No. 19-1793

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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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 OF AMERICA,
*Defendant/Appellant*.

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Appeal from the United States Court of Federal Claims
No. 1:14-cv-00388 (Hon. Margaret M. Sweeney)

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**OPENING BRIEF FOR THE UNITED STATES OF AMERICA**

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 47.5, counsel states that no appeals in or from this action were previously before this Court or any other court. Counsel is aware of one case that could directly affect the Court's decision in this appeal: *Caquelin v. United States* (No. 19-1385).

## INTRODUCTION

Plaintiffs own land along or near a railroad corridor about 30 miles east of Atlanta, Georgia. In 2016, a portion of this corridor was "railbanked" and converted to interim trail use pending future reactivation to active rail service, under the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247(d). Plaintiffs contend that the railroad held only an easement (rather than a fee interest) in the rail corridor, and that but for the rail-to-trail conversion, the railroad's easement would have expired, giving Plaintiffs an unencumbered fee interest in the portion of the rail corridor abutting or crossing their properties. They further contend that because the workings of the Trails Act prevented the vesting of such "reversionary interest," the government effected a compensable Fifth Amendment taking of their property.

The United States does not dispute that the railroad indeed held only an easement over certain portions of its corridor. But for other parts, the original deeds conveying an interest to the railroad plainly conveyed a fee interest under Georgia law. Thus, the Plaintiffs who claim a taking of these portions lack any reversionary interest in the rail corridor that could have been taken by the United States through the workings of the Trails Act. Other Plaintiffs lack a reversionary interest in the rail corridor because they are not fee owners of the land adjacent to the rail corridor; instead, they are separated from that corridor by a county road on land that was granted to the State in fee. A third subset of the Plaintiffs were unaffected by the workings of the Trails Act at all, because

the railroad never intended to abandon the portion of its rail line adjacent to those Plaintiffs' properties and it was never converted to interim trail use.

Accordingly, three aspects of the rulings of the Court of Federal Claims ("CFC") rulings should be reversed. First, this Court should correct the CFC's erroneous interpretation of those original railroad deeds, which conveyed fee (and not a mere easement) to the railroad. Second, this Court should similarly rule that the original deeds conveying land for what would become County Road 213 conveyed a fee interest (and not a mere easement) to the State, such that the landowners adjacent to the road have no reversionary interest in the railroad corridor. Third, this Court should hold that property beyond the clear terminus of the section of line slated for abandonment (and later trail use) has not been taken because the railroad lacked any intent to abandon that section of line, such that the United States has neither thwarted any intended abandonment nor interfered with any of Plaintiffs' reversionary interests.

## STATEMENT OF JURISDICTION

The CFC had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), to adjudicate Plaintiffs' Fifth Amendment takings claim.

The CFC entered judgment under CFC Rule 54(b) in favor of Plaintiffs on February 19, 2019 (Appx0042), following several published opinions: 127 Fed. Cl. 1 (2016) (Appx0001–0023); 129 Fed. Cl. 513 (2016) (Appx0024–0033); 131 Fed. Cl. 534 (2017) (Appx0035–0041); 141 Fed. Cl. 1 (2018). The judgment was final because it resolved all claims against the United States. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

The United States filed its notice of appeal on April 19, 2019, or 59 days after entry of judgment. *See* Appx1781. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(i).

## STATEMENT OF THE ISSUES

1. Whether the CFC erred in ruling that a number of deeds for the rail corridor at issue in this case conveyed merely an easement to the railroad where no language in the deeds overcomes the presumption that deeds convey a fee interest under Georgia law. Similarly, whether the CFC erred in ruling that deeds conveying land to the state for a public road conveyed merely an easement, rather than a fee.

2. Whether the CFC erred in ruling that issuance of a notice providing time to negotiate possible conversion of a right-of-way for interim use as a trail effectuated a physical taking of certain Plaintiffs' property where the notice did not actually apply to the section of rail line adjacent to those Plaintiffs' land, where the railroad lacked any intent to abandon this section of rail line, and where trail conversion never occurred.

## PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the addendum following this brief.

## STATEMENT OF THE CASE

### A. Statutory and regulatory background

In 1920, Congress conferred exclusive and plenary authority on the Interstate Commerce Commission (now the Surface Transportation Board, or "STB") to regulate abandonment of nearly all the Nation's rail lines. *See* 49 U.S.C. § 10501(b); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Rail carriers under the Board's purview must "provide . . . transportation or service on reasonable request," 49 U.S.C. § 11101(a), unless the STB agrees to a temporary discontinuance or permanent abandonment of the rail line, *id.* § 10903. A discontinuance allows a rail carrier to "cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service," and abandonment removes a line from the national transportation system. *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990) ("*Preseault I*"). A grant of abandonment authority is time-limited and permissive; under long-standing regulations, the carrier must affirmatively decide to consummate the abandonment by filing a notice with the STB, typically within one year. 49 C.F.R. § 1152.29(e)(2); *Baros v. Texas Mexican Railway Co.*, 400 F.3d 228, 235–36 (5th Cir. 2005). The STB may exempt a rail line from formal abandonment proceedings, providing an expedited process to the same end, and it does so as a matter of course if the line has been dormant for at least two years. *See* 49 U.S.C. § 10502(a); 49 C.F.R. § 1152.50.

By Section 8(d) of the Trails Act, 16 U.S.C. § 1247(d), Congress in 1983 added a third option for railroads wishing to terminate rail service, commonly

known as "railbanking." When a rail corridor is railbanked under the Trails Act, the STB retains jurisdiction so that the corridor may be returned to railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a state or local government or qualified private organization, allowing its use in the interim as a recreational trail. *See Preseault I*, 494 U.S. at 6–7. Section 8(d) provides that "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d).

The railbanking process works as follows. When a rail carrier applies to abandon a rail line or exempt it from the abandonment process, a "state, political subdivision, or qualified private organization" may file a comment indicating an interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. § 1152.29(a). If the carrier agrees to negotiate an interim trail use/rail banking agreement with a potential trail operator, the STB will issue a Notice of Interim Trail Use ("NITU"), providing a 180-day negotiation period. *Id.* § 1152.29(d)(1).[1] If the carrier and the trail

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[1] This notice is inaptly named. On its own, a NITU does not effect trail use. Instead, it provides a negotiation period during which the railroad may take up tracks and take other steps toward abandonment but not formally abandon its line. Only if other later-occurring conditions are fulfilled may trail use (and railbanking) actually occur. *See, e.g., City of Fishers*, Docket No. FD 36137, 2019 WL 3493988, at *5 (STB served July 31, 2019) (concluding that "because no agreement has been reached between the Owners and the proposed interim trail sponsors, no part of the NITU Line has yet been railbanked and made available for interim trail use").

operator do not agree to terms within 180 days, then the carrier may abandon its line. *Id.* §§ 1152.29(d)(1), (e)(2). If the parties do agree, the corridor is "railbanked" under 16 U.S.C. § 1247(d), i.e., it is converted to an interim recreational trail, pending possible future reactivation for active rail use.

After enactment of the Trails Act, property owners whose land is crossed by railroads began claiming that railbanking constituted a taking of their property. In *Preseault I*, 494 U.S. at 12–17, the Supreme Court agreed that application of the Trails Act may result in a taking. Subsequently, this Court held that establishment of a recreational trail—and the preclusion of easement reversion—may be the basis for a valid physical takings claim. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) ("*Preseault II*"). This Court further held that the mere issuance of a NITU may constitute a physical taking, even in the absence of a consummated agreement or actual trail use. *Ladd v. United States*, 630 F.3d 1015, 1023–24 (Fed. Cir. 2010).[2]

Regardless of the alleged mode of taking—whether through NITU issuance alone or through trail use and preclusion of easement reversion—a threshold question is whether a takings claimant has a compensable property

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[2] This Court recently recognized that the propriety of that holding in *Ladd* may be open to question. *Caquelin v. United States*, 697 F. App'x 1016, 1019–20 (Fed. Cir. 2017) ("En banc review may be warranted . . . to decide whether *Ladd* should remain governing precedent."). Following this Court's remand in *Caquelin*, the CFC conducted additional hypothetical analysis under a multi-factor (rather than per se) approach, concluding that it would hold the United States liable for a physical taking under that framework. The United States' appeal of that CFC decision—in which the United States requests this Court to sit en banc to overrule *Ladd*—is pending in this Court as No. 19-1385.

interest in the land allegedly taken. In Trails Act litigation, that question is frequently answered by analysis of the original deeds conveying an interest in the rail corridor to the railroad, specifically to determine whether the interest transferred was a fee interest or merely an easement. *Preseault I*, 494 U.S. at 16; *Preseault II*, 100 F.3d at 1533.

### B. Factual background

#### 1. The source deeds at issue

The land at issue in this case was largely part of a series of acquisitions by the Middle Georgia & Atlantic Railway Company ("MG&AR") from 1890 to 1894. MG&AR obtained property rights through deeds or condemnation. MG&AR used a standard form right-of-way deed, but grantors were free to modify the form deed, and some did so. These form deeds (modified or not) were used to convey part of the rail corridor at issue herein. The pre-printed deeds used by MG&AR between 1890 and 1894 are part of the record, *see, e.g.*, Appx0521 (photograph); Appx0523 (transcription), and the relevant language is block-quoted in the Argument below (p. 19–20).

A second type of form deed at issue was used for conveyances to the State Highway Department for land that eventually became County Road 213, which separates relevant eight parcels from the rail corridor. These deeds, too, are part of the record, *see, e.g.*, Appx1153, and the relevant language is block-quoted in the Argument below (p. 34).

### 2. The August 2013 NITU

On July 1, 2013, the parent company of Central of Georgia Railroad Company ("CGA," or "the railroad") filed a notice with the STB for an exemption under 49 C.F.R. § 1152.50 from formal abandonment proceedings. Appx0106–0156. The notice described 14.90 miles of rail line located in Newton County, Georgia. The railroad described the location of the line as follows: "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)." Appx0108; *see also* Appx0117 (map). On July 19, 2013, the STB published notice of the abandonment exemption in the Federal Register. Appx1588–1591. The Newton County Trail Path Foundation ("Newton Trails") then filed a petition with the STB indicating that it was interested in negotiating a trail use agreement. Appx0157–0171. The railroad also indicated interest in negotiating, Appx0172; and so on August 19, 2013, the STB issued a NITU, which provided 180 days for the parties to complete negotiations, Appx0173–0176. The NITU repeated the description of the rail line endpoints that had been provided by the railroad. Appx0173. The NITU was extended several times over the next three years. *See* Appx1061–1063.

On September 28, 2016, CGA and Newton Trails entered a Notice of Agreement on Rail Banking/Interim Trail Use with the STB, indicating that the parties had entered into a lease agreement for the rail line from mileposts E65.80 to E80.70. Appx1500–1502.

### 3. The 2016 Corrected NITU

On October 14, 2016, during the course of this takings litigation, CGA filed a letter with the STB noting that the NITU required a correction. Appx1512–1514. The letter notified the STB that the railroad had made an error in its exemption notice in the parenthetical description of milepost E65.80 in the original NITU and on the accompanying map. Appx1512. CGA had described the endpoint of its proposed abandonment as "the point of the line's crossing of Route 229 in Newborn," but in fact milepost E65.80 is at "a point just east of the Ziegler Road crossing west of downtown Newborn." Appx1512–1513. The railroad repeated this error in its September 2016 notice to STB that it had entered into a lease with the trail group. Appx1516–1517.

In its October notice to STB, the railroad made clear that "the mileposts listed in the Notice are, and remain, correct," as is the "total length of the line of approximately 14.90 miles . . . as are the zip codes and other relevant information"—only the parenthetical and map contained mistakes. Appx1513. The railroad attached an updated map depicting the correct location of milepost E65.80, slightly to the west of the location indicated on the railroad's original map. *Compare* Appx1514 *with* Appx0117. The railroad requested that STB clarify the parenthetical references to the location of milepost E65.80 in STB's NITU. Appx1513.

Despite this erroneous parenthetical description, the trail negotiations never included the possible conversion to trail use of any portion of the rail line east of milepost E65.80, as the section of the rail line between that milepost

and the town of Newborn remained an active rail line leased to a different rail company. Indeed, the resulting lease from CGA to Newton Trails indicated its *terminus* as milepost E65.80, described as just east of Ziegler Road. Appx1739; Appx1755. On November 18, 2016, the STB issued a decision modifying the parenthetical referenced in the original NITU to comport with the actual location of milepost E65.80. Appx1519–1520. A few days later, the STB issued notice of the correction to CGA's notice of exemption in the Federal Register and provided public notice of its recognition of CGA's corrections. 81 Fed. Reg. 84673 (Nov. 23, 2016).

### C. Proceedings below

Plaintiffs filed suit on May 6, 2014. After informal discovery focused on title issues, the parties cross-moved for summary judgment on liability.

The United States argued that most of the deeds at issue conveyed a fee interest to the railroad, rather than an easement, and that the same was true of deeds conveying an interest to the State of Georgia for a road separating certain Plaintiffs' parcels from the rail corridor. The United States also argued that, to the extent the railroad deeds conveyed easements, those easements were broad enough to encompass recreational trail use. The United States also argued that several of Plaintiffs' parcels were east of the eastern terminus of the NITU, and so those Plaintiffs had no viable claim. Further, the United States urged that no taking had yet occurred because (at the time of briefing) no trail-use agreement had been reached, and so no trail use had occurred.

The court, applying Georgia law, analyzed several sets of deeds, grouped by similar characteristics. Relevant to this appeal, the CFC determined:

- The "Armstrong deed"—an MG&AR form deed with consideration the CFC deemed "nominal," ranging from $1 to $125—and twenty-nine similar deeds conveyed an easement for railroad purposes only. Appx0008–0011.

- The "Lee deed"—an MG&AR form deed with consideration the CFC deemed "substantial," ranging from $100 to $325—and eight similar deeds conveyed a fee simple interest. Appx0011–0012.

- The land granted to construct County Road 213, which separates the rail corridor and eight parcels at issue here, was conveyed as an easement. Because this easement was conveyed after the relevant rail corridor easement, Plaintiffs who own the parcels adjacent to County Road 213 own to the centerline of the adjoining rail corridor. Appx0014–0017.

The CFC rejected the United States' argument that certain Plaintiffs' lands (those east of milepost E65.80) were beyond the eastern terminus of the NITU, reasoning only that "the parameters of the NITU are settled by the plain language of the NITU itself." Appx0022–0023. Finally, the CFC rejected the United States' argument that, because no trail-use agreement had been reached, no taking occurred. Applying *Ladd*, 630 F.3d at 1024, the CFC held that it is irrelevant that railbanking had not (yet) occurred: "The Federal Circuit's holdings are unambiguous: the STB's issuance of a NITU effects a Taking." Appx0022.

Both parties moved for reconsideration of aspects of the CFC's decision. Relevant here:

- The CFC reversed its position regarding the Lee deed—previously deemed a "substantial" compensation MG&AR form deed that conveyed a fee interest—determining that this deed in fact conveyed an

easement only. Appx0026–0030. The CFC denied the United States' subsequent motion for reconsideration of this decision. Appx0034.

- After CGA notified the STB in October 2016 that the eastern terminus in its abandonment exemption notice (and thus the STB's NITU) had been incorrectly described, the United States moved for reconsideration of the CFC's decision that the NITU constituted a taking with regard to Plaintiffs whose parcels are beyond the true endpoint of the NITU. The CFC rejected that argument: under *Ladd*, "events occurring after a NITU is issued are irrelevant in determining whether there has been a compensable taking." Appx0038–0039. The CFC reasoned that because the NITU's amendment was not retroactive, Plaintiffs had suffered a temporary taking from the date of the original NITU to the date of the modified NITU as to parcels between the true location of milepost E65.80 and the point that Plaintiffs believed to be the location based on the erroneous description in the original NITU. Appx0040–0041.

Subsequently, the case proceeded to discovery and trial regarding valuation. After an eight-day trial beginning in September 2017, the CFC issued a decision largely accepting Plaintiffs' proposed valuation for the properties held to have been taken. On February 19, 2019, the court awarded Plaintiffs a total of $2,364,767.85, which comprised $1,827,855.00 in principal and $536,912.85 in interest through that date. Appx0042.

**SUMMARY OF ARGUMENT**

1. The CFC misapplied Georgia law in interpreting the MG&AR form deeds that were used to convey land to the railroad in the late 1800s.

a. The MG&AR form deeds state that they convey "land" to the railroad "forever," with a warranty from the grantor. Under Georgia law, such deeds conveyed a fee interest to the railroad (and not a mere easement that could expire upon rail line abandonment). Additionally, while the deeds

contain the phrase "right of way," that phrase is descriptive—not limiting, as the CFC incorrectly determined. Indeed, the deeds lack any specially carved-out retained rights or reversion clauses that might suggest conveyance of only an easement. Although the recited consideration in these deeds is modest, that lone fact does not trump all other evidence of fee conveyance, particularly in the context of the general presumption under Georgia law that a properly executed deed conveys a fee interest. Finally, the CFC's observation that the Lee deed was made after condemnation proceedings is irrelevant: even in that context, the language in the resulting deed controls the estate conveyed, which here was fee simple.

b. The CFC similarly erred in concluding that the deeds to the State of Georgia for construction of County Road 213 conveyed only an easement. These deeds also convey "land, and expressly state that the conveyance is in "fee simple." As with the MG&AR deeds, the reference to a "right of way" is merely descriptive, and the deeds lack any other specific language limiting the estate conveyed to an easement. Although the recited consideration is modest, the deed's strong language indicating a fee conveyance, particularly in light of the context of the general presumption under Georgia law, establishes that the State holds a fee interest in this road. As with the railroad deeds, the CFC erred in concluding that the context of the acquisitions—a state statute that the CFC interpreted as allowing only an easement acquisition—prevented a fee conveyance. That statute did not restrict the estate acquired, and in any event the plain language in the resulting deed controls the estate conveyed, namely,

fee simple. Because this road—owned in fee by the State—lies between certain Plaintiffs' land and the rail corridor, these Plaintiffs are not actually adjacent landowners to the corridor and accordingly had no reversionary interest that could have been taken by the workings of the Trails Act.

2. No taking has occurred with regard to twelve of Plaintiffs' parcels that are at least partially beyond the eastern terminus of the NITU, milepost E65.80. The original NITU correctly identified the name of this endpoint but contained a descriptive error as to the location of the endpoint. That erroneous description did not alter the actual land covered by the NITU, and it did not extend the NITU's effect beyond its intended scope.

Even if the Court determines that the NITU's endpoint was ambiguous, the railroad never filed a notice of consummation of abandonment with the STB, which would have indicated definitive intent to abandon this section of the line. Uncontroverted testimony and evidence that the railroad was actively leasing that section of line to another rail carrier further establishes that the railroad had no intent to abandon the section of its rail line east of milepost E65.80. In the absence of any intent to abandon this section of its rail line, the NITU cannot have constituted a taking of Plaintiffs' property. Plaintiffs' reversionary interest (if any) was always contingent on the railroad's voluntary decision to seek and (if granted) exercise its authority to abandon its entire rail line. But the railroad never intended to initiate or consummate abandonment for the section of line east of milepost E65.80. Accordingly, the NITU cannot

be said to have prevented such abandonment, and thus it cannot have effected a physical taking of these Plaintiffs' alleged reversionary interest.

The judgment of the CFC should be reversed.

## STANDARD OF REVIEW

The existence of a compensable property interest in a takings case is a question of law that is subject to de novo review. *Casitas Municipal Water District v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013). In particular, the estate conveyed by the deeds at issue is likewise a question of law that is reviewed de novo, applying Georgia law. *Chicago Coating Co. v. United States*, 892 F.3d 1164, 1169–70 (Fed. Cir. 2018).

## ARGUMENT

### I. Certain Plaintiffs have no cognizable property interest because the railroad owns fee title to the corridor adjacent to or crossing their property, or because they are not the fee owner of land immediately adjacent to the rail corridor.

This Court has a well-established two-part test to evaluate claims that a governmental action constitutes a taking of private property under the Fifth Amendment. The first part of this test is whether the claimant has established a "property interest" for purposes of a claim for just compensation. *See Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). Only if a court determines that a plaintiff has a cognizable property interest does a court then determine whether the government has effected a taking of that interest. *Id.; see also Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003).

To prove a Fifth Amendment taking resulting from the issuance of a NITU, a plaintiff must prove that his or her "state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) (citing *Preseault II*, 100 F.3d at 1543). As a threshold matter, this means that a plaintiff must demonstrate an ownership interest in segments of the rail corridor in which the rail operator possesses an easement. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009). If, instead, the railroad owns the relevant segment of the rail corridor in fee, the plaintiff lacks an interest in the corridor at issue, and the United States is not liable for a taking. *Preseault I*, 494 U.S. at 16; *Preseault II*, 100 F.3d at 1533.

Because the plain language of certain of the original railroad deeds at issue here demonstrates that the railroad holds a fee interest in the rail corridor, Plaintiffs claiming an interest in those lands transferred to the railroad in fee have no valid, cognizable property interest that can support their takings claim.

### A. Georgia law requires analysis of a deed as a whole and presumes, absent limiting words, that a deed for an estate in lands conveys fee simple.

Georgia law applies to determine whether Plaintiffs have an ownership interest in the allegedly taken rail corridor. *See Preseault I*, 494 U.S. at 8, 16; *Chicago Coating*, 892 F.3d at 1169–70. Under that law, courts should discern "the intention of the parties," looking to the "whole deed or instrument . . . not merely disjointed parts of it." *Jackson v. Rogers*, 54 S.E.2d 132, 136 (Ga. 1949).

That discernment must proceed from the fundamental premise of deed interpretation in Georgia: "Every conveyance, properly executed, must be construed to convey the fee, unless a less[er] estate is mentioned and limited in such conveyance." *Holloman v. Board of Education*, 147 S.E. 882, 884 (Ga. 1929); *accord Department of Transportation v. Knight*, 232 S.E.2d 72, 74 (Ga. 1977); Ga. Code Ann. § 44-6-21 ("Every properly executed conveyance shall be construed to convey the fee unless a lesser estate is mentioned and limited in that conveyance.").[3] If the parties desire less than a fee simple estate, "they should so state." *City of Atlanta v. Jones*, 69 S.E. 571, 572 (Ga. 1910).

