgot to inform the Court that the deeds were all entitled "Right-of-Way Deed," but also failed to inform this Court that all of the deeds were "state-aid roads pursuant to Ga. Code § 95-1721 (1935)."[51] All of the public roads in Georgia, like County Road 213, were built pursuant to Georgia statute 95-1721, where "state-aid roads" were made part of the state highway system and the roads constituted "rights of way" running through private land.[52] Under Georgia law, the conveyance of land as a "right-of-way" was the grant of an easement as opposed to a property interest in fee simple. *See Crutchfield,* 191 S.E.

[51] *See Hardy I,* 127 Fed. Cl. at 16 (Appx0015-0017).
[52] *Id.*

at 470 (holding that a deed that granted "right-of-way over which to pass" conveyed an easement).

All of the deeds pertaining to the construction of County Road 213 were granted to the State Highway Department as "right of way deeds" and all of the deeds conveyed a "strip of land" as a "right-of-way" for a "state aid road" through private land. In addition, each of the deeds at issue conveyed the right-of-way to the State Highway Department for the consideration of one dollar. Since all of the deeds referred to the land conveyed as a "strip of land" and a "right-of-way," the land was acquired to construct a "state aid road" as set forth in Georgia statute § 95-1721, and nominal consideration was given, the CFC correctly concluded that the deeds all conveyed easements to the State Highway Department.[53]

The government once again attempts to advance a completely inept argument that County Road 213 was granted as a fee interest to the State Highway Department because of the Limited Access Highway Act and because of deed interpretation under that Act pursuant to *Knight*. The government's attempt to cite to the Limited Access Highway Act, and then to rely on *Knight,* which was decided in the context of that statute, lacks merit.

The Limited Access Highway Act, Ga. Code § 95-1703 (1965), addresses situations where abutting landowners have limited or no access to a limited access

[53] *Id.* at 17 (Appx0016-0017).

highway and both federal interstate highways and limited access roads constructed to support them are conveyed in fee.[54] Since County Road 213 is a county road, and not a limited access highway at all, and since County Road 213 was created as a state aid road, both the Limited Access Highway Act and the *Knight* decision interpreting that act are not relevant in this context at all.[55]

Simply put, the government has attempted to advance an incomplete prototypical deed, has failed to even mention the applicable Georgia statute pertaining to "state-aid roads," has failed to properly analyze the actual terms of each deed under basic deed construction principles as established by the Georgia Supreme Court, and has attempted to advance an inapposite argument concerning other types of deeds pursuant to the Limited Access Highway Act. Since all of the deeds at issue relative to the construction of County Road 213 were right-of-way deeds pursuant to Georgia's state-aid road statute with nominal consideration, the CFC's conclusion that each of the County Road 213 deeds conveyed easements was correct.

[54] *Id.* at 15 (Appx0014-0015).
[55] *Id.* at 15-16 (Appx0014-0016).

III. THE GOVERNMENT'S ARGUMENT PERTAINING TO THE CFC'S CONCLUSION OF A TEMPORARY TAKING FOR PARCELS BEYOND MILEPOST 65.80 IS NOTHING MORE THAN A HODGEPODGE OF MISSTATEMENTS OF LAW

The NITU in this case, dated August 19, 2013, described the location of the abandoned 14.90 miles as "the Line extends from milepost E 65.80 (at the point of the line's crossing of Route 229 in Newborn, Georgia) to milepost E 80.70 (near the intersection of Washington Street, SW, and Turner Lake Road, SW, in Covington, Georgia)" Appx0173-0176. Over three years later, on October 14, 2016, a corrected NITU was issued because the railroad mistakenly described the eastern endpoint of the proposed abandonment as "the point of the line's crossing of Route 229 in Newborn" when the endpoint was actually "a point just east of the Zeigler Road Crossing west of downtown Newborn." Appx 1512-1513. Because certain parcels are adjacent to the corridor east of Zeigler Road and west of where Route 229 crosses the corridor,[56] the government maintains that "United States cannot be liable for a taking of land that was never affected by the NITU."[57]

The government originally argued that there was no taking "because no railbanking and interim trail use agreement ha[d] been reached" and it was

[56] The government has identified 12 parcels at issue when, in reality, there are only 11. *See* Govt's Br. at 42. One parcel listed by the government, parcel 100, is not actually impacted by this issue.