Where the interest conveyed is described in the granting clause as "land," Georgia courts tend to find conveyance of fee title, rather than an easement. *See Johnson v. Valdosta, Moultrie & Western Railroad Co.*, 150 S.E. 845, 847–48 (Ga. 1929) (finding a fee conveyance to railroad where the deed granted a "strip of land," and distinguishing a case involving a deed conveying a "right of way"). This is true even when that "land" is described as being granted for a specific purpose, such as for a railroad right-of-way. *Id.* at 847 (finding a fee conveyance where deeds contained a clause granting "A strip of land sixty feet wide for a railroad right of way over" the grantor's land).

Georgia courts also look to the so-called "habendum clause"—which describes the term of a conveyance—to determine whether a grant is limited or

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[3] This statute has been in force since 1821. *See* Ga. Laws 1821, Cobb's 1851 Digest, at 169; *see also* Ga. Code 1863, § 2228; Code 1868, § 2222; Code 1873, § 2248; Code 1882, § 2248; Civil Code 1895, § 3083; Civil Code 1910, § 3659; Code 1933, § 85-503.

conditional, suggesting a lesser estate. *See Lawson v. Georgia Southern & Florida Railway Co.*, 82 S.E.233 (Ga. 1914) (deed with habendum clause including "for railroad purposes only, and for the time that they shall so use it" created an estate conditioned on the railroad's continued use). Courts examine whether the deed contains a warranty clause, which is "potent" evidence of a fee conveyance. *Valdosta*, 150 S.E. at 847. On the other hand, courts look to whether a deed contains any reservations of rights to the grantor, such as the right to cross or cultivate the granted land, which weighs in favor of interpreting the instrument as conveying an easement. *Askew v. Spence*, 79 S.E.2d 531, 532 (Ga. 1954). Finally, courts may look to the amount of consideration recited, although that factor is not treated as dispositive. *Rogers* 54 S.E.2d at 137; *Valdosta*, 150 S.E. at 847.

Examination of extrinsic evidence is improper unless a deed is truly ambiguous, meaning that "an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represent the true intention of the parties." *Turk v. Jeffreys-McElrath Manufacturing Co.*, 60 S.E.2d 166, 168 (Ga. 1950) (quoting *McCann v. Glynn Lumber Co.*, 34 S.E.2d 839, 945 (Ga. 1945)).

Georgia law has no different rule for the interpretation of conveyances to railroads. As with all deeds, an interest transferred to the railroad should be "determined by the terms of the conveyance." *Atlanta, Birmingham & Atlantic Railway Co v. Coffee County*, 110 S.E. 214, 216 (Ga. 1921). This is so even when

the railroad has the power of condemnation, which, under Georgia law, ordinarily results in an easement only. *See id*.[4]

### B. The MG&AR form deeds grant ownership of "land," and no language in the deeds otherwise limit that conveyance to a mere easement.

Most of the parcels for which the CFC awarded compensation were conveyed by MG&AR form deeds with no or minor modifications. The language of these deeds indicates conveyance of fee title. The CFC held, however, that a subset of these form deeds conveyed merely easements based on the modest amounts of consideration recited in those deeds. Appx0008–0012; Appx0028–30.

These deeds take the following form:

> . . . . That the undersigned [Grantor] has bargained, sold, and conveyed to the MIDDLE GEORGIA & ATLANTIC RAILWAY COMPANY . . . the following property: A strip of land situated in the [*X*] of Newton County [*X*] feet wide, the same being [*X*] feet on each side of 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: [*X*]

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[4] The CFC incorrectly implied that there is a rule favoring the interpretation of deeds conveying rail corridors as mere easements. *See* Appx0007–0008. The cases cited contain no such rule. Instead, the "rule" cited in *Descendants of Bulloch, Bussey & Co. v. Fowler*, 475 S.E.2d 587, 589 (Ga. 1996), and *Fambro v. Davis*, 348 S.E.2d 882, 884 (Ga. 1986), is the centerline presumption. That presumption applies to the question of who takes the unencumbered fee to a rail corridor *when a railroad easement e*xpires in the context of ambiguous property boundaries. It has no application to the question of what estate was originally conveyed to the railroad by deed, i.e., easement or fee.

> The Consideration of this Deed is the sum of [*X*] 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 [Grantor] will forever warrant and defend the title hereby conveyed to the said Railroad Company against any and every person whatsoever.

*E.g.*, Appx0521 (photograph); Appx0523 (transcription).[5]

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[5] The MG&AR form deeds at issue in this appeal are those listed in the CFC's initial liability decision at Appx0009–0010 (omitting two that the United States conceded conveyed only an easement), plus one additional deed that the CFC on reconsideration also determined conveyed only an easement, Appx0029–0030. Those deeds are as follows:

- Petty (Appx0473–0478);
- S.G. Morgan (Appx0516–0519);
- A.R. Morgan (Appx0520–0523);
- Rhebergh (Appx0434–0437);
- Robinson & Hardeman (Appx0559–0562);
- John Roquemore (Appx0582–0585);
- J.H. Roquemore (Appx0571–0575);
- Jackson (Appx0545–0548);
- Epps (Appx0524–0527);
- Banks (Appx0499–0502);
- Armstrong (Appx0563–0566);
- A.S. Hays (Appx0549–0553) (the CFC reported that this deed recited no consideration, Appx0009; in fact, the deed reports $5 in consideration);
- W.J. & B.F. Hays (Appx0775–0778);
- Skinner (Appx0662–0665);
- Pitts (Appx0603–0604);
- J.C. Anderson (Appx0755–0761);
- Stanton, Hays & Hays (Appx0689–0694);
- Corley (Appx0704–0706);
- Pace (Appx0715–0721) (the CFC reported that this deed recites $1 in consideration, Appx0009; in fact, the deed variously reports both $225

Some of the form deeds contain minor modifications to the form language, but all contain the operative language discussed below.[6]

Applying settled Georgia law regarding deed interpretation, these deeds plainly conveyed a fee interest. The deeds state that they convey "a strip of land," rather than some other and more limited estate, and such a conveyance is bolstered by a habendum clause that contains no conditions or limitations and a warranty clause that provides compelling evidence of fee conveyance. Moreover, nothing in the deeds defeats the presumption under Georgia law that deeds convey fee unless specifically indicating conveyance of a lesser estate. *See* Ga. Code Ann. § 44-6-21. The CFC erred in concluding that these deeds conveyed a limited estate to the railroad—only an easement—and its

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and $1 in consideration, Appx0721);

- Wright (Appx0724–0727);
- Simms (Appx0728–0731);
- Bagby (Appx0651–0654);
- White (Appx0805–0808);
- Childs (Appx0830–0833);
- Terrell (Appx0834–0835);
- Ozburn (Appx0836–0837);
- J.H. Roquemore (Appx0838–0842); and
- Lee (Appx0744–0751).

[6] For instance, the Petty deed replaces "before the execution of these presents" with "to be paid by said Company to the undersigned before the right to build on said strip is granted." Appx0474; Appx0478. One deed that the CFC considered among the MG&AR "form" deeds—the Stanton, Hays & Hays deed, Appx0689–0694—is not, in fact, an MG&AR form deed. However, because it contains the same operative language as the MG&AR form deed—it conveys "lots or parcels of land," and "a strip of land," in "fee simple," with a warranty clause and no reservation of rights, Appx0694—it is subject to the same analysis discussed in this section.

judgment awarding compensation to Plaintiffs based on that erroneous legal ruling must be reversed.

#### 1. The granting clause, the habendum clause, and the warranty clause of the MG&AR deeds all indicate a fee conveyance.

These form deeds share several features affirmatively demonstrating conveyance of a fee interest.

*First*, the granting clause states that it grants "a strip of land," rather than some other, more limited interest. *Cf.* Appx0694 (Stanton, Hays & Hays deed grants both "lots or parcels of land" and "a strip of land"). Under Georgia law, where the interest conveyed is "land," this weighs in favor of a conveyance of fee title rather than an easement. *See Knight*, 232 S.E.2d at 74 (finding a fee conveyance for a road where deed referred to "land" to be granted); *Rogers*, 54 S.E.2d 136 (finding fee conveyance to railroad where interest was described as "land"); *Valdosta*, 150 S.E. at 847–48 (finding fee conveyance to railroad where deed granted a "strip of land" and distinguishing case involving deed that conveyed a "right of way"); *Holloman*, 147 S.E. at 885 (finding fee conveyance where deed granted "one acre" for specific purpose).

By contrast, deeds granting a "right of way" suggest conveyance of a more limited interest. *See, e.g.*, *Jackson v. Crutchfield*, 191 S.E. 468, 470 (Ga. 1937) (grant of "the right of way over which to pass" conveyed an easement); *Duggan v. Dennard*, 156 S.E. 315, 317 (Ga. 1930) (grant of "all the right" to the "right of way" conveyed an easement); *Coffee County*, 110 S.E. at 216 (grant of

"One hundred feet in width of right of way" created easement). Notably, the form deeds here contain the phrase "right of way"—but only as a description of the intended use, not as a description of the estate conveyed: "A strip of land . . . *for* a right of way" *E.g.*, Appx0523 (emphasis added). *Cf.* Appx0694 (Stanton, Hays & Hays deed contains only a reference to the marking "Right of Way" on a plat). As discussed in greater detail below, under Georgia law, a reference to a "right of way" as the intended use (as in the deeds here) is not the same as the *grant* of a right of way (as in *Crutchfield, Duggan*, or *Coffee County*) and does not limit the estate conveyed. *Valdosta*, 150 S.E. at 847 (holding that the term "right of way" in "a strip of land . . . for a railroad right of way" was descriptive, not interest-limiting); *Holloman*, 147 S.E. at 885 (holding that a statement of intention does not limit the estate conveyed). The CFC's legal conclusion that "a deed that grants a railroad a strip of land as a 'right of way' usually conveys an easement," Appx0010, both confuses the different uses of the phrase "right of way" and relies on a case (*Crutchfield*) involving a deed materially different from those at issue here. *See infra* pp. 25–26 (discussing the phrase "right of way" and *Crutchfield*).

*Second*, the habendum clause conveys this land to the grantee's successors and assigns "forever," without limitation. *Cf.* Appx0694 (Stanton, Hays & Hays deed states that the land is to be held "in FEE SIMPLE"). Accordingly, the habendum clause lacks limiting language in many deeds found to convey a lesser estate, such as "so long as they . . . shall maintain such road." *Tomkins v. Atlantic Coast Line Railroad Co.*, 79 S.E.2d 41, 43 (Ga.

App. 1953); *see also Duggan*, 156 S.E. at 317 (finding conveyance of easement where standard warranty deed language is followed by a qualification of use of the "right of way"); *Lawson*, 82 S.E. 233 (deed with habendum clause including "for railroad purposes only, and for the time that they shall so use it" created an estate conditioned on the railroad's continued use). By contrast, the *unlimited* habendum clause here is further evidence of a fee title conveyance.

*Third*, the deeds contain a warranty clause: that grantor "will forever warrant and defend the title hereby conveyed to the said Railroad Company against any and every person whatsoever." *Cf.* Appx0694 (Stanton, Hays & Hays deed's warranty clause states that grantor "shall and will warrant and forever defend by virtue of these presents"). The Georgia Supreme Court has deemed this "potent" evidence of a fee conveyance. *Valdosta*, 150 S.E. at 847.

*Fourth*, it is a fundamental principle of deed interpretation under Georgia law that "[e]very conveyance, properly executed, must be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance." *Holloman*, 147 S.E. at 885; *accord Knight*, 232 S.E.2d at 74; Ga. Code Ann. § 44-6-21. Here, the granting, habendum, and warranty clauses all weigh in favor of fee conveyance, working with (not against) the general presumption of fee conveyance under Georgia law. As discussed below, no feature of these deeds rebuts that presumption and the clauses supporting its application here.

### 2. The use of the phrase "right of way" is descriptive, and it does not explicitly or implicitly limit the estate conveyed.

As noted above, the form deeds include the words "right of way," but that term describes the land conveyed and not the type of interest granted. The CFC erred in concluding that under Georgia law "a deed that grants a railroad a strip of land as a 'right of way' usually conveys an easement." Appx0010 (citing *Crutchfield*, 191 S.E. at 470). In *Crutchfield*, the granting clause conveyed "the right of way over which to pass," not (as here) a "strip of land." 191 S.E. at 470. Further, as the Georgia Supreme Court explained in *Valdosta*, this phrase may have two different meanings. Sometimes "right of way" describes the *right* or *interest* conveyed, and sometimes "right of way" merely describes the *land*: "a tract of land which the railroad company appropriates to its use and upon which it builds the roadbed or track." 150 S.E. at 847. *Valdosta* involved deeds nearly identical to those at issue here, including a virtually identical granting clause: "A strip of land sixty feet wide for a railroad right of way over" the grantor's land. *Id.* The Georgia Supreme Court deemed this use of the term "right of way" to be merely descriptive, as it did not "define the tenure by which the grantee holds the land conveyed." *Id.; see also Knight*, 232 S.E.2d at 74 (finding a fee conveyance of "so much land as to make a right of way for said road"). The same conclusion is warranted here, where the deeds grant a "strip of land . . . for a right of way of said Railroad."

Moreover, the phrase "for a right of way of said Railroad, or for any other use, in the discretion of said Company," functions as a statement of intention, not a limitation on the interest acquired or condition on its duration. The Georgia Supreme Court has held that the creation of a more limited estate, such as one that reverts to grantor on a condition subsequent, "will not be raised by implication." *Holloman*, 147 S.E. at 885. Instead, "[w]here the grant is for a named purpose only, with no words of reverter or of limitation, such grant is a mere declaration of the purpose to which the land conveyed was intended to be used, and in such a case there is no reversion." *Id.*; *accord Knight*, 232 S.E.2d at 74; *Rogers*, 54 S.E.2d at 137. In the form deeds here, there is no reversionary clause, as there was in many cases finding an easement rather than fee interest. *See, e.g.*, *Tomkins*, 79 S.E.2d at 43 ("to revert to the said party of the first part whenever said road shall be abandoned"); *Askew*, 79 S.E.2d at 532 ("If work is not commenced on said road in two years said property is to revert to party of the first part."); *see generally Knight*, 232 S.E.2d at 74 (listing frequently used words of qualification or condition).

Accordingly, the phrase "right of way" in the MG&AR form deeds does not, as the CFC erroneously concluded, weigh in favor of the conveyance of an easement. This description of the conveyance's purpose is not a limitation of the estate conveyed and does not overcome the presumption under Georgia law in favor of the conveyance of a fee interest.

#### 3. The deeds lack any other specific limitation on the estate conveyed.

The deeds do not contain (and the CFC did not identify) any other limiting language that could rebut the presumption of a fee conveyance here. *See* Ga. Code Ann. § 44-6-21. The absence of express limitations or conditions on the grant is strong evidence of fee conveyance, because a limitation on the estate conveyed cannot be created through implication. *City of Atlanta v. Jones*, 69 S.E. at 572 (holding that if the parties desire a lesser estate or for the fee to be forfeited on breach of some condition, "they should so state").

The CFC erred in relying heavily on *Jackson v. Sorrells*, 92 S.E.2d 513 (Ga. 1956), which the CFC deemed to contain language "nearly identical" to the MG&AR form deeds. Appx0010. In fact, the *Sorrells* deed contained an important difference: specifically carved-out retained rights by the grantor, which suggested conveyance of an easement rather than a fee interest. Although the deed stated that it granted "land . . . forever in fee simple," it also reserved to the grantor "the right to cultivate up to the road bed" and the railroad agreed "to keep up all stock gaps" (i.e., obstacles intended to prevent livestock from passing along a railroad). *Id.* at 513. These rights retained by the grantor of the *Sorrells* deed are inconsistent with the purported grant of fee in the deed's granting clause, and they work to rebut the presumption of a fee conveyance. *See also Crutchfield*, 191 S.E. at 470 (finding an easement conveyance where grantor reserved the right to cultivate the land not actually used by the railroad); *Askew*, 79 S.E.2d at 532 (holding that reservation of "the

right to cultivate so much of said land as does not interfere with its use for railroad purposes" weighed in favor of easement conveyance). But here, none of the MG&AR form deeds at issue contains any such language of reservation. *Sorrells* consequently does not support the CFC's conclusion that those deeds conveyed an easement. The absence of any language in the deeds reserving an interest to the grantor or otherwise limiting the estate conveyed weighs strongly in favor of a fee conveyance.

#### 4. Modest consideration does not outweigh all other aspects of the deed that indicate a fee conveyance.

The CFC also erred by placing excessive weight on the amount of consideration recited in the deeds at issue. Although these deeds recite smaller consideration for the conveyance to the railroad than some of the deeds that the CFC found to convey fee to the railroad, *see* Appx0009–0010 (indicating consideration from $1 to $125 for deeds deemed to convey an easement); Appx0029 (indicating $150 for the Lee deed), that is just one factor among many to be considered in determining the estate transferred; it is not dispositive. *See Valdosta*, 150 S.E. at 847. Where it is potentially the *only* factor that might weigh in favor of an easement conveyance, it is inadequate to rebut the presumption of a fee conveyance.

The CFC relied on three cases for its holding that the deeds here conveyed only easements based on the recited consideration. But in each of these cases, several other factors supported the conclusion that those deeds conveyed less than fee simple. In *Askew*, the deeds contained a right of reverter

if the railroad failed to construct the "road," specifically carved out a right of the grantor to continue cultivating the land not actually needed by the railroad, and contained no warranty. 79 S.E.2d at 531–32. In *Sorrells,* the court found it significant that the grantor reserved "the right to cultivate up to the road bed"—meaning the part of the granted lands not actually used by the railroad—and that the railroad agreed "to keep up all stock gaps." 92 S.E.2d at 514. In *Duggan*, the deed granted a "right of way" (rather than, as here, a "strip of land") and contained specific direction regarding how this "right of way" was "to be used." 156 S.E. at 316–17. This description of the grant as a "'right of way,' and not otherwise," in addition to the "qualification" of the use of that grant, "clearly denotes that it was not the intention of the grantor that his lot of land should be alienated in fee." *Id.* The present case is unlike any of the three case upon which the CFC relied. The form deeds here granted "a strip of land," not a "right of way" limited to a particular use (as in *Duggan*); and the deeds contain no reserved rights for the grantor, no reverter clause, and no affirmative duties placed upon the railroad (as in *Askew* and *Sorrells*).

Further, a small amount of recited consideration does not require an instrument to be interpreted as conveying a mere easement, particularly in the absence of other factors supporting that interpretation. In *Rogers*, for instance, the Georgia Supreme Court concluded that the instrument at issue conveyed to a railroad fee-simple title where it granted "land" and recited nominal ($10) consideration. 54 S.E.2d at 137 (noting also that the deed contains the phrase "for railroad purposes," but declining to interpret that phrase as an express

limitation on the land's use). The court came to the same conclusion in *Woods v. Flanders*, 181 S.E. 83 (Ga. 1935), as to deeds conveying "a strip of land" to a railroad and reciting just $1 in consideration. Accordingly, the consideration recited in the form deeds at issue—ranging from $1 to $150—does not rebut the presumption of fee conveyance, nor does it outweigh the other aspects of the deeds that establish a grant of fee to the railroad.

#### 5. Even if the Lee deed were ambiguous and made in the context of condemnation, that context would still support the conclusion that a fee was granted.

Finally, because the plain language of the MG&AR form deeds is unambiguous for all of the foregoing reasons, there is no occasion for the Court to look to extrinsic evidence to assist in its interpretation of the scope of the grant. *See Turk*, 60 S.E.2d at 168. However, even if the Court looks to the condemnation context of the making of this deed—as the CFC did with regard to the Lee deed, Appx0029—nothing about that context requires a different interpretation of that deed.

Georgia law is clear that the interest transferred to the railroad should be "determined by the terms of the conveyance." *Coffee County*, 110 S.E. at 215. This is so even when the railroad has the power of condemnation, *see id.*, which under Georgia law ordinarily results in the railroad's acquisition of only an easement *where there is no deed*, *see City of Atlanta v. Fulton*, 82 S.E.2d 850, 851–53 (Ga. 1954). In the condemnation context, the landowner may choose not to make a deed and "may stand upon the statutory regulation as to the

extent of the estate acquired by condemnation and the reversion in case of abandonment." *City of Atlanta v. Jones*, 69 S.E. at 572. But if "instead of so doing, [the landowner] makes a deed to the condemnor on account of benefits or advantages which he anticipates will flow to him, the rights of the parties with respect to reversion on abandonment will not be determined solely by the statutory result of condemnation, but by the terms of the conveyance." *Id*. Where a deed exists (as here), that deed defines the estate transferred, and the grantor "cannot complain that he has conveyed a greater estate than the law would have required." *Id.* Accordingly, even if this Court were to consider the condemnation context of the Lee deed, that context has no bearing on the scope of the interest granted to the railroad in the text of that deed.

* * *

For all of these reasons, the Court should reverse the CFC's judgment that the MG&AR form deeds conveyed a mere easement to the railroad. The Court should direct the CFC to enter judgment for the United States as to all of Plaintiffs' claims based on these deeds, as those Plaintiffs hold no cognizable reversionary property interest in land that was conveyed in fee to the railroad.

### C. The County Road 213 deeds also conveyed land in fee to the State of Georgia, separating certain Plaintiffs' land from the railroad corridor.

A very similar analysis applies to the second set of deeds at issue in this appeal—those conveying land to the Georgia State Highway Department for the construction of County Road 213. This highway separates eight parcels at

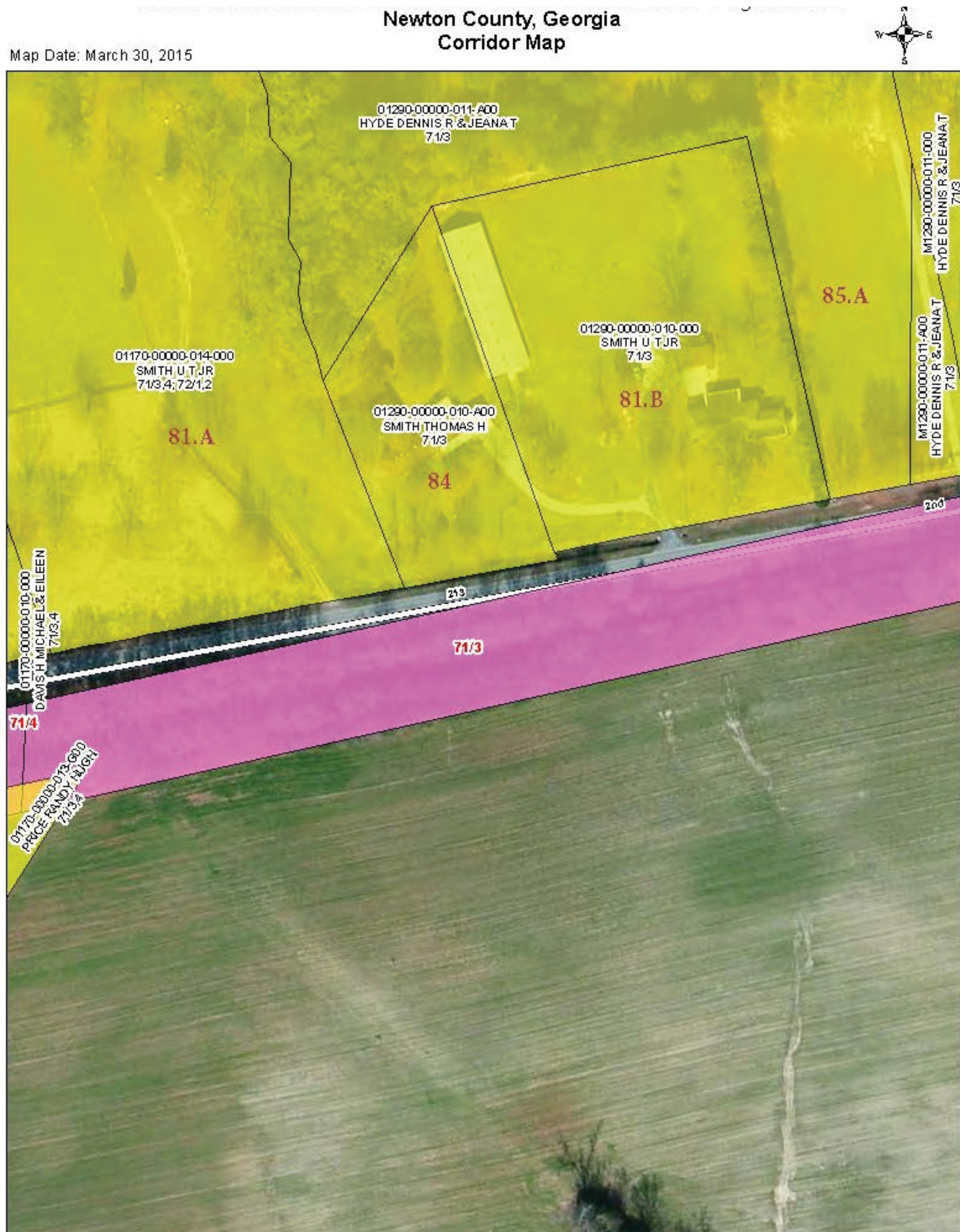
issue from the rail corridor. Determining whether these highway lands were conveyed in fee (rather than as an easement) is necessary to establish whether Plaintiffs who own these eight parcels have a compensable interest in the rail corridor. If the conveyance to the Highway Department was a conveyance of a fee, the adjacent rail corridor easement (assuming arguendo that it is an easement) would not vest upon expiration in the owners of private lands separated by the rail corridor by that County Road 213.[7]

[7] Plaintiffs acknowledge that the following eight parcels owned by these four sets of Plaintiffs are separated from the railroad corridor by County Road 213:

- U.T. Smith, Jr. (claims 81.A, 81.B, 81.C), *see* map at Appx0817–0824;
- Davis Family Revocable Trust (claim 83), *see* Appx0819;
- Thomas H. Smith (claim 84), *see* Appx0818; and
- Dennis R. & Jeana T. Hyde (claims 85.A, 85.B, 85.C), *see* Appx0817–0818).

Appx1132; *see also* Appx0373–0375 (table indicating parcels and Plaintiffs).

Certain of these Plaintiffs have no cognizable property interest in the rail corridor for the independent reason that the railroad owns the rail corridor adjacent to their property in fee. *See*, *e.g.*, Appx0373–0375 (indicating, for certain of these parcels separated from the rail corridor by County Road 213, that the railroad took its relevant interest via the White or Robinson deeds, which, as discussed above (pp.19–31) conveyed fee via MG&AR form deeds).




Map from Appx0818 (depicting a portion of the rail corridor (in pink) that is separated from claimants' parcels (in yellow) by County Road 213)

These County Road 213 deeds read as follows:

> 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 by 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 so much land in Land Lot No. ___ of the ___ Land District or ___ G.M. District of said County as to make a right of way for said road as surveyed and measured. . . .
>
> To have and to hold the said conveyed premises in fee simple.
>
> I hereby warrant that I have the right to sell and convey said land and bind myself, my heirs, executors and administrators forever to defend by virtue of these presents.

*See, e.g.*, Appx1153.[8]

Applying settled Georgia law regarding deed interpretation, these deeds plainly conveyed a fee interest. The deeds are substantially similar to those held to convey fee for a roadway in *Knight*, 232 S.E.2d 72. The deeds state that they convey "land," rather than some other and more limited estate. That conveyance is bolstered (1) by a habendum clause that contains no conditions or limitations and (2) by the absence of any special reservations or limitations that might defeat the presumption under Georgia law that deeds convey fee unless specifically indicating conveyance of a lesser estate. *See* Ga. Code Ann. § 44-6-21. The CFC erred in concluding that these deeds conveyed a mere

[8] The deeds are found at Appx1153–1166. In addition to the language above, some the deeds contain a condition: "In case the right of way is abandoned as a highway location, same shall revert to the property from which it is taken." *See* Appx1154–1157. Most of the County Road Form 213 deeds have deleted this condition. *See* Appx1153; Appx1158–1166.

easement, a conclusion that rests in large part on its mistaken conclusion that *Knight* is distinguishable.

Because the land for County Road 213 was conveyed in fee, Plaintiffs whose lands are separated from the rail corridor by that road have no cognizable property interest in the rail corridor. Thus, the CFC's judgment that the United States has taken these Plaintiffs' property should be reversed.

#### 1. The granting clause and habendum clause of the County Road 213 deeds all indicate conveyance of a fee interest.

As with the MG&AR form deeds, *see supra* pp. 22–24, the County Road 213 deeds expressly convey "land," and not some more limited interest. Where the deed is for a transfer of "land" and not for a "right of way" or "easement," this language weighs strongly in favor of a fee conveyance—even where the deed makes plain that a conveyance is intended for a specific purpose. *See Valdosta*, 150 S.E. at 847–48 (finding a fee conveyance to railroad where deed granted a "strip of land," and distinguishing case involving deed conveying a "right of way"); *Holloman*, 147 S.E. at 885 (finding a fee conveyance where deed granted "one acre" for specific purpose); *Rogers*, 54 S.E.2d 136 (finding a fee conveyance to railroad where interest was described as "land").

In *Knight*, the granting clause—in a very similar deed to the Highway Department for construction of a road—contained the same operative language, granting "so much land as to make a right of way for said road." 232 S.E.2d at 74. The Georgia Supreme Court held that because the deed

"repeatedly refers to the 'land' which is to be granted, and says the grant is in 'fee simple,'" and because the deed lacked any "express terms creat[ing] an estate on condition" or manifest intent "to create a conditional estate," the deed conveyed the land in fee simple. *Id.* at 74. Moreover, the County Road 213 deeds contain a habendum clause indicating that the land is conveyed "in fee simple," without any limitation. *See id.* (holding that deed stating that grant is "fee simple" suggests that the deed indeed conveyed fee simple). The CFC did not even consider the effect of this important phrase. *See* Appx0017.

Accordingly on its face, as in *Knight*, the deed indicates that "land" is transferred "in fee simple." As discussed below, no other language in the deed limits the interest conveyed, and so this affirmative language—in addition to the general presumption of a fee conveyance under Georgia law—controls.

#### 2. The use of the phrase "right of way" is descriptive, and it does not explicitly or implicitly limit the estate conveyed.

As with the MG&AR deeds, *see supra* pp. 25–26, the County Road 213 deeds contain a reference to a "right of way." The context of this phrase—the title "Right of Way Deed" and the grant of "such land . . . as to make a right of way"—indicates that this phrase is merely descriptive of the purpose of the grant. *See Knight*, 232 S.E.2d at 74 (holding that the words "to make a right of way for said road" did not constitute a limited purpose or create a conditional estate). There is no indication that the phrase is meant to limit the scope or duration of the grant. Indeed, as in *Valdosta*, 150 S.E. at 847, where "right of

way" is merely descriptive—as in the grant of a "strip of land sixty feet wide for a railroad right of way over" the grantor's land—that phrase does not "define the tenure by which the grantee holds the land conveyed." *Id.* As discussed above, moreover, such limits must be expressly stated and will not be raised by implication. *Holloman*, 147 S.E. at 885; *Knight*, 232 S.E.2d at 74. Thus, even the title "Right of Way Deed" cannot implicitly limit the estate conveyed where the body of the deed describes the estate as "land," particularly "land" that is being conveyed "in fee simple."

### 3. The deeds lack any other specific language limiting the estate conveyed to a mere easement.

Just as with the MG&AR deeds, *see supra* pp. 27–28, the County Road 213 deeds contain no conditions on the grantee and they lack any specially carved-out rights for the grantor. The absence of such terms distinguishes these deeds from situations in which the Georgia Supreme Court has interpreted conveyance of land for a right of way to be a mere easement. *See Crutchfield*, 191 S.E. at 470 (finding an easement conveyance where grantor reserved the right to cultivate the land not actually used by the railroad); *Askew*, 79 S.E.2d at 532 (holding that reservation of "the right to cultivate so much of said land as does not interfere with its use for railroad purposes" as weighed in favor of easement conveyance); *Sorrells*, 92 S.E.2d at 514 (holding that the reservation to the grantor of "the right to cultivate up to the road bed" and the railroad agreed "to keep up all stock gaps" weighed in favor of easement conveyance). In contrast to each of these cases, there is no language here indicating a

reservation or condition that is inconsistent with a grant of fee simple title to the Highway Department. Accordingly, as in *Knight*, the presumption of a fee conveyance is unrebutted in the absence of any words of qualification, condition, or other limitation. 232 S.E.2d at 74.

Four of the deeds conveying land to the Highway Department contain a reverter clause: "In case the right of way is abandoned as a highway location, same shall revert to the property from which it is taken." Appx1154–1157. This clause creates a fee simple determinable estate. *Georgia, Ashburn, Sylvester & Camilla Railway Co. v. Johnson*, 174 S.E. 2d 895 (Ga. 1970) (deed conveying a strip of land for railway purposes containing a clause that upon the railroad's failure to locate and maintain facilities on the land, "then and in that event the land hereby conveyed shall at once revert to the grantor," created a fee simple determinable estate). This type of instrument conveys an "estate in fee simple" that shall "expire in the future upon occurrence of a stated event." *Restatement (First) of Property* § 44 (1936). Here, Plaintiffs have not argued that the reversion clause in these deeds has ever been triggered; accordingly, the State (or the County) continues to hold a fee interest (subject to possible future reversion) in the lands conveyed by these deeds.

#### 4. Modest consideration does not outweigh all other parts of the deed that indicate a fee conveyance.

In interpreting the County Road 213 deeds as conveying merely an easement, the CFC relied on the minimal consideration recited in the deeds. Appx0017. But such consideration does not trump all other parts of the deed

that indicate transfer of fee title. As discussed in the context of the MG&AR deeds, *see supra* pp. 28–30, modest consideration is not dispositive. *See Valdosta*, 150 S.E. at 847. The Georgia Supreme Court has on numerous occasions found the transfer of fee in the context of minimal consideration. *See Rogers*, 54 S.E.2d at 137 (finding a transfer of fee where consideration was $10); *Woods*, 181 S.E. 83 (same where consideration was $1). Indeed, in *Knight*—involving very similar deeds to here—the court found the conveyance of a fee where the deeds recited only $1 consideration. 232 S.E.2d at 74–75.

#### 5. A Georgia statute regarding state-aid highways does not suggest any different interpretation of the County Road 213 deeds or render *Knight* irrelevant.

Despite the strong language in the deed indicating conveyance of fee simple, the CFC concluded that the County Road 213 deeds must be deemed to convey only an easement because they were made in the context of Georgia's statute regarding Control and Supervision of State-Aid Roads, 1935 Ga. Laws 160 (codified at Ga. Code § 95-1721 (1935)). The CFC interpreted that statute to authorize the State's acquisition of only a "right of way," as opposed to a property interest in fee simple. Appx0016.

The CFC's interpretation is incorrect for two reasons. First, the cited statute does not purport to limit the estate that may be acquired for state-aid roads. Rather, the statute provides that it is the duty of county authorities "to assist in procuring the necessary rights of way as cheaply as possible . . . including the purchase price of any land purchased for a right of way." *Id.* This

provision simply does not address the type of estate acquired, and so it provides no statutory limitation on the state's authority to acquire fee simple interests. Nor, for the same reason, does the provision shed light on the State's intent as the grantee when it obtained such deeds.

Second, the CFC is incorrect that the reference to "right of way" in the statute would suggest conveyance of an easement (if indeed the statute were relevant at all). Appx0016 (citing *Crutchfield*, 191 S.E. at 470). The statute refers to the purchase of "*land* . . . for a right of way" (emphasis added). As discussed above, the grant of "land"—as in the deeds (and statute) here—weighs in favor of a fee conveyance. *Crutchfield* is inapposite: that deed stated that it conveyed a "right of way," not "land," and the deed reserved rights to the grantor that were inconsistent with a fee conveyance. 191 S.E. at 470.

The CFC also erroneously rejected the United States' analogy to *Knight*, which involved virtually identical deeds and held that a deed for "land" for a "right of way for said road" conveyed "in fee simple" was indeed a grant of land in fee simple. The CFC reasoned that the road at issue in *Knight* was a limited-access highway (built pursuant to a Georgia statute requiring the State government to acquire property rights in fee simple), as opposed to a state-aid road (which, as discussed above, the CFC incorrectly interpreted to require an easement-only acquisition). In addition to the above-discussed problems with the CFC's interpretation, the CFC's approach to this issue is fundamentally incorrect. As *Knight* explains, the deed itself determines the "estate . . . actually conveyed"; the intent of the parties—evidenced, in part, by a relevant statute—

is one piece of evidence, but the instrument's language is paramount. 232 S.E.2d at 73–74; *see also Coffee County*, 110 S.E. 215 (the estate conveyed should be "determined by the terms of the conveyance," regardless of the context of that conveyance). The Georgia Supreme Court's determination that the deed in *Knight* conveyed a fee was not based on the limited-access nature of the roadway, but rather on the text of the instrument effecting the conveyance. There is no basis for distinguishing *Knight* on these (or any other) grounds.

* * *

For all of these reasons, the Court should reverse the CFC's judgment that the County Road 213 deeds conveyed a mere easement to the State of Georgia. Because these deeds conveyed a fee interest to the State, certain of Plaintiffs' parcels are not actually adjacent to the rail corridor, and they accordingly have no interest to the centerline of the corridor under state law as they have claimed. *See* Appx1132 n.5 (conceding this point if the land had been transferred in fee). The Court should direct the CFC to enter judgment for the United States as to all Plaintiffs whose claim to the rail corridor is based on parcels that are separated from the corridor by County Road 213.

## II. The United States cannot be liable for a taking of land that was never affected by the NITU.

This lawsuit involves a number of Plaintiffs who claim an interest in land that is east of the eastern terminus (milepost E65.80) of the 14.9-section of rail corridor that was converted to interim trail use.[9] This land was never subject to

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[9] These Plaintiffs whose lands are at least partially east of milepost E65.80 are:

railbanking and interim trail use, and thus no permanent physical taking from trail conversion arose, as in *Preseault II*, 100 F.3d 1525. However, Plaintiffs insist—and the CFC held, Appx0022–0023; Appx0038–0039—that their property was nonetheless physically taken by the United States during the pendency of the NITU because Plaintiffs apparently believed, based on an erroneous parenthetical in the railroad's notice of exemption and the resulting NITU, that their property was within the corridor to be abandoned.

Although Plaintiffs may have been genuinely confused, confusion is not enough to establish a taking here. The milepost numbers indicate the extent of

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- Beaver Manufacturing Co. (claim 91.E), *see* maps at Appx0847, Appx0595, Appx0608;
- Margaret Harker (claim 100), *see* Appx0847;
- Hy-Line Indian River Co. (claims 101.A and 101.B), *see* Appx0847, Appx0595;
- Global Signal Acquisitions IV, LLC (claim 102), *see* Appx0595;
- George Randall Haymons & Robert Gary Rolander (claim 103.A), *see* Appx0608;
- George Randall Haymons (claim 103.B), *see* Appx0606–0608;
- Charles E. Kirkland (claim 104), *see* Appx0607–0608;
- Harry & Mary S. Hardeman (claim 105), *see* Appx0607;
- James Jackson (claim 106), *see* Appx0607;
- Philip G. Downs (claim 107), *see* Appx0605; and
- Geneva Hart, et al. (claim 109), *see* Appx0606.

*See generally* Appx0356–0357, 0379–0380.

Certain of these Plaintiffs have no cognizable property interest in the rail corridor for the independent reason that the railroad owns the rail corridor adjacent to their property in fee. *See*, *e.g*. Appx0356–0357, Appx0380 (claims of Plaintiffs Kirkland, Hardeman, Downs, Haymons, Jackson, and Hart based on property beyond milepost E65.8 where the railroad took its relevant interest via the Pitts deed, which, as discussed above (pp. 19–31) conveyed fee via a MG&AR form deed).

the NITU, and uncontroverted evidence confirms that the railroad never intended to abandon the portion of the line east of milepost E65.80. The NITU had no effect whatsoever on properties beyond that terminus. Thus, Plaintiffs who own property east of the NITU's endpoint are not entitled compensation for a physical taking.

### A. The NITU never extended east of milepost E65.80, the endpoint of the line to be abandoned.

The plain language of the 2013 NITU supports the government's interpretation that the NITU covered lands only between mileposts E65.80 and E80.70, and that the NITU therefore could not have affected properties outside those endpoints.

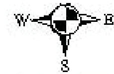
Although the 2013 NITU contained an erroneous description of the location of milepost E65.80—i.e., "the point of the line's crossing of Route 229 in Newborn"—that parenthetical description does not "overcome the explicit milepost reference[]" in the document, which plainly indicates the intended endpoint. *Montezuma Grain Co. v. STB*, 339 F.3d 535, 540–41 (7th Cir. 2003). Indeed, in *Montezuma*, the Seventh Circuit held that the STB reasonably concluded that the recitation of an accurate milepost reference and the correct total mileage to be abandoned gave adequate notice of the section of rail line intended to be abandoned, even in the context of an inaccurate map and letters that evinced a mistaken belief about the location of one milepost. Here, too, the railroad plainly stated the endpoint of the portion of the rail line that it sought authority to abandon in its notice of intent of exemption (and the NITU

consequently so stated as well)—"milepost E 65.80"—and the erroneous parenthetical indication of the *location* of that endpoint does not trump or alter that endpoint. Appx0108; Appx0173.

Moreover, the description of E65.80's location was not only erroneous, it was meaningless: the rail line in fact does not (as the parenthetical description suggests) cross Route 229. Accordingly, the parenthetical reference to "the point of the line's crossing of Route 229 in Newborn" was effectively a nullity and a harmless scrivener's error. *Cf. Ruffin v. United States*, 509 F. App'x 978, 980 (Fed. Cir. 2013) (holding that in a military discharge proceeding, where a cover memorandum referred to the plaintiff's being processed for "mandatory administrative separation for misconduct," when the plaintiff was subject to a different process and did not qualify for the mandatory process, such reference was a harmless scrivener's error). This factually inaccurate description could not have created a genuine ambiguity because it referred to a location that does not exist.

It appears that Plaintiffs assumed that the NITU extended to the rail line's crossing of a *different* road from the one referenced in the NITU's parenthetical—Georgia Highway 142/County Road 213. *See* Appx0388 (map indicating the length of the corridor under the NITU, from milepost E80.70 to milepost E65.80), *reproduced infra* p. 45; Appx0389 (showing some claimants' parcels along a section of corridor that is east of milepost E65.80, extending east to near Highway 142), *reproduced infra* p. 46; Appx0921 (depicting overlay of railroad map on current street map); Appx0383–0385, Appx0919–0920

Newton County, Georgia
NITU Overview Map




Map Date: May 15, 2015

Walton County

MP 80.7

Newton County

MP 65.80

Jasper County

Milepost (from Valuation Maps)

Claimant Parcels

NITU

Map from Appx3088.

Newton County, Georgia
NITU Overview Map

Map Date: May 15, 2015

Milepost (from Valuation Maps)
Claimant Parcels
Val Parcels

Map from Appx0389.

(describing the process of creating these maps).[10] But that assumption is not reasonable, given that the parenthetical on which it is based is patently inaccurate. As the Seventh Circuit observed in *Montezuma*, if Plaintiffs were "unsure as to the location of the west terminus, they could have conducted their own investigation." 339 F.3d at 541. Any such investigation would have clarified the location of the milepost that was the NITU's terminus. *See* Appx0383–0385; Appx0388; Appx0389.