[57] *See* Govt's Br. at 41.

therefore "uncertain whether a taking had occurred."[58] In supplemental briefing, however, the government ultimately conceded that any takings that occurred did so on the date that the NITU was issued but there could not be any taking without a trail use agreement because there was no intention to abandon.[59] Finally, the government attempted to argue that even if a trail use agreement was ultimately reached, there still can be no taking because railbanking means that "the railroad has a right to restore rail service in the future."[60] The CFC correctly noted that all of the government's argument were contrary to established binding precedent as established in *Preseault II, Caldwell, Barclay, Illig,* and *Ladd,*[61] and that the government's arguments pertaining to the parcels east of Zeigler Road and west of where Route 229 crosses the corridor was inappropriate because "the parameters of the NITU were settled by the plain language of the NITU itself."[62]

The government's motion for reconsideration argued that the correction to the NITU merely remedied a "ministerial error" only and that there was no "unequivocal act that demonstrates the necessary intent to abandon the rail line" constitute a taking of Plaintiffs' land between the corrected description of milepost

---

[58] *See Hardy I,* 127 Fed. Cl. at 21 (Appx0022).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 21-22 (Appx0022-0023).
[62] *Id.* at 22, fn. 5 (Appx0022) ("defendant argues that the NITU and Exemption Notice are ambiguous as to the location of the end of the trail line. However, as the Court stated during oral argument, and in its November 9, 2015 Order, the parameters of the NITU were settled by the plain language of the NITU itself").

E-65.80's location and the original description of milepost E-65.80's location.[63] The CFC correctly confirmed its original ruling pertaining to the parcels at issue because the issuance of a NITU effects a taking regardless of the railroad's intent to abandon the rail line or subsequent events.[64] Contrary to the government's argument, under the bright-line rule announced by this Court in *Caldwell, Barclay, Illig,* and *Ladd,* the taking for the parcels at issue was correctly determined to be a temporary taking by the CFC that started on August 19, 2013 and ended on November 18, 2016."[65]

The basic premise of the government's argument in this appeal is that the United States cannot be liable for a temporary taking because the parcels at issue were not affected by the NITU, "the NITU never extended east of milepost E-65.80,"[66] and "the railroad never intended to abandon the portion of its line to the east of milepost 65.80."[67] As the CFC correctly concluded, the issuance of the NITU effects a taking regardless of the railroad's intent to abandon the rail line and regardless of subsequent events.[68] Because all of this Court's precedent establishes that the issuance of a NITU effects a taking, regardless of the railroad's intent to abandon the rail line, the only way the government could prevail was if the

[63] *See Hardy III,* 131 Fed. Cl. at 537 (Appx0037); *see also* Appx1503-1520.
[64] *Id.* at 537-538 (Appx0038-0039).
[65] *Id.* at 537 (Appx0037).
[66] *See* Govt.'s Br. at 41-47.
[67] *Id.* at 47-49.
[68] *See Hardy III,* 131 Fed. Cl. at 537-538 (Appx0037-0039).

amendment to the NITU was retroactive and, since the NITU's amendment was not retroactive, the amendment of the NITU was properly viewed as a subsequent NITU and thus has no bearing on the accrual of a takings claim based on the original NITU.[69]

The government also attempts a collateral attack on all of this Court's well-established precedent by stating that "the NITU cannot have prevented abandonment and therefore did not constitute a physical taking."[70] In essence, citing *Caquelin,*[71] the government is attacking all of this Court's precedent that a taking occurs when the NITU is issued, the taking is a physical taking rather than a regulatory taking, and that the taking is a physical taking requiring compensation even if temporary in duration. Although *Caquelin* is fully briefed and is awaiting oral argument or other disposition, all of these arguments by the government are contrary to well-established precedent from this Court and cannot even be entertained unless all of the precedent as set forth in *Preseault II, Caldwell, Barclay, Illig,* and *Ladd* is overturned.

[69] *Id.* at 538-539 (Appx0039-0040).
[70] *See* Govt's Br. at 49-53.
[71] *See Caquelin v. United States,* 697 Fed. Appx. 1016 (Fed. Cir. 2017).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

Stewart, Wald & McCulley, L.L.C.

By /s/ *Thomas S. Stewart*
Thomas S. Stewart
Elizabeth McCulley
2100 Central, Suite 22
Kansas City, MO 64108
(816) 303-1500
(816) 527-8068 (facsimile)
stewart@swm.legal
mcculley@swm.legal
ATTORNEYS FOR PLAINTIFFS/APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

All case participants are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas S. Stewart
ATTORNEY FOR PLAINTIFFS/APPELLEES

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 12,006 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 2013 in 14-Point Times New Roman, a proportionally spaced font.

/s/ Thomas S. Stewart
Thomas S. Stewart