For these reasons, the NITU's geographic extent was clear from its identification of milepost E65.80 as its eastern terminus, and the erroneous (and impossible) reference to the location of that terminus did not extend the NITU's application beyond its clear scope.

**B. Testimony and evidence confirm that the railroad never intended to abandon the portion of its line to the east of milepost 65.80.**

The eastern terminus of the 2013 NITU can be determined from its text alone. But if the Court determines that the NITU is ambiguous, testimony and evidence developed in the CFC confirm that the railroad never intended to abandon the section of rail line to the east of milepost E65.80.

CGA itself confirmed that it actively leases the rail line east of milepost E65.80 and that it has not abandoned and does not intend to abandon the rail line between milepost E53.3 at Machen and milepost E65.80 at Newborn.

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[10] These maps do not depict all Plaintiffs' parcels, but they are illustrative of the location of the NITU-covered corridor versus the location of claimants' parcels beyond the corridor's eastern terminus.

Appx1669; Appx1671–1672; Appx1674–1675. For this reason alone, Plaintiffs are not entitled to any compensation for an alleged taking based on the theory that the NITU somehow thwarted CGA's intended abandonment of its rail line to the east of milepost E65.80, as CGA lacked any such intent.

Moreover, CGA's definitive statement that it never intended to abandon this section of rail line is supported by its actions around the time of the 2013 NITU and the actions of the current operator of the rail line east of milepost E65.80. In 2009, CGA (the rail line's owner) entered into a lease with Squaw Creek Southern Railroad for the section of the line extending east from the eastern terminus of the NITU at issue in this case: a section approximately 12.5 miles "between milepost E-53.3 at Machen, Jasper County, GA, and milepost E-65.8 at Newborn, Newton County, GA." 74 Fed. Reg. 47,855, 74,856 (Sept. 17, 2009); Appx1670; Appx1672. In 2013, CGA released Squaw Creek Southern Railroad from its lease obligations and entered into a new lease through 2023 with a different operator, CaterParrott Railnet ("CaterParrott"). Appx1641; Appx1643; Appx1670; Appx1672. Both CaterParrott and CGA identified the location of milepost E65.80 as being near Ziegler Road. Appx1642; Appx1650–1651; Appx1657; Appx1664; Appx1672–1675; Appx1739; Appx1755.

In December 2013, CaterParrott received the STB's approval to begin operations on the rail line between milepost E53.3 and E65.80; it began operations around January 1, 2014. 78 Fed. Reg. 75,959 (Dec. 13, 2013); Appx1640–1643; Appx1672. Since that time, CaterParrott has worked to

recruit new customers on the line and has spent more than $500,000 to improve and clear the right-of-way. Appx1644–1645. As of its deposition in 2017, CaterParrott was "aggressively working" to improve the track on this section of line so that it could be used, Appx1644, including by working with the City of Newborn to remove asphalt paving from crossings and by operating large maintenance vehicles on the corridor, Appx1643–1645.

Accordingly, no evidence supports Plaintiffs' contention that, but for the NITU, the railroad would have abandoned the line east of milepost E65.80. The evidence establishes the opposite: CGA did not intend to abandon the rail line east of this terminus, as that line was leased to another railroad company that was actively working to run trains on this section of rail line.

### C. In the absence of the railroad's intent to abandon, the NITU cannot have prevented abandonment and therefore did not constitute a physical taking.

Because the 2013 NITU never extended beyond the actual location of milepost E65.80, Plaintiffs whose property lies beyond this terminus have not been affected by any government action that could constitute a physical taking of their property. Put another way, they have no cognizable property interest in land affected by the NITU or railbanking.

For one thing, this Court has expressed doubt whether a NITU alone, in the absence of rail-to-trail conversion and railbanking, may constitute a physical taking. *See Caquelin v. United States*, 697 F. App'x 1016, 1019–20 (Fed. Cir. 2017) (noting that "En banc review may be warranted" to address

questions raised about *Ladd*, 630 F.3d 1015, and remanding for further proceedings before "further consideration of what the proper takings framework is" for NITU-only takings claims). Indeed, as the United States argues in *Caquelin v. United States* (No. 19-1385), currently pending in this Court after its remand to the CFC, a NITU merely provides time for a railroad and a potential trail operator to enter into voluntary negotiations for potential railbanking/interim trail use. *See City of Fishers*, Docket No. FD 36137, 2019 WL 3493988, at *5 (STB served July 31, 2019). Thus, a NITU is simply one step in the STB's regulatory abandonment process and does not constitute a physical occupation, invasion, or seizure that could constitute a physical taking.

A NITU does not on its own effect railbanking or interim trail use—the activities that were found to constitute a taking in *Preseault II*, 100 F.3d at 1550. Instead, railbanking, interim trail use, and Section 8(d) of the Trails Act (which prevents railbanking as being treated as an abandonment of the railroad's easement under state law) are triggered only if a railroad and a trail operator reach a qualifying trail agreement and so notify the STB. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(h). In the absence of such an agreement for the section of the corridor east of milepost E65.80, Section 8(d) was never triggered for this section of right-of-way, the corridor was never authorized to be converted to trail use, and neither the railroad's easement nor any reversionary interest of Plaintiffs who reside along this section was affected in any way.

In any event, *Ladd*'s holding that a bare NITU may constitute a physical taking of a landowner's reversionary interest does not require the absurd conclusion that a physical taking occurred with respect to the rail line east of milepost E65.80. *Ladd* held that the NITU itself had "blocked" the railroad's abandonment and thus blocked state-law reversionary property interests. 630 F.3d at 1023. Even if that were true in *Ladd*, it is demonstrably false here. CGA and its lessee have unequivocally stated that they had no intent to abandon the section of rail line east of milepost E65.80. More specifically, CGA stated that it did not intend to begin that process for any part of the line east of milepost E65.80, and it did not intend to consummate abandonment for that part of the line. Appx1669; Appx1671–1672; Appx1674–1675.

This stated intent is confirmed by CGA's actions. As discussed above, during the same timeframe during which it began the abandonment process for the section of line between milepost E65.80 and E80.70, CGA was negotiating a lease to CaterParrott for the section of line between E53.3 and E65.80, i.e., for a section of rail line immediately east of milepost E65.80. CGA thus evinced an affirmative intent *not* to abandon this section of line. *Cf. Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996) ("relinquishment of control over the right-of-way" is a concrete action that may indicate intent to abandon). Because CGA had leased the section of its line east of milepost E65.80 to CaterParrott, it could not have transferred this section of corridor to a trail operator for rail-to-trail conversion in any event. Further, CGA never filed a notice of consummation, which would have definitively signified its intent to abandon

this part of the line and remove it from the national rail transportation system. 49 C.F.R. § 1152.29(e)(2).

In short, Plaintiffs' reversionary property interest (if indeed they had an interest in the corridor at all) was entirely contingent on the railroad's voluntary decision to not just start the abandonment process, but also to consummate that abandonment, which would terminate STB jurisdiction. *See* 49 C.F.R. § 1152.24(e)(2); *Baros*, 400 F.3d at 235–36; 49 C.F.R. § 1152.24(e)(2); *cf. id.* § 1152.29(e)(2) (only definitive way to abandon a rail line under the STB's jurisdiction is to file a notice of consummation with the STB). Here, CGA did not even take the first step to begin the abandonment process for the section of the line beyond milepost E65.80. The NITU never encompassed those Plaintiffs' properties and could never have resulted in rail-to-trail conversion. In other words, east of this milepost, there was no intent to abandon, no abandonment in law or fact, and thus no potential reversion of state law property interests for the NITU to block. Accordingly, these Plaintiffs cannot carry their "burden of proof to establish that the government action caused" any injury. *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019). Indeed, it is plain that "what would have occurred" absent the NITU is no different from what *did* occur here for the section of rail corridor east of milepost E65.80—the continued existence of a rail line under STB jurisdiction. *Id.* (quoting *United States v. Archer*, 241 U.S. 119, 132 (1916)).

Finally, the CFC erroneously ruled that the 2016 NITU could prevent 2013 NITU from constituting a taking only if the 2016 NITU had retroactive effect. Appx0039–0040. That approach is wrong. Although the corrected 2016 NITU clarified the erroneous parenthetical about the location of milepost E65.80, it did not alter the actual endpoint of the covered section of corridor. As established by the text of the railroad's notice and the NITU that followed, and as confirmed by evidence of CGA's intent and its actions on the ground, that section of corridor always terminated at milepost E65.80.

* * *

In sum, the NITU cannot have caused a physical taking of any property beyond the actual location of milepost E65.80.

**CONCLUSION**

For the foregoing reasons, the judgment of the Court of Federal Claims should be reversed.

Respectfully submitted,

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U.S. Department of Justice

August 20, 2019
90-1-23-14192

# DECISIONS OF COURT OF FEDERAL CLAIMS

# In the United States Court of Federal Claims

No. 14-388L
(Filed: May 4, 2016)

| | |
|---|---|
| WILLIAM C. HARDY & BERTIE ANN HARDY et al., Plaintiffs, v. THE UNITED STATES, Defendant. | Rails-to-Trails; Fifth Amendment Taking; NITU; Easement; Fee Simple; Strip of Land; Right-of-Way; Railroad Purposes; Deed; Conveying Easements Under Georgia Law; Scope of Easement; Parcel of Land |

Elizabeth A. Gepford McCulley, Kansas City, MO, for plaintiffs.

Stephen Finn, United States Department of Justice, Washington, DC, for defendant.

**OPINION AND ORDER**

**SWEENEY**, Judge

In this Rails-to-Trails class action, 112 plaintiffs contend that they own real property adjacent to a railroad corridor in Newton County, Georgia. They assert that until 2013, defendant, the United States, held easements for railroad purposes that crossed their land. According to plaintiffs, defendant then authorized the conversion of the railroad rights-of-way to recreational trails pursuant to the National Trail Systems Act ("Trails Act"), conduct that resulted in a taking that violated the Just Compensation Clause of the Fifth Amendment to the United States Constitution. Plaintiffs move for partial summary judgment on the issue of liability. Defendant cross-moves for partial summary judgment regarding the parcels of land identified in plaintiffs' motion, and also with respect to additional parcels that defendant identifies. For the reasons set forth below, the court grants in part and denies in part the parties' motions.

## I. BACKGROUND

### A. Statutory and Regulatory Context

During the last century, the United States began to experience a sharp reduction in rail trackage. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 5 (1990) ("Preseault I"). To remedy this problem, Congress enacted a number of statutes, including the Trails Act, 16 U.S.C. §§ 1241-1251 (2012). The Trails Act, as amended, provides for the preservation of "established

railroad rights-of-way for future reactivation of rail service" by authorizing the interim use of such rights-of-way as recreational and historical trails. Id. § 1247(d). This process is referred to as "railbanking," and is overseen by the Surface Transportation Board ("STB"), id., the federal agency with the exclusive jurisdiction to regulate "the construction, acquisition, operation, abandonment, or discontinuance" of most railroad lines in the United States, 49 U.S.C. § 10501(b) (2012).

Before railbanking can occur, the railroad company must seek to abandon its line, either by initiating abandonment proceedings with the STB pursuant to 49 U.S.C. § 10903, or by requesting that the STB exempt it from such proceedings pursuant to 49 U.S.C. § 10502. When considering the railroad company's abandonment application or exemption request, the STB will entertain protests and comments from interested third parties. 49 C.F.R. §§ 1152.25, 1152.29(a) (2010). These third parties may submit requests for the interim use of the railroad line as a trail pursuant to 16 U.S.C. § 1247(d) and make offers of financial assistance pursuant to 49 U.S.C. § 10904. Id.

If an interested third party submits a trail use request to the STB that satisfies the requirements of 16 U.S.C. § 1247(d), the STB must then make the necessary findings pursuant to 49 U.S.C. § 10502(a) or 49 U.S.C. §10903(d). Once the railroad company agrees to negotiate a trail use agreement, the STB will issue one of two documents: if the railroad company initiated abandonment proceedings, the STB will issue a Certificate of Interim Trail Use or Abandonment; if the railroad company sought an exemption, the STB will issue a Notice of Interim Trail Use or Abandonment ("NITU"). Id. § 1152.29(b)-(d). The effect of both documents is the same: to "permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking . . . ; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions . . . ." Id. § 1152.29(d)(1); accord id. § 1152.29(c)(1). The STB will entertain requests to extend the 180-day deadline to enable further negotiations. If the railroad company and the interested third party execute a trail use agreement, then abandonment of the railroad line is stayed for the duration of the agreement. Id. § 1152.29(c)-(d); 16 U.S.C. § 1247(d). If no trail use agreement is executed, the railroad company is permitted to fully abandon the line. 49 C.F.R. § 1152.29(c)-(d). To exercise its abandonment authority, the railroad company must "file a notice of consummation with the STB to signify that it has . . . fully abandoned the line" within one year of "the service date of the decision permitting the abandonment . . . ." Id. § 1152.29(e)(2). In the absence of a timely filed notice of consummation, the railroad company's authority to abandon the line automatically expires. Id.

If efforts to execute a trail use agreement are unsuccessful, and the railroad company notifies the STB that it has fully abandoned the line, the STB is divested of jurisdiction over the abandoned railroad line and "state law reversionary property interests, if any, take effect." Caldwell v. United States, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004).

**B. The Initial Acquisition of the Land in Question**

As explained above, plaintiffs are 112 individuals who collectively own 173 parcels of land adjacent to a railroad corridor in Newton County, Georgia. The disputed land is situated

between milepost E 65.80 (at the point of the railroad line crossing Route 229 in Newborn, Georgia) and milepost E 80.70 (near the intersection of Washington Street, SW, and Turner Lake Road, SW, in Covington, Georgia), a distance of 14.9 miles. The alleged easements were acquired by the Middle Georgia & Atlantic Railway Company ("MG&AR"). In 1896, the Central of Georgia Railway Company ("CGA") bought MG&AR. CGA subsequently extended the railroad line to Porterdale, Georgia. In 1963, CGA was bought by Southern Railway Company, which merged CGA with two other railroad companies to form the modern-day CGA. CGA is currently a wholly owned subsidiary of the Norfolk Southern Railway Company ("NSRC").

When MG&AR acquired rights to the land upon which the railroad was built, it did so through a combination of standard form deeds and condemnation. CGA, as the successor-in-interest to MG&AR, assumed these rights over the rail corridor. Subsequently, when CGA extended the railroad line, it obtained property rights over the expanded corridor through standard form deeds that were different from those used by MG&AR. Most of the deeds vary with respect to specific details, including the size of the parcel and the consideration given. All of the deeds in question are dated between 1889 and 1927.

### C. Proceedings Before the STB

More recently, CGA decided that it no longer needed the railroad lines that traverse the parcels of land at issue in this case. Thus, on July 1, 2013, it submitted to the STB a notice of exemption from formal abandonment proceedings. The petition referenced the land described above. The Newton County Trail Path Foundation ("Foundation"), an interested third party, sought to prevent abandonment. It filed a petition with the STB on July 26, 2013, indicating that it was interested in negotiating a trail use agreement with the NSRC. The NSRC replied that it was willing to negotiate with the Foundation. On August 19, 2013, the STB issued a NITU, which provided 180 days, or until February 15, 2014, for negotiations. Since that date, the Foundation has requested extensions to continue and complete negotiations. The most recent request states that CGA and the Foundation "have been negotiating a trail use Agreement but need additional time to continue and complete negotiations." Parties' Joint Notice, Docket No. 75, Ex. 1. The STB approved this request and extended the NITU deadline to August 3, 2016.

### D. Procedural History

On May 6, 2014, William C. Hardy, for himself and as representative of a class of similarly situated individuals, filed a complaint in this court alleging a Fifth Amendment taking. Plaintiffs have amended their complaint twice. In the second amended complaint, Mr. Hardy and the other 111 plaintiffs continue to assert, as their sole claim for relief, a Fifth Amendment taking. Plaintiffs filed a motion for partial summary judgment on the issue of liability with respect to 101 of their parcels. Defendant cross-moved for partial summary judgment on those same 101 parcels, as well as an additional 50 parcels. The motions are fully briefed, and the court heard argument on October 28, 2015. Because of a factual dispute and legal argument that arose at oral argument that precluded a merits ruling, the court ordered supplemental briefing which is now complete.

## II. DISCUSSION

### A. Legal Standards

#### 1. Summary Judgment

Both plaintiffs and defendant move for summary judgment on the issue of liability pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

#### 2. Fifth Amendment Takings and the Trails Act

As noted above, the sole claim for relief in plaintiffs' second amended complaint is a Fifth Amendment taking. The Fifth Amendment prohibits the federal government from taking private property for public use without paying just compensation. U.S. Const. amend. V. The United States Court of Federal Claims possesses jurisdiction to entertain Fifth Amendment takings claims against the United States, 28 U.S.C. § 1491(a)(1) (2012); Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004), such as claims premised upon the conversion of a railroad right-of-way into a recreational trail pursuant to the Trails Act, Preseault I, 494 U.S. at 12-13.

To establish a taking, a plaintiff must first "identif[y] a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1348 (Fed. Cir. 2013). In determining whether a plaintiff has demonstrated the existence of a valid property interest in a Trails Act case, the court considers:

> (1) who owned the strips 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 public recreational trails; 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.

Preseault v. United States, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc) ("Preseault II"). Then, "if the court concludes that a cognizable property interest exists, it determines whether the government's action amounted to a compensable taking of that interest." Casitas Mun. Water Dist., 708 F.3d at 1348. In Trails Act cases, a taking occurs when "government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." Ladd v. United States, 630 F.3d 1015, 1019 (Fed. Cir. 2010). It is well settled that the STB's issuance of "[t]he NITU is the government action that prevents the landowners from possession of their property unencumbered

by the easement." Id.; accord Barclay v. United States, 443 F.3d 1368, 1374 (Fed. Cir. 2006); Caldwell, 391 F.3d at 1233-34.

**B. The Parties' Arguments**

Plaintiffs allege that they collectively own 173 parcels of land in the subject area, and move for partial summary judgment with respect to 101 of those parcels. Plaintiffs contend that they own the disputed property in fee simple, and that the railroad acquired easements limited to railroad purposes. Accordingly, plaintiffs assert that the issuance of the NITU authorizing the conversion of the railroad line for use as a public recreational trail under the Trails Act exceeded the scope of the easement and thus constituted a taking that requires just compensation.

Defendant cross-moves for partial summary judgment on those same 101 parcels of land, as well as on an additional 50 parcels. Defendant advances the following arguments in its cross-motion to explain why no taking has occurred: (1) for those parcels burdened by a strip of land acquired by CGA in fee simple, plaintiffs lack the requisite ownership interest needed to assert a taking; (2) for those plaintiffs whose land does not adjoin the rail corridor due to an intervening public road, plaintiffs have no claim; (3) for plaintiff whose parcel is burdened by a strip of land acquired by the railroad through adverse possession and held by the railroad in fee simple, plaintiff lacks the requisite ownership interest needed to assert a taking; (4) for plaintiffs whose parcels are burdened by railroad easements sufficiently broad to encompass future trail use, plaintiffs are precluded from establishing a taking; and (5) for plaintiffs whose parcels are burdened by railroad easements limited to railroad purposes, no taking has occurred because the railroad has not abandoned the rail line and extinguished its easements.

Plaintiffs dispute all of defendant's arguments. First, plaintiffs assert that the railroad's easements are limited to railroad purposes. Second, with respect to the parcels of land with intervening roads, which are themselves easements, plaintiffs contend that own to the centerline of the rail corridor. Third, with respect to the parcel of land for which there is no deed, plaintiffs concede that the railroad adversely possessed it, but assert that the railroad only possesses an easement, not ownership in fee simple. Finally, plaintiffs argue that the issuance of a NITU results in a taking. Thus, plaintiffs assert, whether or not the railroad abandoned the rail line is immaterial to the court's takings analysis.

**C. Analysis**

**1. Interpretation of Railroad Right-of-Way Deeds Under Georgia Law**

The parties' first dispute concerns the nature of the property interests acquired by CGA and its predecessors. Plaintiffs assert that the deeds conveyed easements, while defendant contends that many of the deeds conveyed property in fee simple. Under Georgia law,

> [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.

Ga. Code Ann. § 1689 (1882). Further, Georgia law provides 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." Ga. Code Ann. § 5233 (1910).

To determine the nature of the property interests at issue, "the controlling question is whether the instruments upon which the plaintiff bases his claim of title convey the title to the lands therein referred to, or merely an easement for railroad purposes." Askew v. Spence, 79 S.E.2d 531, 531 (Ga. 1954). When reviewing these deeds, the court must examine them in light of the common law and the law of Georgia at the time that they were executed. Preseault II, 100 F.3d at 1534. With respect to such deeds:

> [T]he crucial test in determining whether a conveyance grants an easement in, or conveys title to, land, is the intention of the parties, but in arriving at the intention many elements enter into the question. The whole deed or instrument must be looked to, and not merely disjointed parts of it. The recitals in the deed, the contract, the subject-matter, the object, purposes, and nature of the restrictions or limitations, if any, or the absence of such, and the attendant facts and circumstances of the parties at the time of the making of the conveyance are all to be considered. [OCGA § 44-5-34].

Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 538 S.E.2d 107, 108 (Ga. 2000) (citing Jackson v. Rogers, 205 Ga. 581, 586-87 (1949)).

Although the deed must be examined as a whole to determine what type of property interest was conveyed, certain aspects of a deed carry significant weight. According to the Supreme Court of Georgia, a deed that grants a railroad a strip of land as a "right-of-way" over the surrounding land typically conveys an easement, such that the railroad is given a right to pass over and use the land, instead of to the land, itself. See Jackson v. Crutchfield, 191 S.E. 468, 470 (Ga. 1937) (holding that a deed that granted "right-of-way over which to pass" conveyed an easement). In addition, the presence of a reservation in a deed, such as a conveyor's right to cultivate the land up to the right-of-way, offers proof of intent to convey an easement. Jackson v. Sorrells, 92 S.E. 513, 514 (Ga. 1956) (holding that a deed that reserved the conveyor's right to "cultivate up to [the] road bed" constituted an easement); accord Safeco Title Ins. Co. v. Citizens & S. Nat'l Bank, 380 S.E.2d 477, 479 (Ga. 1989).

Moreover, the presence of a qualification, or a stipulation specifying that the property will be used "for railroad purposes," signals that the deed conveys an easement. Askew, 79 S.E.2d at 532; see also Crutchfield, 191 S.E. at 470; Rogers v. Pitchford, 184 S.E. 623, 624 (Ga. 1936); Duggan v. Dennard, 156 S.E. 315, 317 (Ga. 1930). A deed may further indicate that the

land is "to be used" "as [the railroad] may deem proper in the construction and equipment of [a] railroad . . . and for all other purposes." Duggan, 156 S.E. at 317. Because the deed stipulates that the property must be used for a particular purpose, it "clearly denotes that it was not the intention of the grantor that his lot of land should be alienated in fee." Id. In such cases, the words "'for all other purposes,' construed with its associate language," refer only to purposes related to building and using the railroad. Id.

In addition, the amount of consideration is a factor. For example, if the consideration set forth in a railroad right-of-way deed is relatively low, it is likely that the deed conveyed only an easement, and not fee simple title. See id.; Pitchford, 184 S.E. at 624. Deeds conveying property to a railroad for "nominal consideration" generally convey only easements. Sorrells, 92 S.E.2d at 514. By contrast, a large amount of consideration given is typically indicative of an intent to convey a property interest in fee simple. Johnson v. Valdosta, 150 S.E. 845, 847 (1929).

On the other hand, the presence of a "warranty clause" in a railroad right-of-way deed may weigh in favor of determining that the land was conveyed in fee simple. Id. at 847. For example, the grantor may "stipulate[] to warrant the title to the tract or parcel of land conveyed, and [to] defend the title against the claims of all persons whatsoever, unto the railroad company, its successors and assigns, forever in fee simple." Id. Further, the presence of the term "forever in fee simple," on its own, does not necessarily indicate that title was actually conveyed in fee simple. See Sorrells, 92 S.E.2d at 513; Valdosta, 150 S.E. at 847 (noting that "the words . . . 'forever in fee simple' do not demand the construction that this deed conveys title to this land, and not a mere easement therein"); Atlanta B. & A. Ry. Co. v. Coffee Cty., 110 S.E. 214, 215 (Ga. 1921) (determining that the words "fee simple" did not describe the interest conveyed, but were only "descriptive of the extent of duration and enjoyment of the easement"). By itself, the phrase "forever in fee simple" has played little role in ascertaining whether an interest in fee simple or an easement was conveyed. However, when this phrase and a warranty clause are present "in connection with" other factors, including the payment of substantial consideration, then the combination of the phrase "fee simple forever" and the warranty clause are "potent . . . in inducing [the court] to hold" that the deed conveyed fee simple. Valdosta, 150 S.E. at 847.

Finally, in construing deeds purporting to convey property interests to a railroad company, courts must be cognizant that:

> "It is favorable to the general public interest that the fee in all roads should be vested either exclusively in the owner of the adjacent land on one side of the road, or in him as to one half of the road, and as to the other half, in the proprietor of the land on the opposite side of the road. This is much better than that the fee in long and narrow strips or gores of land scattered all over the country and occupied or intended to be occupied by roads, should belong to persons other than the adjacent owners. In the main, the fee of such property under such detached ownership would be and forever continue unproductive and valueless."

Fambro v. Davis, 348 S.E.2d 882, 884 (Ga. 1986) (quoting Johnson v. Arnold, 91 Ga. 659, 666-67 (1893)). Indeed, the Supreme Court of Georgia has specifically held:

> The rule avoids the undesirable result of having long, narrow strips of land owned by people other than the adjacent landowner. Pindar asserts that this rule of construction also should govern the construction of deeds that designate a railroad right-of-way as a boundary. This Court has, in fact, already applied it to language in a will to determine title to an abandoned railroad right-of-way. We now adopt this rule for use in construing deeds that have as a boundary a railroad right-of-way.

Descendants of Bulloch, 475 S.E.2d 587, 589 (Ga. 1996). Having set forth the relevant rules of deed construction, the court will now examine the deeds at issue in this case.

**2. The Deeds at Issue**

**a. The Armstrong Deed and Substantially Similar Deeds**

The Supreme Court of Georgia has held that the "true meaning" of a deed "can only be ascertained by an examination and consideration of the instrument as a whole." Duggan, 156 S.E. at 316. The majority of the deeds at issue in this case contain language that is substantially similar to that of the deed signed by W.W. Armstrong in 1890 ("Armstrong deed"). This deed provides:

> This Indenture Witnesseth That the undersigned W.W. Armstrong has bargained sold and conveyed to the Middle Georgia & Atlantic Railway Company, a Corporation of Said State the following property – A strip of land situated in the 477 G.M. District Newton County. Fifty feet wide, the same being twenty five feet 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 made by said Railway Co. through my land in said State & County. The consideration of this Deed is the sum of seven no/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 W.W. Armstrong will forever warrant and defend the title hereby conveyed to the said Railroad Company against any and every person whatsoever. In witness whereof, the said W.W. Armstrong has hereunto set his hand and affixed his seal, and delivered these presents, this the 1st day of May 1890.

Pls.', Ex. F(13). The deeds that are similar to the Armstrong deed are listed in the table below.

| Deed | Consideration | Exhibit Number |
|---|---|---|
| Petty | "10 per acre dollars" | Pls.' Ex. F(3) |
| S.G. Morgan | $20 | Pls.' Ex. F(4) |
| A.R. Morgan | $56 | Pls.' Ex. F(5) |
| Rhebergh | $50 | Pls.' Ex. F(6) |
| Robinson & Hardeman | $25 | Pls.' Ex. F(7) |
| John Roquemore | $5 | Pls.' Ex. F(8) |
| J.H. Roquemore | $1 | Pls.' Ex. F(9) |
| Jackson | $5 | Pls.' Ex. F(10) |
| Epps | $28 | Pls.' Ex. F(11) |
| Banks | $8 | Pls.' Ex. F(12) |
| Armstrong | $7 | Pls.' Ex. F(13) |
| A.S. Hays | None | Pls.' Ex. F(15) |
| W.J. & B.F. Hays | $70 | Def.'s Ex. GG |
| Skinner | $5 | Pls.' Ex. F(17) |
| Pitts | Depot at Newton | Pls.' Ex. F(18) |
| J.C. Anderson | $5 | Pls.' Ex. F(19) |
| Smith | $5 | Pls.' Ex. F(21) |
| Stanton & Bateman | Left Blank in Deed | Pls.' Ex. F(22) |
| G.B. Stanton | $125 | Pls.' Ex. F(25) |
| Stanton, Hays, & Hays | $20 | Def.'s Ex. Y |
| Corley | $5 | Def.'s Ex. AA |
| Pace | $1 | Def.'s Ex. AA |
| Wright | $10 | Def.'s Ex. BB |

| | | |
|---|---|---|
| Simms | $1 | Def.'s Ex. BB |
| Bagby | $5 | Def.'s Ex. V |
| White | $1 | Def.'s Ex. II |
| Childs | $1 | Def.'s Ex. JJ |
| Terrell | $10 | Def.'s Ex. JJ |
| Ozburn | $10 | Def.'s Ex. JJ |
| J.H. Roquemore | $1 | Def.'s Ex. JJ |

The Supreme Court of Georgia's decision in Sorrells provides guidance in interpreting the Armstrong deed and those substantially similar to it. 92 S.E. at 514. In Sorrells, the court examined whether the interest conveyed to a railroad was an easement or title to the land. Id. at 513-14. 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." Id. 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 Armstrong deed and those substantially similar to it are nearly identical to the language in the Sorrells deed. Specifically, the Armstrong deed and those substantially similar to it each 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." Pls.' Ex. F(13). As described earlier, a deed that grants a railroad a strip of land as a "right-of-way" usually conveys an easement. Crutchfield, 191 S.E. at 470. In addition, the deeds here qualified how the designated land would be used, namely, for railroad purposes; 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 (holding that because the deed in question "qualifi[ed]" how the land was to be used, it "seem[ed] clear that a reversion of the possession to the grantor or his heirs or successors in title was in the contemplation of the parties"); Latham, 538 S.E.2d at 109 (determining that because the deed defined how the railroad would use the land and its rights therein, it was "inconsistent with the conveyance of title, where the owner has full dominion and control, [unlike] in an easement"). Clearly, when a deed indicates that the land is to be used for the railroad and "for all other purposes," it refers only to uses related to building and using the railroad. Id. at 317. Thus, the use of the phrase "for any other use" here refers only to uses related to railroad purposes.

The consideration described in the deeds in question was typically one or five dollars, with some exceptions, including one for $28, one for $50, and one for $56.[1] Overall, these amounts are small. Taken together, these factors lead the court to conclude that the grantors intended to convey easements, and not fee simple interests, in the strips of land. See Askew, 79 S.E.2d at 532 (holding that a deed that conveyed a right-of-way for railroad purposes for nominal consideration conveyed an easement that reverted to the original owner when such use was complete); Sorrells, 92 S.E.2d at 514 (concluding that a deed that conveyed a strip of land for use as a railroad for nominal consideration conveyed an easement); Duggan, 156 S.E. at 317 (determining that a deed that conveyed a right-of-way and qualified that it was to be used in the construction and equipment of a railroad and for all other purposes, for nominal consideration, conveyed an easement).

**b. The Lee Deed and Substantially Similar Deeds**

Among the remaining deeds are two categories of deeds whose language differs from that of the Armstrong deed.[2] First, some deeds contain language that is substantially similar to that of the deed signed by W.B. Lee in 1894 ("Lee deed"). This deed provides:

> This Indenture witnesseth that the undersigned W.B. Lee has bargained, sold and conveyed to the Middle Georgia & Atlantic Railway Company, a corporation of said State, the following property; A Strip of land situated in the 462 \G.M. District of Newton County, the width to be what is necessary for Railroad purposes for said Railroad, as a right-of-way, more particularly described 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 W.B. Lee from Jon L. Sibley – The consideration of this deed is the sum of one hundred and fifty 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 and Atlantic Railroad Company, its successors and assigns, forever.
> And the said W.B. Lee will forever warrant and defend the title hereby Conveyed to the said Railroad Company against any and every harm whatsoever. In witness whereof, the said W.B. Lee has

[1] Although the consideration described in the G.B. Stanton deed was larger, namely, $125, the host of other factors present in the deed—including the terminology used and the qualification that the land would be used for railroad purposes—weigh in favor of concluding that an easement was conveyed.

[2] These categories or subsets have been created by the court after comparing the language of the various deeds at issue.

> hereto set his hand and affixed his seal, and delivered those presents the 2nd day of June 1894. Signed, sealed and delivered.

Pls.' Ex. F(24). The deeds that are similar to the Lee deed are listed in the table below.

| **Deed** | **Consideration** | **Exhibit Number** |
|---|---|---|
| Lee | $150 | Pls.' Ex. F(24) |
| McCormick | $325 | Pls.' Ex. F(2) |
| Hight | $150 | Pls.' Ex. F(14) |
| Henderson | $100 | Pls.' Ex. F(16) |
| Boyle | $300 | Pls.' Ex. F(26) |
| Cannon | $100 | Pls.' Ex. F(27) |
| Peek | $250 | Def.'s Ex. T |
| J.E. Robinson | $275 | Def.'s Ex. AA |
| Butler | $300 | Def.'s Ex. CC |

The Lee deed and those substantially similar to it each provided that a "strip of land" would be designated as a "right-of-way" for the railroad. Id. The consideration that was paid in each was substantial, ranging from $100 to $325. As noted previously, a "substantial sum" of consideration materially "differs from conveyances to railroad companies of right-of-way based upon nominal considerations," as the former typically indicates that the land was conveyed in fee simple. Valdosta, 150 S.E. at 847. Further, the deeds here contained a warranty clause, where the grantor "would forever warrant and defend the title hereby conveyed . . . against any & every person whatsoever." Id. Although the inclusion of a warranty clause would not be sufficient, on its own, to establish that a fee simple interest was conveyed, the Supreme Court of Georgia has held that "when considered in connection with . . . other terms of th[e] deed[s]" in question, such as a substantial sum of consideration, the land was conveyed in fee simple. Id. Accordingly, the court finds that the Lee deed and those substantially similar to it did not convey an easement, but rather, a property interest in fee simple. See id. at 847-48 (determining that the deed conveyed a property interest in fee simple because of a combination of factors, including that a substantial sum of money would be paid in consideration for a "strip of land" to be used as a "railroad right-of-way," and that the deed contained a warranty clause).

**c. The Robinson and Weaver Deeds**

Finally, the deeds signed by J.E. Robinson in 1894 ("Robinson deed") and R.I. Weaver in 1927 ("Weaver deed") are distinct from those previously discussed. As with the prior deeds, the court examines the language within these deeds to determine whether a fee simple interest was conveyed. The relevant language and terms encompassed in the Robinson deed appear in identical, or nearly identical, form in the Weaver deed. The court will examine the language in the Robinson deed. This deed provided:

> THIS INDENTURE, Made the this ___ day of April in the year of one thousand eight hundred and ninety-nine between J.E. Robinson of the State of Georgia and the County of Newton of the first part, and the Central of Georgia Railway Company, a corporation created by and existing under the laws of the State of Georgia, of the second part:
>
> WITNESSETH: that the said party of the first part, for and in consideration of the sum of Two Hundred and seventy-five and no/100 ($275.00) dollars, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell, and convey unto the said party of the second part, and to its successors and assigns forever, all that certain tract or parcel of land:
>
>> Beginning at the Southwest corner of the land of the said J.E. Robinson where it intersects the property of W.C. Lee on the South and B.F. Camp on the West; thence running in an Easterly direction on the line dividing said Robinson & W.C. Lee to a point where said land is intersected by a public road leading to Carroll's Brick Yard; thence along said public road to the right of way line of the Central of Ga. Ry. Co.; thence in a Westerly direction along the Southern line of said right of way and parallel therewith and distant 50 feet from the centre thereof to the intersection of said right of way by the property of B.F. Camp; thence in a Southerly direction along said property line to point of beginning. Containing in all 2.00 acres, more or less, situated in the State of Georgia County of Newton; the exact metes, bounds, & location begin shown on map attached & made a part here of.
>
> TO HAVE AND TO HOLD the said above described property, together with all and singular the rights, members, and

> appurtenances thereto in anywise appertaining or belonging to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns, in FEE SIMPLE forever.
>
> And the said party of the first part, will and his heirs, executors and administrators shall the afore granted premises unto said party of the second part its successors, ~~heirs, executors, administrators and~~ assigns forever warrant and defend, by virtue of these presents. IN WITNESS WHEREOF, The said party of the FIRST part has hereunto set his hand and seal the day and year above written.

Def.'s Ex. AA at 11-12.

The Robinson deed contained no mention of a "strip of land" being granted, which, as described earlier, is terminology that typically indicates that an easement was conveyed. Id. Further, although the deed conveyed a property interest to a railroad company, the deed did not provide any qualification stipulating that the land would be used exclusively "for railroad purposes." A qualification specifying that the land conveyed will be used for "railroad purposes" usually indicates that an easement was conveyed. Askew, 79 S.E.2d at 532; see also Crutchfield, 191 S.E. at 470; Pitchford, 184 S.E. at 624; Duggan, 156 S.E. at 317. Thus, the absence of a qualification leans more heavily in favor of a fee simple interest being conveyed. In addition, the deed provided for a large amount of consideration, namely, $275.

Lending additional support in favor of finding that the conveyance was in fee is the deed's warranty clause, in which the grantor pledged that he and his "heirs, executors and administrators" would "forever warrant and defend" the property in question "unto" the railroad company to which the land was being conveyed. Def.'s Ex. AA at 11. The deed also provided that the land was being conveyed "in FEE SIMPLE forever." Id. Although the use of that terminology or the presence of a warranty clause in themselves "do not demand the construction" of a deed as conveying a property interest in fee simple, here, the appearance of both, the large sum of consideration, and the other factors set forth above compels the conclusion that this deed conveyed land in fee simple. See Valdosta, 150 S.E. at 847 (holding that the presence of a warranty clause, the phrase "forever in fee simple," and a large sum of consideration in the deed was "potent" and indicated that the deed conveyed a property interest in fee simple); Latham, 538 S.E.2d at 109 (noting that "the deed form language of 'successor and assigns,' 'forever in fee simple,' and 'will warrant and defend the title thereof, against the claim of all persons' has the attributes of a deed of title in fee simple by warranty deed"). Moreover, as mentioned above, the Weaver deed contained the same or substantially similar relevant language as the Robinson deed. In addition, the Weaver deed provided for a large amount of consideration, namely, $2500. Consequently, the Weaver deed conveyed a property interest in fee simple as well.

### 3. County Road 213

County Road 213 is a public road that separates the rail corridor and eight parcels of land: Claims 81.A, 81.B, 81.C, 83, 84, 85.A, 85.B, and 85.C. According to defendant, County Road

213 was granted in fee to rural Newton County, and because the eight parcels do not adjoin the rail corridor, plaintiffs who own the parcels lack a property interest in the railroad right-of-way.

Defendant relies upon Department of Transportation v. Knight, 232 S.E.2d 72, 74 (Ga. 1977), in support of its contention that the land granted to build County Road 213 was conveyed in fee simple. In Knight, the Supreme Court of Georgia evaluated whether a deed concerning land used to build a highway conveyed a fee simple interest or an easement. To make this determination, the court engaged in an "examination of the laws governing the acquisition," id. at 226, and also interpreted the "words used" in the conveyance deed, including the term "conveyance," because such terms "serve as guides to [the] construction" of a deed and "the intention of the parties," id. at 227. The court concluded that the deed conveyed an interest in fee simple.

Defendant's argument that the holding in Knight controls the outcome in this case lacks merit. The subject land in Knight was conveyed to build a limited access highway next to a federal interstate highway pursuant to the Limited Access Highway Act, Ga. Code Ann. § 95-1703 (1965). Under that statute, abutting landowners have limited or no access to a limited access highway, and both federal interstate highways and limited access roads constructed to support them are conveyed in fee. By contrast, County Road 213 is a county road, not a limited access highway. Indeed, defendant acknowledges that County Road 213 was created as a state road. Thus, the statute that the court interpreted in Knight, and the court's specific reasoning therein, are inapt.

Although the court's conclusion in Knight does not compel the same result here because of the difference in the facts in the two cases, its methodology in interpreting a road conveyance deed is instructive. Like the Knight court, this court will examine the relevant law and the construction of the conveyance deeds.

Public roads like County Road 213 were built pursuant to Georgia Statute 95-1721, which provides in pertinent part:

> Section 1. That title 95 ("Roads, Bridges and Ferries"), part IV ("State Highway System"), chapter 95-17 ("State-Aid Roads") of section 95-1721 ("Counties Prohibited from Participating in the Cost of Construction") of the Code of Georgia of 1933 be and the same is hereby amended by striking and repealing all of said section 95-1721, and enacting in lieu thereof a new section to be numbered section 95-1721, and to read as follows:
>
> 95-1721. Control and supervision of State-aid Roads; expense of procuring rights of way borne by county. When a road is approved as a part of the system of State Highways, establishment of such road and its construction, including location, surveys, grading, and paving, shall be under the control and supervision of the State Highway Board. All expenses necessary for such construction, including surveys, the location or relocation of such roads, and all other expenses connected with the establishment and construction thereof, except the expense of procuring rights of way, shall be paid by the Board but of funds allocated to the Highway Department.

> It shall be the duty of county commissioners or other county authorities having control of county roads to assist in procuring the necessary rights of way as cheaply as possible, and all expenses thereof, including the purchase price of any land purchased for a right of way, and all direct and consequential damages awarded in any proceeding brought to condemn any such right of way, shall be paid by the county in which such road is situated out of the county treasury; provided that nothing contained in this Act shall prevent the State Highway Board from using State Highway funds for the purpose of purchasing right of way, or to pay the purchase price thereof, or to pay any damages awarded on account of the location of any such State-aid Road, or from assisting the counties in so doing.

Ga. Code Ann. § 95-1721 (1935). This statute allowed the State Highway Board to construct "State-aid Road[s]" as part of the "system of State Highways," where the roads constituted "right[s] of way" running through private land. Id. As explained above, under Georgia law, the conveyance of land as a "right of way" is typically considered an easement, as opposed to a property interest in fee simple. Crutchfield, 191 S.E. at 470.

Further, the deeds that granted the land to build County Road 213 are substantially similar. One such deed provides:

> 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 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. District 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.

Pls.' Suppl. Ex. A-B at 25-26. This deed reflects that the land in question was granted to the State Highway Department of Georgia through "right of way deed[s]," where such deeds conveyed a "strip" of land as a "right of way" for a "state aid road" through private land. Id. In addition, each of these deeds conveyed the corresponding land for a consideration of one dollar.

Because 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 court concludes that the deeds that conveyed the land for County Road 213 conveyed easements. See Crutchfield, 191 S.E. at 470 (holding that a deed that granted "right of way over which to pass" conveyed an easement); Sorrells, 92 S.E.2d at 514 (determining that deeds conveying property to a railroad for "nominal consideration" generally convey only easements). Consequently, because the land granted to construct County Road 213 was conveyed as an easement, those plaintiffs who own the subject parcels of land adjacent to County Road 213 own to the centerline of the adjoining rail corridor. See Metro. Atlanta Rapid Transit Auth. v. Datry, 220 S.E.2d 905, 907 (Ga. 1975) (concluding that "as owners of land abutting Sycamore Street, [the plaintiffs] hold fee simple title to the middle line of the street subject to the easement held by the City of Decatur").

Finally, the court rejects defendant's argument that the deeds that conveyed the eight parcels of land—namely, parcels 81.A, 81.B, 81.C, 83, 84, 85.A, 85.B, and 85.C —were fee conveyances. Some of these parcels were conveyed by the Robinson & Hardeman deed, some were conveyed by the G.B. Stanton deed, some were conveyed by the White deed, and some were conveyed by a combination thereof. See Def.'s App'x A. Because the court previously determined that these deeds conveyed easements, see supra Part II.C.2.a, plaintiffs who own parcels of land conveyed by any one or combination of these three deeds possess a property interest in the railroad right-of-way.

#### 4. Railroad Avenue

Further, in their initial briefs, the parties disagreed as to whether Railroad Avenue, which runs between the rail corridor and five parcels of land, was conveyed as an easement or in fee to the town of Mansfield, Georgia. In its supplemental brief, defendant concedes that Railroad Avenue was conveyed as an easement. Nonetheless, defendant asserts that although four of these parcels of land—namely, parcels 85.D, 92.A, 92.B, and 92.C—were conveyed as easements, parcel 95 was not because it falls beyond the limits of the Mansfield plat. In response, plaintiffs argue that parcel 95 is, indeed, within the limits of the Mansfield plat, and provide the survey for the land at issue. Based on a review of that survey, the court concludes that plaintiffs are correct. Parcel 95 was conveyed by the John Roquemore deed. Def.'s App'x A. The survey for the lands conveyed by the John Roquemore deed clearly indicates that such parcels, including parcel 95, were platted within the town of Mansfield. See Pls.' Suppl. Ex. A. Thus, parcel 95 falls within the limits of the Mansfield plat.

Defendant raises an additional challenge, arguing that the deed that conveyed these five parcels of land—namely, parcels 85.D, 92.A, 92.B, 92.C, and 95—was a fee conveyance. By contrast, plaintiffs argue that each of these parcels of land was conveyed as an easement. It is evident, based on the court's prior analysis, that defendant's argument is incorrect. The court has already determined that the deed that corresponds to parcel 95, namely, the John Roquemore deed, and the deed that conveyed the other four parcels, specifically, the J.H. Roquemore deed both conveyed easements. See supra Part II.C.2.a.

Finally, defendant argues that the Railroad Avenue easement and the rail corridor (if it is found to be an easement) should be subdivided at the center of the combined easements, rather than at the center of the railroad's easement. Plaintiffs counter that because the railroad was conveyed as an easement before Railroad Avenue was, the landowners owned to the center of the rail corridor, and the subsequent establishment of the Railroad Avenue easement did not affect that ownership. Plaintiffs are correct. Defendant's contention would be accepted by the court if the Railroad Avenue easement and the railroad corridor easement had been established at exactly the same time. However, the railroad corridor easement was established first, and the Railroad Avenue easement followed at a later date. Thus, the landowners on both sides of the railroad corridor easement owned to the center of that easement; the addition of the Railroad Avenue easement afterwards did not change that. Consequently, the plaintiffs who own the parcels of land adjoining Railroad Avenue own to the centerline of the railroad right-of-way and retain a property interest in it.[3]

**5. Parcel 97**

Defendant also argues that there is no deed conveying parcel 97, and that the Stanton & Bateman deed does not pertain to that parcel of land. Plaintiffs concede the point. However, plaintiffs assert that because the railroad was built adjacent to parcel 97 and has been used and maintained by the railroad since the 1880s, the railroad has satisfied the requirements of adverse possession and has acquired an easement by prescription for railroad purposes. In support of their position, plaintiffs rely on Watkins v. Hartwell R. Co., 597 S.E.2d 377 (Ga. 2004). In that case, the court held that the subject railroad adversely possessed the disputed land and obtained a prescriptive easement. Id. at 380. The court explained that the railroad only acquired "title" to use the right-of-way, but that no fee ownership was given in the right-of-way. Id. Plaintiffs argue that similarly, in this case, the railroad adversely possessed parcel 97 and therefore only held title in the easement as a right-of-way, instead of acquiring title in fee simple. According to plaintiffs, the title in the easement was extinguished when the rail line terminated service. Defendant responds that the railroad did not acquire an easement that was limited to use as a right-of-way. Rather, defendant argues, because the railroad adversely possessed the land, it obtained a claim of title and ownership in the land, not mere use by virtue of an easement.

Defendant has the better argument. Generally, if a railroad adversely possessed disputed land, and there is uncertainty regarding whether it used all of the land in the right-of-way, a court may find that the railroad only acquired an easement limited to rail use. However, because there is no uncertainty here, the railroad acquired title in fee simple. The court's ruling is supported by the holding in Kelley v. Randolph, 763 S.E.2d 858 (2014). In that case, the Supreme Court of Georgia held that "[t]o establish adverse possession, a party must show possession that is in the right of the party asserting possession and not another and that is public, continuous, exclusive, uninterrupted and peaceable, and accompanied by a claim of right." Id. at 860 (citing Ga. Code Ann. § 44-5-161 (2010)). Here, the parties agree that the railroad satisfied these elements of adverse possession when it constructed and used a rail line adjacent to parcel 97. Further, as set

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[3] Defendant previously argued that those plaintiffs who claimed ownership in parcels 3.B, 81.A, 81.C, and 106 did not, in fact, retain such property interests. However, in its supplemental brief, defendant concedes that each of these plaintiffs did enjoy such ownership.

forth in Kelley, "[p]ossession of property in conformance with these elements for a period of 20 years confers good title by prescription to the property." Id. (citing Ga. Code Ann. § 44-5-163 (2010)). The railroad possessed the property for more than twenty years, and thus, acquired title to it, as opposed to a mere easement to use it. The railroad's "[c]onstruction" of the railroad "demonstrated [its] exercise of exclusive dominion over the property[,] . . . establish[ing] a claim of right to the property." Id. Thus, the railroad acquired a claim of title, or ownership of the land, with respect to parcel 97. See Id. (noting that "'claim of right' is synonymous with 'claim of title' and 'claim of ownership' in the sense that the possessor claims the property as his own"(citing Walker v. Sapelo Island Heritage Auth., 674 S.E.2d 925 (Ga. 2009))); accord Ga. Power Co. v. Irvin, 482 S.E.2d 362 (Ga. 1997); Waxelbaum v. Gunn, 104 S.E. 216 (Ga. 1920).

Plaintiffs rely on Watkins to argue that the prescriptive easement here grants "title" to use the right-of-way, but not fee ownership. The reasoning in Watkins fails to assist plaintiffs. In that case, the deed conveying the land in question was unrecorded, and the court held that the railroad satisfied the requirements for adverse possession, thereby "gain[ing] a right-of-way by prescription." 597 S.E.2d at 380. The court then examined the "scope of that prescription." Id. It held that because it was not clear whether the railroad had used the entirety of the land in the right-of-way, there was a genuine dispute of material fact as to whether the railroad had "actual possession of the disputed property." Id. Consequently, the court reasoned, because constructive possession of the disputed land in such cases does "not extend beyond the tract or lot in which actual possession is maintained," id., and the railroad had not demonstrated actual possession, it could "not prevail based on constructive possession," id. at 380. By contrast, in this case, there is no such factual dispute. The parties agree that the railroad adversely possessed parcel 97, and plaintiffs do not offer any arguments or evidence creating a dispute of fact regarding whether the railroad used all of the land in the right-of-way. Thus, there is no basis to question whether the railroad actually possessed the land, and consequently, whether it constructively possessed it. The railroad's claim to the land would therefore not be limited to an easement. Accordingly, the railroad acquired a claim of title in fee with respect to parcel 97.

### 6. The Scope of the Easements

The court must now determine whether the easements at issue were limited to use for railroad purposes, or if they were broad enough to encompass use for recreational trails. See Preseault II, 100 F.3d at 1533 (examining whether the easements were "limited to use for railroad purposes, or [if] they include[d] future use as public recreational trails"). Plaintiffs contend that because the deeds at issue indicated that the respective rights-of-way were to be used for railroad purposes, the scope of the easements was limited to rail use.

By contrast, defendant argues that the easements contemplated public uses like railbanking. In support of its contention, defendant relies on Romanoff Equities, Inc. v. United States, 815 F.3d 809, 810 (Fed. Cir. 2016), in which the United States Court of Appeals for the Federal Circuit ("Federal Circuit") held that the conversion of a railway to a recreational trail in the state of New York did not exceed the scope of the easement, and thus, did not constitute a Fifth Amendment taking. In that case, the court explained that the interest conveyed to the railroad was an easement. Id. In determining the scope of that easement, the court relied on Missionary Society of the Salesian Congregation v. Evrotas, 175 N.E. 523 (N.Y. 1931), a

decision by the Court of Appeals of New York, for guidance. In Missionary Society, the court held that because the subject deed allowed the easement to be used by the railroad and "for all other lawful purposes," the easement could also lawfully be used as a walkway and to install water pipes. Id. at 524. The court reached this conclusion because, it explained, "[w]hen the terms of a grant are doubtful, the grantee may take the language most strongly in its favor." Id.

Consequently, the Federal Circuit reasoned in Romanoff Equities that the Missionary Society decision "clearly signal[ed] that the New York courts will enforce easements by their terms and that a very broad easement, although 'unusual,' is not void simply because it extends not only to the specific purposes named in the easement, but to 'all other lawful purposes.'" 815 F.3d at 814 (citation omitted). The court then noted that the language of the subject deed was "broad" because it granted the railroad and "its successors and assigns forever . . . the permanent and perpetual rights and easements . . . together with the exclusive use of the portion of the parcels of land herein described . . . for railroad purposes and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same." Id. at 811 (citation omitted). The Federal Circuit therefore affirmed the trial court, explaining that the "broad grant of the easement 'for such other purposes' as the railroad company and its successors desired to make of it, was broad enough to encompass the use of the property for a park." Id. In this case, defendant argues that because the language of the subject deeds is similarly broad, the court should find that they encompassed trail use.

The court examines the scope of the easements that have already been identified above. In addition, the court evaluates the nature of some additional easements, namely, the easements conveyed by the Stanton & Bateman deed and by the Stanton, Hays, & Hays deed.[4] Because the Supreme Court of Georgia has held that when deeds stipulate that the land in question is to be used for railroad purposes and for all other purposes in the railroad's discretion, the scope of the easements conveyed is limited to rail use, the court finds that the easements in this case contemplated only rail use. As described previously, if a deed stipulates that the property in question is to be used for railroad purposes, the intended use is limited to such purposes. See Crutchfield, 191 S.E. at 470-71 (determining that because the deed in question "granted, sold, bargained, and conveyed to [a railroad company], its successors and assigns, the right of way over which to pass at all times by themselves, directors, officers, agents and hirelings, for the purpose of running, erecting, and establishing thereon a railroad track or tracks," the property was "deeded solely for a railroad right of way, and therefore conveyed to the company only an easement in said lands for that purpose" (internal quotation marks omitted)); accord Askew, 79

[4] Defendant concedes that certain deeds conveyed easements. Specifically, these deeds are: the Dearing deed, Pls.' Ex. F(1); the Stanton, Hays, & Hays deed, Def.'s Ex. Y; the Stanton & Bateman deed, Def.'s Ex. R; and the Brown deed, Def.'s Ex. U. Defendant also admits that when parcels of land along the subject rail corridor were acquired by condemnation, namely, the "Samuel Johnson Condemnation," the railroad acquired easements. Defendant concedes that the scope of the easements associated with the Dearing and Brown deeds, and with the Samuel Johnson Condemnation, was limited to railroad purposes. However, with respect to the Stanton & Bateman deed, as well as the Stanton, Hays, & Hays deed, defendant argues that the respective easements were broad enough to encompass railbanking and interim trail use.

S.E.2d at 532; Rogers, 184 S.E. at 624; Duggan, 156 S.E. at 317. Thus, if an easement is conveyed for railroad purposes, a public use beyond that is not considered a railroad purpose. See Tompkins v. Atl. Coast Line R. Co., 79 S.E.2d 41, 47 (Ga. App. 1953) (holding that if an easement for railroad purposes is conveyed, it does not allow for communications or power lines on the right-of-way because they exceed the scope of a railroad purpose); see also Haggart v. United States, 108 Fed. Cl. 70, 93 (Fed. Cl. 2012) (finding that "recreational trail use is not a railroad purpose and thus exceeds the scope of the . . . easements"). Moreover, if the deed conveys the land for the railroad's use and indicates that the land is to be utilized "for all other purposes," this phrase, "construed with its associate language," refers only to purposes related to building and using the railroad. Duggan, 156 S.E. at 317; Tompkins, 79 S.E.2d at 45 (noting that "the conveyance to a railroad of the right to construct and operate its road is ordinarily construed to give the railroad the right to use and to take from the described area of the easement earth, stone, and timber necessary for the construction of the roadbed and the free operation of its trains thereon").

In this case, the Stanton, Hays, & Hays deed conveyed an easement "through which the track of the . . . Rail Road r[an]," a qualification clearly indicating that the right-of-way was intended for rail use alone. Def.'s Ex. Y at 7. Further, the Armstrong deed, the deeds substantially similar to it, and the Stanton & Bateman deed all conveyed easements to the railroad "for a right of way of said Railroad, or for any other use, in the discretion of said Company." Pls.' Exs. F(13), F(22); Def.'s Ex. 4. Because the initial part of the clause indicated that the land conveyed would be used "for a right-of-way of" the railroad, the use of the property was limited to railroad purposes. Id. Further, although the remainder of the clause indicated that the land would be used "for any other use, in the discretion of the Company," this language is interpreted in the context of the earlier clause, and thus refers only to purposes related to construction and use of the railroad. Id. Consequently, the scope of the easements conveyed herein was limited to railroad purposes, and did not contemplate the use of the land as public trails or for any other use.

Defendant's argument that the reasoning in Romanoff Equities applies here is misplaced. Although the Federal Circuit's decisions are binding on this court, the Federal Circuit has also held that in Trails Act cases, whether a taking has occurred is governed by "state-defined property rights." Ladd, 630 F.3d at 1019. Thus, because the Federal Circuit's analysis in Romanoff Equities was based on New York property law, that decision is not binding here, where the court must apply Georgia law. The difference between these two states' bodies of law highlights why the holding in Romanoff Equities does not apply here. Although New York courts have interpreted the phrase "for all other lawful purposes" as being broad enough to include uses beyond railroad purposes, the Supreme Court of Georgia has held that if a deed conveys land for a railroad's use and indicates that the land is to be utilized "for all other purposes," that phrase, in tandem with the "associate language," refers only to purposes related to building and using the railroad. Duggan, 156 S.E. at 317. Consequently, while the phrase "for all other purposes" is interpreted to include public trail use in New York law, it holds the opposite meaning in Georgia law. The decision in Romanoff Equities is therefore inapposite here. Accordingly, the scope of the easements at issue here is limited to railroad purposes and did not encompass public trail use.

### 7. The Effect of the NITU on Plaintiffs' Property Interests

In its cross-motion, defendant argued that with respect to those deeds that conveyed easements, because no railbanking and interim trail use agreement has been reached, it was uncertain whether a taking had occurred. However, in its supplemental briefing, defendant has reversed course and now concedes that any takings that occurred did so on the date that the NITU was issued. Nonetheless, defendant argues, because the railroad has not abandoned the rail line, the easements have not been terminated. According to defendant, mere nonuse of the rail line, without further indication of an intent to abandon it, does not constitute abandonment. Further, defendant asserts, the railroad's decision to negotiate with a third party regarding the future use of the corridor indicates that the railroad has not abandoned its property interest. Defendant argues that if an agreement is reached, the railroad has a right to restore rail service in the future. According to defendant, because the railroad has not abandoned the rail line, the easements conveyed by deed have not been terminated and no taking has occurred.

Defendant's arguments are contrary to established binding precedent. In Ladd, the central issue before the Federal Circuit was "whether the issuance of a NITU constitutes a compensable taking, where no conversion to a recreational trail has occurred." 630 F.3d at 1015. The Federal Circuit held:

> Because according to our precedent, a takings claim accrues on the date that a NITU issues, events arising after that date—including entering into a trail use agreement and converting the railway to a recreational trail—cannot be necessary elements of the claim. Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established.

Id. at 1024; see also Barclay, 443 F.3d at 1378 ("This is merely another version of the argument–rejected in Caldwell—that the original NITU should not be viewed as the taking because subsequent events might render the NITU only temporary."). The Federal Circuit's holdings are unambiguous: the STB's issuance of a NITU effects a taking. Events arising thereafter—such as the conversion of a rail line to a trail pursuant to a railbanking agreement, or the restoration of rail service—are not necessary elements in determining whether a taking occurred. Indeed, they have no bearing whatsoever on the existence of a Fifth Amendment taking. This conclusion was reinforced in Preseault II, when the Federal Circuit held that abandonment of the rail line provided an "alternative ground for concluding that a governmental taking [had] occurred." 100 F.3d at 1549. Abandonment is therefore not an essential element to determining whether a NITU effects a taking. Rather, abandonment is an alternative means of evaluating whether a taking has occurred, distinct from the certainty that issuance of a NITU effects a taking. Consequently, a taking occurs if (1) a NITU is issued, or, alternatively, (2) the rail line is abandoned. Because a NITU was issued here, a Fifth Amendment taking occurred, regardless of whether the rail line was abandoned. Accordingly, the affected plaintiffs are entitled to summary judgment on the issue of liability.[5]

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[5] Defendant argues that the NITU and Exemption Notice are ambiguous as to the location of the end of the rail line. However, as the court stated during oral argument, and in its

## III. CONCLUSION

Because the parties have demonstrated that: (1) some of the deeds at issue conveyed easements limited to railroad purposes; (2) some of the deeds at issue conveyed interests in fee simple; and (3) condemnation of some parcels of land resulted in the acquisition of easements limited to railroad purposes, the court **GRANTS IN PART** and **DENIES IN PART** the parties' cross-motions for partial summary judgment. The parties shall file a joint status report **by no later than Monday, May 23, 2016** suggesting further proceedings.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

November 9, 2015 order, the parameters of the NITU are settled by the plain language of the NITU, itself. Tr. of Oral Arg. 72.

# In the United States Court of Federal Claims

No. 14-388L
(Filed: November 28, 2016)

| | |
|---|---|
| WILLIAM C. HARDY & BERTIE ANN HARDY et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE UNITED STATES,<br><br>Defendant. | RCFC 59(a)(1); Motion for Reconsideration; Deed; Interpretation of Deeds Under Georgia Law; Easement; Scope of Easement; Fee Simple; Adverse Possession; Claim of Right; Color of Title |

Elizabeth A. Gepford McCulley, Kansas City, MO, for plaintiffs.

Stephen Finn, United States Department of Justice, Washington, DC, for defendant.

## OPINION AND ORDER

**SWEENEY**, Judge

Plaintiffs move, pursuant to Rule 59(a)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), for reconsideration of the court's May 4, 2016 ruling on the parties' cross-motions for summary judgment ("summary judgment ruling"). For the reasons set forth below, the court denies in part and grants in part plaintiffs' motion for reconsideration.

## I. BACKGROUND

In this Rails-to-Trails action, 112 plaintiffs contend that they own real property adjacent to a rail corridor in Newton County, Georgia. They assert that until 2013, the Central of Georgia Railroad Company ("CGA") and its predecessors held easements for railroad purposes that crossed their land.[1] According to plaintiffs, defendant United States then authorized the conversion of the railroad rights-of-way into recreational trails pursuant to the National Trail Systems Act, conduct that resulted in a taking in violation of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

[1] The modern-day CGA is the successor in interest to the Middle Georgia and Atlantic Railway Company ("MG&AR"), which originally acquired the land at issue in this action.

Descriptions of the conflict's statutory and regulatory context, initial acquisition of the land in question, proceedings before the Surface Transportation Board, and procedural history are provided in the court's summary judgment ruling and need not be repeated herein. See Hardy v. United States, 127 Fed. Cl. 1, 5-7 (2016). In that ruling, the court determined the following:

- The Armstrong deed and twenty-nine similar deeds conveyed an easement for railroad purposes only.

- The Lee deed and eight similar deeds, including the Hight, Henderson, and Cannon deeds, conveyed a fee simple interest.

- The Robinson and Weaver deeds conveyed a fee simple interest.

- The land granted to construct County Road 213, which separates the rail corridor and eight parcels of land, was conveyed as an easement. The County Road 213 easement was conveyed after the rail corridor easement was conveyed. Thus, plaintiffs who own the subject parcels of land adjacent to County Road 213 own to the center line of the adjoining rail corridor.

- The land granted to construct Railroad Avenue, which runs between the rail corridor and five parcels of land, was conveyed as an easement, as the parties conceded in supplemental briefing, and one of the five parcels of land, Parcel 95, was included in the Mansfield town plat. The Railroad Avenue easement was conveyed after the rail corridor easement was conveyed. Thus, plaintiffs who own the parcels of land adjacent to Railroad Avenue own to the center line of the adjoining rail corridor.

- In accordance with binding precedent, a taking occurred when the Notice of Interim Trail Use ("NITU") was issued regardless of whether the rail line was abandoned.

Id. at 10-22.

After the court issued its summary judgment ruling, plaintiffs moved for reconsideration. Specifically, plaintiffs argue that (1) the court did not properly apply the standards for interpretation of deeds under Georgia law with respect to four particular deeds and (2) the court erred in applying the law of adverse possession to the portion of the rail corridor adjacent to the parcel owned by claimant 97 ("Parcel 97"). Defendant counters that plaintiffs are merely attempting to relitigate the issues, which is an insufficient ground for reconsideration. The motion is fully briefed, and the court deems oral argument unnecessary.

## II. DISCUSSION

### A. Standard of Review

A motion for reconsideration is a request for extraordinary relief and is not an avenue for a dissatisfied party to simply relitigate the case. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004); Four Rivers Invs., Inc. v. United States, 78 Fed. Cl. 662, 664 (2007); Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999), aff'd per curiam, 250 F.3d 762 (Fed. Cir. 2000) (unpublished table decision). Thus, such a motion does not allow a party to raise arguments that it failed to raise previously or reassert arguments that have already been considered. Four Rivers Invs. Inc., 78 Fed. Cl. at 664. Pursuant to RCFC 59(a)(1), the court "may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." Young v. United States, 94 Fed. Cl. 671, 674 (2010) quoted in Biery v. United States, 818 F.3d 704, 711 (Fed. Cir. 2016). A decision on a motion for reconsideration is within the discretion of the trial court. See Entergy Nuclear FitzPatrick, LLC v. United States, 711 F.3d 1382, 1386 (Fed. Cir. 2013) (explaining that a decision on a motion for reconsideration is reviewed on appeal for abuse of discretion).

### B. The Court Properly Interpreted the Hight, Henderson, and Cannon Deeds, but Erred in Interpreting the Lee Deed

In its summary judgment ruling, the court was required to determine the nature of the property interests acquired by CGA and its predecessors. See Hardy, 127 Fed. Cl. at 8; see also Askew v. Spence, 79 S.E.2d 531, 531 (Ga. 1954) (explaining that the "controlling question" is whether the deeds conveyed title in fee simple or an easement for railroad purposes). Plaintiffs argued that all of the deeds granted the railroad an easement limited to railroad purposes, while defendant argued that the grants were either fee simple interests or easements broad enough to include rail banking and interim trail use. The court determined that the Armstrong deed, among others, conveyed an easement limited to railroad purposes and that the Lee, Hight, Henderson, and Cannon deeds, among others, conveyed a fee simple property interest. Plaintiffs urge the court to reconsider, stating that the misapplication of relevant law to the Lee, Hight, Henderson, and Cannon deeds was a clear error because these deeds are substantially more similar to the Armstrong deed than to the other deeds that the court determined had conveyed a fee simple property interest, particularly with respect to the consideration given. If plaintiffs' arguments are correct, the court must perform a new analysis that would change the court's prior ruling and warrant the granting of the motion for reconsideration under RCFC 59(a)(1). See Biery, 818 F.3d at 711.

A deed must be examined as a whole in light of the common law and Georgia statutes that existed at the time of its execution to determine what type of property interest was conveyed, but certain clauses of a deed can carry significant weight. See Ga. Code Ann. § 44-5-34 ("[T]he intention of the parties should, if possible, be ascertained from the whole instrument and carried into effect."); Presault v. United States, 100 F.3d 1525, 1534 (Fed. Cir. 1996) (noting that an instrument is examined "in light of the common law and [state] statutes . . . then in effect" with particular attention given to specific clauses); Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc.,

784 S.E.2d 353, 358 (Ga. 2016) (explaining that a "deed must be examined in its entirety in order to determine the parties' intent and to be given a construction which is consistent with reason and common sense" in light of the "circumstances and purpose" under which it was executed). In its summary judgment ruling, the court described the standards by which deeds are interpreted under Georgia law to determine the intention of the parties in light of "the attendant facts and circumstances of the parties" at the time a deed was executed:

- A deed granting a railroad a strip of land as a "right-of-way," or the presence of a reservation in a deed (such as a grantor's right to cultivate land up to the right-of-way), typically indicates an easement.

- The presence of a qualification or stipulation that the property will be used for railroad purposes generally conveys an easement, even if the grant includes language such as "all other purposes." In such cases, "all other purposes" refers only to purposes related to building and using the railroad.

- Deeds reciting nominal consideration typically convey easements, whereas substantial consideration typically indicates an intent to convey a fee simple interest.

- The presence of a warranty clause may weigh in favor of determining that the land was conveyed in fee simple. While the phrase "forever in fee simple" on its own can refer simply to the duration of an easement, a deed's recitation of such a phrase and a warranty clause alongside other elements, including substantial consideration, can provide "potent" evidence of an intent to convey a fee simple interest.

- Courts must be cognizant of the strong Georgia public policy preference against strips and gores of land held in fee simple.

Hardy, 127 Fed. Cl. at 8-10. Neither party disputes these standards.

The court determined that the Armstrong deed and twenty-nine other deeds conveyed an easement limited to railroad purposes because those deeds each provided a strip of land to be designated as a right-of-way for railroad purposes and the consideration in each case was typically small. Although the consideration recited in the G.B. Stanton deed ($125) was much larger than the consideration recited in the other deeds in this group, the totality of all of the other clauses in that deed—including the particular terminology used—weighed in favor of concluding that the deed conveyed an easement. For example, the G.B. Stanton deed "reserve[d] the right and privilege of making and using such crossings as may be necessary for farm uses." As the court previously explained, the presence of such a reservation in a deed typically indicates an easement.

In asserting that the court clearly erred in interpreting the Lee, Hight, Henderson, and Cannon deeds (the "disputed deeds") under the applicable standards, plaintiffs focus primarily on the amount of consideration recited in those deeds.[2] The focus on consideration is proper, given that the deeds were substantially similar in many other respects both to the deeds determined to have conveyed an easement and the deeds determined to have conveyed a fee simple interest.[3] Plaintiffs contend that the consideration recited in the disputed deeds ($100 to $150) is not substantial and therefore these deeds should be held to have conveyed an easement in light of the other factors. To bolster this assertion, plaintiffs argue that two deeds held to convey an easement recited consideration of $70 and $125 (the W.J. and B.F. Hayes deed and the G.B. Stanton deed, respectively), whereas the lowest consideration in deeds found to have conveyed a fee simple interest besides the disputed deeds was $250 (in the Peek deed).

Each of the disputed deeds was executed in either April 1890 or June 1894. Pursuant to Rule 201(b)(2) of the Federal Rules of Evidence, the court takes judicial notice that according to the National Bureau of Economic Research, the national median wage in 1890 was $445 annually.[4] Clarence D. Long, Wages and Earnings in the United States 1860-1890 42 (1960). Therefore, the court did not err in deeming consideration of $100 in 1890 and 1894 to be substantial.

Furthermore, consideration should not be examined in a vacuum. As explained above and in the court's summary judgment ruling, consideration is but one of the standards by which to interpret deeds because the entire context of a deed's execution is important. Atlanta Dev. Auth., 784 S.E.2d at 358. In this case, comparing the consideration recited in the disputed deeds to the $125 consideration recited in the G.B. Stanton deed is inapposite because, as explained above, the G.B. Stanton deed contained clauses other than the clause reciting the amount of consideration showing that it conveyed an easement for railroad purposes. Those distinguishing clauses of the G.B. Stanton deed, such as the reservation for farm use, were not contained in any of the disputed deeds.

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[2] Plaintiffs also point to the granting clause and warranty clause in each of the disputed deeds and the Lee deed's reference to railroad purposes. However, the court properly considered the similarities in the granting and warranty clauses among all the deeds and need not revisit those similarities. The reference to railroad purposes in the Lee deed is discussed below.

[3] The Henderson and Hight deeds, for instance, used the same standard form deed used by the Armstrong, G.B. Stanton, W.J. and B.F. Hayes, and McCormick Neal deeds. The McCormick Neal deed was found to have conveyed a fee simple interest, while the Armstrong, G.B. Stanton, and W.J. and B.F. Hayes deeds were found to have conveyed an easement for railroad purposes only.

[4] State-level and county-level data for 1890 is not available because a fire destroyed the vast majority of records from the 1890 census. Kellee Blake, First in the Path of the Firemen: The Fate of the 1890 Population Census, Nat'l Archives & Records Admin. Prologue Magazine, Spring 1996.

Moreover, the W.J. and B.F. Hayes deed's recited consideration of $70 was nominal compared to the recited consideration of $100 in the Henderson and Cannon deeds because of the difference in the amount of land conveyed. The court finds it significant that the strip of land conveyed by the W.J. and B.F. Hayes deed was at least three to five times longer and approximately four times wider than the strips of land conveyed by the Henderson and Cannon deeds. Plaintiffs' comparison of the $100 consideration to the $70 consideration therefore misses the mark because the parcel of land conveyed by the W.J. and B.F. Hayes deed (with the slightly lower consideration) was at least twelve to twenty times larger than the parcels of land conveyed by the Henderson and Cannon deeds (with the higher amount of consideration). Similarly, the $150 consideration recited in the Hight deed is substantial compared to the $70 consideration recited in the W.J. and B.F. Hayes deed because the latter deed conveyed at least six times as much land as the Hight deed. Indeed, the court observes that the $150 consideration recited in the Hight deed is actually a lower pro rata amount than the $100 consideration recited in either the Henderson or Cannon deeds when the size of the land conveyed is taken into account.

A similar analysis applies to the Lee deed, which also recites consideration of $150. The W.J. and B.F. Hayes deed conveyed over three times as much land as the Lee deed for consideration ($70) that was less than half as much. However, since the Lee deed conveyed almost twice as much land as the Hight deed for the same consideration, the consideration recited in the Lee deed is not determinative regarding whether a fee simple interest was conveyed.

However, there are other factors in the Lee deed, based on the terminology therein, that were not in any of the other deeds that the court found to have conveyed a fee simple interest. In particular, the strip of land granted in the Lee deed was not described as a specific width, but rather was described as being limited to encompassing only the land that was "necessary for Railroad purposes for said Railroad," and the amount of consideration was determined by a "committee of arbitors selected . . . to assess the damage sustained by [W.B. Lee] on account of the right of way of the [railroad] passing through [W.B. Lee's] property . . . ."[5] In other words, the Lee deed concluded a condemnation. See Ga. Code Ann. § 1689(l) (1880) (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). As the parties agreed, under Georgia law a condemnation by a railroad results in an easement for railroad purposes only. See, e.g., Atlanta B. & A. Ry. Co. v. Coffee Cty., 110 S.E. 214, 215 (Ga. 1921) (holding that land acquired by a railroad via condemnation reverts to the original owner when railroad use ceases). The land description clause in the Lee deed also referred to the grant as a "right-of-way," which was the second such reference in the deed—the first reference being in the granting clause—whereas none of the other disputed deeds referred to the grant as a "right-of-way" after the granting clause. Taken together, the language of the deed tends to indicate that W.B. Lee granted MG&AR and its successors an easement for railroad purposes only. Accordingly, the court finds that it erred in not giving proper weight to these factors in its summary judgment ruling.

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[5] W.B. Lee did not use a standard form deed like most of the other grantors in this case, but this difference is immaterial since the language used was substantially similar.

In sum, the court properly weighed the relevant factors with respect to the Hight, Henderson, and Cannon deeds, but erred in weighing the relevant factors with respect to the Lee deed. Therefore, it must grant in part—with respect to the Lee deed—and deny in part—with respect to the Hight, Henderson, and Cannon deeds—this portion of plaintiffs' motion for reconsideration.

### C. The Court Properly Applied Georgia Law of Adverse Possession to Parcel 97

The dispute regarding Parcel 97 centers on the nature of the railroad's ownership of the rail corridor that is adjacent to that parcel.[6] Plaintiffs argued that the railroad obtained a prescriptive easement only, while defendant argued that the railroad obtained title in fee simple by adverse possession. In its summary judgment ruling, the court determined that the railroad obtained title in fee simple. Plaintiffs urge the court to reconsider, stating that the railroad never acquired fee title by adverse possession because it never used that portion of the rail corridor under color of title, thus Georgia law created a presumption of an easement only. If plaintiffs' argument is accurate, then the court must perform a new analysis that would result in a reversal of the court's prior ruling and warrant the granting of the motion for reconsideration under RCFC 59(a)(1). See Biery, 818 F.3d at 711. However, there was no such error.

To establish title by adverse possession, a party must demonstrate "possession that is in the right of the party asserting possession and not another and that is public, continuous, exclusive, uninterrupted and peaceable, and accompanied by a claim of right." Kelley v. Randolph, 763 S.E.2d 858, 860 (Ga. 2014) (citing Ga. Code Ann. § 44-5-161 (2010)). Depending on the nature and extent of its claim of right, a party can establish either a prescriptive easement or fee simple title by satisfying the elements of adverse possession. For example, a party claiming an ownership interest in an easement (as opposed to outright ownership) or lacking exclusive possession (actual or constructive) of the entire disputed property may acquire a prescriptive easement because its claim of right is limited. See, e.g., Watkins v. Hartwell R.R. Co., 597 S.E.2d 377, 379 (Ga. 2004) (holding that the railroad "gained a right-of-way by prescription" through satisfying the requirements of adverse possession[7]). Meanwhile, a party that claims outright (i.e., fee simple) ownership or that establishes exclusive dominion over the land in question may gain fee simple title by adverse possession because its claim of right is absolute. See, e.g., Seignious v. Metro. Atlanta Rapid Transit Auth., 311 S.E.2d 808, 813 (Ga. 1984) (holding that the state gained fee simple title by adverse possession, having maintained railroad tracks in the disputed area for over ninety years).

It is undisputed that CGA and its predecessors continuously and exclusively used the portion of the rail corridor adjacent to Parcel 97 for over 100 years prior to the issuance of the NITU on August 12, 2013. In that sense, the parties agree that the railroad "adversely possessed"

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[6] The portion of the rail corridor adjacent to Parcel 97 is parcel 6 on valuation map 70.

[7] As the court has previously explained, a railroad right-of-way is generally an easement for railroad purposes. Hardy, 127 Fed. Cl. at 12-13 (citing Jackson v. Sorrells, 92 S.E.2d 513, 514 (Ga. 1956)); Askew, 79 S.E.2d at 532; Duggan v. Dennard, 156 S.E. 315, 317 (Ga. 1930)).

the land in question. However, they disagree regarding whether such adverse possession resulted in title to a prescriptive easement or title in fee simple. Therefore, the only issue is the nature and extent of the railroad's claim of right.

Plaintiffs' myopic focus on color of title in addressing this issue is misplaced. In Georgia, a party does not require color of title to establish title to land (either in fee simple or a prescriptive easement) by adverse possession. Indeed, Georgia courts apply different statutory provisions in quiet title or other proceedings where ownership of land is asserted by adverse possession. A claim based on color of title merely reduces, albeit by a significant amount of time, the applicable statutory period. Compare Ga. Code Ann. § 44-5-163 (indicating that adverse possession for twenty years pursuant to Ga. Code Ann. § 44-5-161 results in good title), with Ga. Code Ann. § 44-5-164 (indicating that adverse possession under color of title untainted by fraud for seven years pursuant to Ga. Code Ann. § 44-5-161 results in good title[8]); accord Watkins, 597 S.E.2d at 379 (holding that the requirements of adverse possession were satisfied "with or without color of title" based on the facts of the case); Ga. Power Co., 482 S.E.2d at 368 (holding that the plaintiff's predecessor in interest established title by adverse possession both under color of title for seven years and without color of title for twenty years). In other words, the lack of an original source conveyance or other written evidence of title—i.e., color of title—is simply not determinative in an adverse possession claim under Georgia law.

Further, a "claim of right" simply means "claiming the disputed property as [one's] own." Kelley, 763 S.E.2d at 860; see also Cong. St. Props., LLC v. Garibaldi's, Inc., 723 S.E.2d 463, 465 (Ga. Ct. App. 2012) ("A claim of right is synonymous with a claim of ownership . . . ."), cert. denied, 2012 Ga. LEXIS 806. Claiming title from a predecessor is not required. Walker v. Sapelo Island Heritage Auth., 674 S.E.2d 925, 927 (Ga. 2009) (citing Ewing v. Tanner, 193 S.E. 243, 246 (Ga. 1937)). A claim of right "will be presumed from the assertion of dominion, particularly where [it] is made by the erection of valuable improvements." Chancey v. Ga. Power Co., 233 S.E.2d 365, 366 (Ga. 1977), quoted in Cong. St. Props. LLC, 723 S.E.2d at 465.

In Seignious, the railroad's maintenance of tracks in the disputed area for over ninety years was found to be "public, continuous, exclusive, uninterrupted, and peaceable." 311 S.E.2d at 813. The state (which owned the railroad) met the "claim of right" requirement for adverse possession by, among other things, references to ownership of the land at issue in official state valuation maps and the state having "treated the property as its own and that its ownership [was] widely known." Id. In this case, during the 100-plus years that the railroad exercised continuous and exclusive possession of the relevant portion of the rail corridor, it similarly asserted exclusive dominion over the land and treated the property as its own by constructing and

[8] Although section 44-5-164 of Georgia Code Annotated refers to "written evidence of title," the phrase "color of title" is often used interchangeably with the statutory description. See, e.g., Haffner v. Davis, 725 S.E.2d 286, 288 (Ga. 2012) (equating "color of title" with "written evidence of title"); Ga. Power Co. v. Irvin, 482 S.E.2d 362, 368 (Ga. 1997) (defining "color of title" as a writing purporting to convey title (citing Capers v. Camp, 257 S.E.2d 517, 521 (Ga. 1979))).

maintaining the railroad tracks. This is unlike what occurred in Watkins, where the railroad gained only a right-of-way by adverse possession because the railroad possessed only a portion of the property claimed as opposed to establishing exclusive dominion. 597 S.E.2d at 379-80. Furthermore, the fact that the railroad's ownership was widely known in this case, as in Seignious, is shown by valuation maps from the early twentieth century reflecting that the railroad's ownership was "claimed by possessory title."[9]

Here, the railroad's assertion of exclusive dominion over the land, the railroad claiming the land as its own by possessory title rather than claiming an easement, and the railroad's ownership of the land being widely known collectively demonstrate that the railroad possessed the relevant portion of the rail corridor under a claim of right that was in the nature of a fee simple interest. Therefore, since the railroad exclusively, notoriously, continuously, peaceably, and without interruption possessed the portion of the rail corridor adjacent to Parcel 97 under a claim of right in fee simple for over twenty years, the railroad obtained title in fee simple.

As with their focus on color of title with respect to the requirements for adverse possession, plaintiffs similarly misconstrue Georgia law regarding the presumption of an easement for railroad purposes. Plaintiffs are correct that Georgia law allows railroads to acquire property for railroad use through condemnation or voluntary grant, that in such cases the acquisitions are generally easements for railroad purposes, and that possession by condemnation or limited-purpose easement expires when the railroad use is over. However, the foregoing statement of law does not suggest that Georgia law prevents a railroad from acquiring land in fee simple. To the contrary, MG&AR's charter gave it the power to "purchase, hold and convey real and personal property . . . and generally do anything and everything necessary to carry out the purposes of [its] incorporation." 1888 Ga. Laws 227. MG&AR's power to acquire real property included the power to "purchase, condemn and acquire such right-of-way . . . and other real estate along its line . . . that may be necessary or proper for its use . . . ." Id. at 228 (emphasis added). In distinguishing "rights-of-way" from other interests in real estate, such as "title to land," the Georgia General Assembly demonstrated that a railroad's "right to acquire title to land or right-of-way," see id. (emphasis added), is not limited to acquiring nonpossessory interests such as easements, but can indeed include acquiring title to land in fee simple.

Moreover, section 1689 of the 1880 version of Georgia Code Annotated, cited often by plaintiffs, endows railroads with "the powers and privileges granted to corporations," which includes "procur[ing] . . . the title to the lands, or right of way, or other property necessary or proper" for railroad purposes. (Emphasis added). The clear demarcation between "right of way" and "other" property demonstrates that railroads have options for holding real estate beyond easements for railroad purposes. See, e.g., Barber v. S. Ry. Co., 274 S.E.2d 336, 337 (Ga. 1981) (holding that certain deeds conveyed fee simple title to the railroad, while others conveyed easements (citing generally Jackson v. Rogers, 54 S.E.2d 132 (Ga. 1949) (deeds conveyed fee simple title) and Sorrells, 92 S.E.2d at 513 (deeds conveyed easements))).

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[9] The record before the court does not reflect exactly when MG&AR's "claim[] by possessory title" began, but such specificity is not necessary here because there is no dispute that the twenty-year statutory period was met long before the NITU was issued on August 12, 2013.

In sum, the court properly applied Georgia law of adverse possession in holding that the railroad's possession of the portion of the rail corridor adjacent to Parcel 97 was held under a claim of right, and thus the railroad acquired title to that portion of the rail corridor in fee simple. Although not expressly stated in its summary judgment ruling, the court's underlying essential finding that title to real property can be held by Georgia railroads in fee simple was similarly correct. Therefore, the court must deny this portion of plaintiffs' motion for reconsideration.

## III. CONCLUSION

For the foregoing reasons, the court **DENIES IN PART** and **GRANTS IN PART** the plaintiffs' motion for reconsideration. The parties shall file a joint status report **by no later than Friday, December 16, 2016**, indicating whether they wish to amend the scheduling order that is currently in place and, if so, setting forth a proposed schedule.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

# In the United States Court of Federal Claims

No. 14-388L
(Filed: January 23, 2017)

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| WILLIAM C. HARDY & BERTIE ANN HARDY et al., | * |
| Plaintiffs, | * |
| v. | * |
| THE UNITED STATES, | * |
| Defendant. | * |

## ORDER

On May 4, 2016, the court issued an opinion and order granting in part and denying in part the parties' cross-motions for summary judgment. On November 28, 2016, the court issued an opinion and order granting in part and denying in part plaintiffs' motion for reconsideration. Plaintiffs collectively own certain parcels of land adjacent to a railroad corridor in Newton County, Georgia. Upon reconsideration, the court determined, among other issues, that the Lee deed conveyed an easement for railroad purposes only. Defendant now moves for reconsideration, arguing that the court improperly relied on evidence of condemnation proceedings. The court observes that evidence regarding condemnation proceedings was not necessary for the court's conclusion concerning the Lee deed—that it conveyed an easement for railroad purposes only—and that the other factors considered by the court amply support its conclusion.[1] Therefore, defendant's January 18, 2017 motion for reconsideration is **DENIED**.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

[1] Since evidence regarding condemnation proceedings had no effect on the results of the court's November 28, 2016 reconsideration decision, the court need not address defendant's arguments about condemnation proceedings under Georgia law.

# In the United States Court of Federal Claims

No. 14-388L
(Filed: April 13, 2017)

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| WILLIAM C. HARDY & BERTIE ANN HARDY et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE UNITED STATES,<br><br>Defendant. | Motion for Reconsideration; RCFC 59(a)(1); Notice of Interim Trail Use; Fifth Amendment Taking; Effective Date of Taking; Duration of Taking |

Elizabeth A. Gepford McCulley, Kansas City, MO, for plaintiffs.

Stephen Finn, United States Department of Justice, Washington, DC, for defendant.

**OPINION AND ORDER**

**SWEENEY**, Judge

Defendant moves, pursuant to Rule 59(a)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), for partial reconsideration of the court's May 4, 2016 ruling on the parties' cross-motions for summary judgment ("summary judgment ruling"). For the reasons set forth below, the court denies defendant's motion for reconsideration.

## I. BACKGROUND

In this Rails-to-Trails action, 112 plaintiffs contend that they own real property adjacent to a rail corridor in Newton County, Georgia. They assert that until 2013, the Central of Georgia Railroad Company ("CGA") and its predecessors held easements for railroad purposes that crossed their land.[1] According to plaintiffs, defendant United States then authorized the conversion of the railroad rights-of-way into recreational trails pursuant to the National Trail Systems Act ("Trails Act"), conduct that resulted in a taking in violation of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

Descriptions of the conflict's statutory and regulatory context, initial acquisition of the land in question, proceedings before the Surface Transportation Board ("STB"), and procedural

[1] The modern-day CGA is the successor in interest to the Middle Georgia and Atlantic Railway Company ("MG&AR"), which originally acquired the land at issue in this action.

history are provided in the court's summary judgment ruling and need not be repeated herein. See Hardy v. United States, 127 Fed. Cl. 1, 5-7 (2016). In its summary judgment ruling, the court determined, among other issues, whether certain parcels of land were included within the parameters of the Notice of Interim Trail Use ("NITU") based on the NITU's description of the end of the rail line. Pursuant to "established binding precedent" that is "unambiguous," the court declared:

> [T]he STB's issuance of a NITU effects a taking. Events arising thereafter . . . have no bearing whatsoever on the existence of a Fifth Amendment taking. . . . Because a NITU was issued here, a Fifth Amendment taking occurred . . . . Accordingly, the affected plaintiffs are entitled to summary judgment on the issue of liability.

Id. at 21-22. The court also observed that, contrary to defendant's position that the NITU was ambiguous regarding the end of the rail line, "the parameters of the NITU are settled by the plain language of the NITU, itself." Id. at 22 n.5 (citing Tr. of Oral Arg. 72, ECF No. 56); accord Order 2, Nov. 9, 2015, ECF No. 60. The NITU, which was issued on August 19, 2013, described the rail line as follows:

> [A]pproximately 14.90 miles of rail line between milepost E 65.80 (at the point of the line's crossing of Route 229 in Newborn) and milepost E 80.70 (near the intersection of Washington Street, SW, and Turner Lake Road, SW, in Covington), in Newton County, [Georgia].[2]

Pls.' Resp. Ex. F at 1, ECF No. 103-6; Cent. of Ga. R.R. Co.—Abandonment Exemption—in Newton Cty., Ga., No. AB 290 (Sub-No. 343X), 2013 WL 4425647 (S.T.B. Aug. 19, 2013).

On September 28, 2016, CGA notified the STB that it had "entered into a Lease Agreement for interim trail use and rail banking for the entire line that was subject to abandonment . . . . The Lease Agreement covers the line extending between mileposts E-65.80 and E-80.70 in Newton County, Georgia . . . ." Notice Att. A at 1, ECF No. 89-1. CGA attached a map of the rail line to its notice depicting milepost E-65.80 as being located in Newborn. Id. at 3.

On October 14, 2016, CGA informed the STB that the precise location of milepost E-65.80 was incorrectly described in the notice of exemption and subsequent NITU, explaining that "the point of the Line's crossing of Route 229 in Newborn, Georgia" should instead read "a point just east of the Ziegler Road crossing west of downtown Newborn." Def.'s Mot. App. A at 1-2,

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[2] A notice of exemption containing the same description of the rail line, verbatim, had been served and published in the Federal Register one month prior. Central of Georgia Railroad Company—Abandonment Exemption—in Newton County, Ga., 78 Fed. Reg. 43,273 (July 19, 2013). The notice of exemption is also reproduced in its entirety at Exhibit B of plaintiffs' response.

ECF No. 96-1; see also Def.'s Mot. App. B, ECF No. 96-2 (noting that the lease agreement was also subject to the corrected location of milepost E-65.80). CGA attached a map of the rail line depicting milepost E-65.80 as being located west of Newborn. Def.'s Mot. App. A at 3, ECF No. 96-1; see also Def.'s Mot. App. B at 3, ECF No. 96-2 (updating the lease agreement).

On November 18, 2016, the STB issued a public notice of correction of the NITU, modifying the parenthetical description of milepost E-65.80 to read "(a point just east of Ziegler Road crossing west of downtown Newborn)" while leaving intact the remainder of the NITU.[3] Def.'s Mot. App. C at 2, ECF No. 96-3; Cent. of Ga. R.R. Co.—Abandonment Exemption—in Newton Cty., Ga., No. AB 290 (Sub-No. 343X), 2016 WL 6839539 at *1-2 (S.T.B. Nov. 18, 2013). Eleven plaintiffs collectively owning twelve parcels of land are affected by the modification to the NITU (the "affected plaintiffs"). Def.'s Mot. 2 n.1, ECF No. 96; Pls.' Resp. 1, ECF No. 103.

On November 28, 2016, the court issued an opinion and order partially reconsidering its summary judgment ruling. However, none of the issues addressed therein is relevant to the instant motion.

Defendant now moves for partial reconsideration of the court's summary judgment ruling, arguing that the correction to the NITU remedied a "ministerial error" only; thus, there was no "unequivocal act that demonstrates the necessary intent to abandon the rail line" constituting a taking of plaintiffs' land between the corrected description of milepost E-65.80's location and the original description of milepost E-65.80's location. Def.'s Mot. 6, ECF No. 96. Plaintiffs, on the other hand, emphasize that the original NITU's issuance effected a taking, and that later-occurring events—including corrections to the NITU—"are relevant to the duration of the taking, not whether a taking occurred." Pls.' Resp. 5, ECF No. 103. Thus, plaintiffs assert, "under the bright-line rule announced by the [United States Court of Appeals for the Federal Circuit ("Federal Circuit")] in Caldwell, Barclay, and Ladd [I], the taking for [the affected plaintiffs] is a temporary taking that started on August 19, 2013 and ended on November 18, 2016." Id. at 6.

Defendant's motion is fully briefed, and the court considers oral argument unnecessary.

## II. DISCUSSION

### A. Standard of Review

A motion for reconsideration is a request for "extraordinary" relief and is not an avenue for a dissatisfied party to simply relitigate the case. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004); Four Rivers Invs., Inc. v. United States, 78 Fed. Cl. 662, 664 (2007); Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999), aff'd per curiam, 250 F.3d 762 (Fed. Cir. 2000) (unpublished table decision). Thus, such a motion does not allow a party to

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[3] A concomitant correction to the notice of exemption was published in the Federal Register five days later. Central of Georgia Railroad Company—Abandonment Exemption—in Newton County, Ga., 81 Fed. Reg. 84,673 (Nov. 23, 2016).

raise arguments that it failed to raise previously or reassert arguments that have already been considered. Four Rivers Invs., 78 Fed. Cl. at 664. Pursuant to RCFC 59(a)(1), the court "may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." Biery v. United States, 818 F.3d 704, 711 (Fed. Cir. 2016) (internal quotation marks omitted). A decision on a motion for reconsideration is within the discretion of the trial court. See Entergy Nuclear FitzPatrick, LLC v. United States, 711 F.3d 1382, 1386 (Fed. Cir. 2013) (explaining that a decision on a motion for reconsideration is reviewed on appeal for abuse of discretion).

### B. Issuance of a NITU Effects a Taking Regardless of the Railroad's Intent to Abandon the Rail Line or Subsequent Events

In its motion for partial reconsideration, defendant does not argue that there has been an intervening change in the law, that the court made a clear factual or legal error, or that there has been a manifest injustice. Rather, it contends that the amended NITU is newly discovered evidence that was previously unavailable.[4] At issue here is the impact of the amendment on the original NITU.

As the court explained in its summary judgment ruling, it is well established under binding precedent that issuance of a NITU effects a taking. Hardy, 127 Fed. Cl. at 21-22 (citing Ladd v. United States ("Ladd I"), 630 F.3d 1015, 1024 (Fed. Cir. 2010); Barclay v. United States, 443 F.3d 1368, 1378 (Fed. Cir. 2006)); see also Rogers v. United States, 814 F.3d 1299, 1303 (Fed. Cir. 2015) ("As we have previously explained in other rails-to-trails cases, a taking, if any, occurs when, pursuant to the Trails Act, the STB issues a [NITU] . . . ."[5]). This is a bedrock principle of Rails-to-Trails case law.

Defendant's focus on CGA's intent to abandon the rail line, see, e.g., Def.'s Mot. 6, ECF No. 96; see generally Def.'s Reply, ECF No. 113, is "contrary to established binding precedent," Hardy, 127 Fed. Cl. at 21. The NITU's issuance "is the only event that must occur" for accrual of a Trails Act takings claim.[6] Barclay, 443 F.3d at 1373. In Ladd I, the Federal Circuit explained that events occurring after a NITU is issued are irrelevant in determining whether there

[4] Defendant also implicitly suggests that the NITU was ambiguous regarding the rail line's eastern terminus and that the proper focus is on CGA's intent to abandon the rail line. However, the court previously considered and rejected those arguments. See Hardy, 127 Fed. Cl. at 21-22. Thus, they are improper grounds upon which to move for reconsideration.

[5] Whether there is a taking depends on whether the claimant holds a "valid interest in the property-at-issue." Rogers, 814 F.3d at 1303 (citing Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001)).

[6] A railroad cannot abandon a rail line without permission from the STB, and a NITU blocks vesting of state law reversionary interests by preventing abandonment. Rogers, 814 F.3d at 1303; Barclay, 443 F.3d at 1374. Thus, a NITU renders moot the issue of the railroad's intent regarding abandonment.

has been a compensable taking. 630 F.3d at 1024-25. The Federal Circuit specified that a taking occurs upon issuance of a NITU even if (1) a railroad is still operating or (2) a trail use agreement and subsequent conversion of the railway to a recreational trail never materialize. Id. at 1024; see also Caldwell, 391 F.3d at 1234-35 (explaining that issuance of a NITU "marks the 'finite start' to either temporary or permanent takings claims" even though "the precise nature of the takings claim . . . will not be clear at the time it accrues"). Therefore, as the court explained in its earlier ruling, events subsequent to a NITU "have no bearing whatsoever on the existence of a Fifth Amendment taking. . . . Because a NITU was issued here, a Fifth Amendment taking occurred, regardless of whether the rail line was abandoned." Hardy, 127 Fed. Cl. at 21-22. "Post-NITU events may affect the duration of, and compensation for, the taking, but they do not foreclose the NITU from effecting the taking in the first instance." James v. United States, 130 Fed. Cl. 707, 733 (2017) (internal quotation marks omitted).

The Federal Circuit has previously confronted the issue of multiple NITUs impacting a rail line, explaining that "a claim alleging a Fifth Amendment taking accrues when the act that constitutes the taking occurs. In the context of Trails Act cases, the cause of action accrues when the government issues the first NITU that concerns the landowner's property."[7] Ladd v. United States ("Ladd II"), 713 F.3d 648, 652 (Fed. Cir. 2013) (emphasis added) (citation and internal quotation marks omitted). In other words, if there are multiple NITUs, "'the issuance of the original NITU,' rather than subsequent NITUs, is the event that 'triggers the accrual date of the cause of action.'" Id. at 654 (quoting Barclay, 443 F.3d at 1378). In this case, defendant concedes that there is a distinction between "the [original] NITU issued on August 19, 2013[,] and the NITU as corrected on November 18, 2016." Def.'s Reply 2, ECF No. 113.

### C. Defendant Can Only Prevail If the NITU's Amendment Is Retroactive

Here, defendant essentially posits that the November 18, 2016 amendment to the NITU to correct the description of the end of the rail line is retroactive. Defendant characterizes the error in the original description of milepost E-65.80's location as "ministerial" and the amendment as a mere "administrative correction," emphasizing that the actual location of the end of the rail line did not change. Def.'s Mot. 6, ECF No. 96. Retroactive application of the amendment to the NITU is the only possible avenue for defendant to prevail on the instant motion since, as explained above, events occurring after a NITU is originally issued—including a subsequent NITU or failure to abandon the rail line—are wholly irrelevant to whether a taking has occurred.

If defendant is correct in its assertion that the amendment to the NITU is retroactive, the court must perform a new analysis that would result in a reversal of the court's prior ruling concerning the affected plaintiffs and warrant granting defendant's motion for partial reconsideration under RCFC 59(a)(1). See Biery, 818 F.3d at 711. Therefore, the court must determine whether the November 18, 2016 amendment relates back to the NITU's original August 19, 2013 issue date (thus warranting partial reconsideration) or is effective as a subsequent NITU (thus making partial reconsideration improper).

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[7] A possible exception to the claim accrual suspension rule, which was the focus of Ladd II, 713 F.3d at 652-53, does not apply here because the affected landowners were sufficiently aware of the original NITU to file suit within six years of its issuance.

**D. The NITU's Amendment Was Not Retroactive**

The court concludes that the amendment to the NITU does not relate back to the NITU's original issue date, and is more properly viewed as a subsequent NITU. Here, the STB issued a NITU on August 19, 2013, that, by its own terms, extended east to "the point of the line's crossing of Route 229 in Newborn." Pls.' Resp. Ex. F at 1, ECF No. 103-6. On September 28, 2016, CGA notified the STB that an indefinite trail use agreement had been reached "for the entire line." Notice Att. A at 1, ECF No. 89-1; accord Def.'s Mot. App. C at 1, ECF No. 96-3. Approximately two weeks later, on October 14, 2016, CGA clarified that the indefinite trail use agreement extended east only as far as "a point just east of the Ziegler Road crossing west of downtown Newborn." Def.'s Mot. App. A at 1-2, ECF No. 96-1; Def.'s Mot. App. B at 3, ECF No. 96-2. On November 18, 2016, the STB issued its decision amending the NITU accordingly. Def.'s Mot. App. C at 2, ECF No. 96-3; Cent. of Ga. R.R., 2016 WL 6839539 at *1-2.

In situations where a trail use agreement is reached that covers less land than the original NITU, the STB reopens the abandonment proceedings, vacates the original NITU, and issues a "replacement" NITU "for only the portion of the right-of-way covered by the interim trail use agreement." 49 C.F.R. § 1152.29(h) (2016). In other words, the updated NITU does not relate back to the original NITU issue date, and is treated as a separate NITU.

The issue of an updated NITU is not one of first impression. In Illig v. United States, 67 Fed. Cl. 47 (2005), aff'd, 274 F. App'x 883 (Fed. Cir. 2008) (unpublished decision), a trail use agreement was reached for an entire line covered by a NITU. Id. at 49. Approximately five years after the original NITU was issued, the underlying trail use agreement was reduced by approximately 0.21 miles. Id. at 49-50. Accordingly, the abandonment proceedings were reopened, and the original NITU was vacated with respect to the segment of the rail line no longer encompassed by the trail use agreement. Id. at 50. Relying on the Federal Circuit's decision in Caldwell, the Illig court determined that a takings claim accrued when the original NITU was issued, despite the NITU's later reduction in scope. Id. at 54.

Here, as in Illig, when the NITU was changed (years later) to reflect the updated trail use agreement, it covered less land than the original NITU, as illustrated by the fact that twelve parcels of land owned by eleven plaintiffs in this case are no longer subject to the NITU. Moreover, the STB decision amending the NITU in this case was, by its own terms, made "effective on its date of service"—i.e., November 18, 2016—not retroactively. Def.'s Mot. App. C at 2, ECF No. 96-3; Cent. of Ga. R.R., 2016 WL 6839539 at *2. Therefore, the NITU's amendment is properly viewed as a subsequent NITU, and thus has no bearing on the accrual of a takings claim based on the original NITU.

**III. CONCLUSION**

The court has considered all of the parties' arguments. To the extent not discussed herein, the court finds them unpersuasive or without merit.

It is well settled that "the STB's issuance of a NITU effects a taking." Hardy, 127 Fed. Cl. at 21. Events occurring after the original NITU is issued—such as abandonment of the rail

line, subsequent restoration of rail service, consummation of a trail use agreement, failure to consummate a trail use agreement, or amendment of the NITU—are irrelevant to the existence of a takings claim, but may impact the duration of the taking. The STB issued an amended NITU in this case. Consequently, the court's conclusion that the original NITU effected a taking of the affected plaintiffs' property need not be disturbed. Rather, the amendment of the NITU only bears upon the duration of the taking suffered by the affected plaintiffs. In short, the affected plaintiffs suffered a temporary taking from August 19, 2013 (the issue date of the original NITU) to November, 18, 2016 (the date the NITU was modified).

Accordingly, defendant's motion for partial reconsideration is **DENIED**. The issue of damages will be addressed at the upcoming valuation trial.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

# STATUTORY AND REGULATORY ADDENDUM


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**16 U.S. Code § 1247.State and local area recreation and historic trails**

* * *

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

* * *

**49 U.S. Code § 10501.General jurisdiction**

* * *

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

* * *

**49 U.S. Code § 10502.Authority to exempt rail carrier transportation**

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

* * *

**49 U.S. Code § 10903. Filing and procedure for application to abandon or discontinue**

(a)

(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include—

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall—

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;
(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;
(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and
(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)

(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.
(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) [1] of this title before May 31, 1998.

(c)

(1) In this subsection, the term "potentially subject to abandonment" has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.
(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its

diagram that are necessary to maintain the accuracy of the diagram. The diagram shall—

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board—

(1) finds public convenience and necessity, it shall—

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

**49 U.S. Code § 11101.Common carrier transportation, service, and rates**

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.
* * *

**Ga. Code Ann. § 44-6-21 What words create; use of word "heirs"; intention of maker of instrument**

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.

**Control and Supervision of State-Aid Roads, 1935 Ga. Laws 160**

When a road is approved as a part of the system of State Highways, the establishment of such road and its construction, including location, surveys, grading, and paving, shall be under the control and supervision of the State Highway Board. All expenses necessary for such construction, including surveys, the location or relocation of such roads, and all other expenses connected with the establishment and construction thereof, except the expense of procuring rights of way, shall be paid by the Board out of funds allocated to the Highway Department. It shall be the duty of county commissioners or other county authorities having control of county roads to assist in procuring the necessary rights of way as cheaply as possible, and all expenses thereof, including the purchase price of any land purchased for a right of way, and all direct and consequential damages awarded in any proceeding brought to condemn any such right of way, shall be paid by the county in which such road is situated out of the county treasury; provided that nothing contained in this Act shall prevent the State Highway Board from using State Highway funds for the purpose of purchasing right of way, or to pay the purchase price thereof, or to pay any damages awarded on account of the location of any such State-aid Road, or from assisting the counties in so doing.

**49 C.F.R. § 1152.24**

* * *

(e)

* * *

(2) Upon the filing of an abandonment or discontinuance application, the Board will review the application and determine whether it conforms with all applicable regulations. If the application is substantially incomplete or its filing otherwise defective, the Board shall reject the application for stated reasons by order (which order will be administratively final) within 20 days from the date of filing of the application. If the Board does not reject the application, notice of the filing of the application shall be published in the Federal Register by the Board, through the Director of the Office of Proceedings, within 20 days of the filing of the application.

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**49 CFR § 1152.29 - Prospective use of rights-of-way for interim trail use and rail banking.**

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the trail sponsor's willingness to assume full responsibility for:

(i) Managing the right-of-way;

(ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and

(iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

* * *

(d) Exempt abandonment proceedings.

(1) If continued rail service does not occur under 49 U.S.C. 10904 and 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail

sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. The NITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the NITU is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

* * *

(e)

* * *

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line.

Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

* * *

(h) When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

(1) The rail carrier that sought abandonment authorization;

(2) The owner of the right-of-way; and

(3) The current trail sponsor.

**49 CFR § 1152.50 - Exempt abandonments and discontinuances of service and trackage rights.**

(a)

(1) A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.

(2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of §§ 1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Board has found:

(1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and

(2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use this class exemption. The procedures are set out in § 1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). This also does not

preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d)Notice of exemption.

(1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii)Department of Defense (Military Surface Deployment and Distribution Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement "Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it."

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter "X") with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in § 1152.50(b), the information required in §§ 1152.22(a) (1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §§ 1152.50(d)(1) and 1105.11 have been complied with.

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. Petitions to stay the effective date of the notice on environmental or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on the petition before the notice becomes effective. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters, and requests for public use conditions under 49 U.S.C. 10905 and 49 CFR 1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and 49 CFR 1152.29 must be filed within 10 days after publication. The exemption will be effective 30 days after publication, unless stayed. If the notice of exemption contains false or misleading information, the use of the exemption is void ab initio and the Board shall summarily reject the exemption notice.
(4) In out-of-service rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.
(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.
(6) To address whether the standard labor protective conditions set forth in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91

(1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

(e)Consummation notice. As provided in § 1152.29(e)(2), rail carriers that receive authority to abandon a line under § 1152.50 must file with the Board a notice that abandonment has been consummated.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM OF RECORDS:

The following categories of individuals are covered by PMIS:

1. All active MARAD employees, which include U.S. Merchant Marine Academy (USMMA) Federal employees.

2. All inactive MARAD and USMMA employees, which include retirees.

CATEGORIES OF RECORDS IN THE SYSTEM:

PMIS contains the following types of records:

- Payroll information such as pay grade, salary, awards, thrift savings data (TSP), reduction in force (RIF) Personnel data include SSN, name (first, middle, last), security clearance level, employment status, organization, *etc.*
- Project labor charges has the labor rate information for each MARAD mission project.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Merchant Marine Act of 1936.

PURPOSES:

PMIS is used for personnel management, which includes name, labor charges, approved project codes. The information is utilized for project management and forecasting labor charges.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

PMIS provides MARAD managers with timely Personnel Compensation & Benefit (PC&B) information to allow informed decision-making, which can be the cost effects of current and future staffing and the financial position of their organizations. PMIS is also used to generate bi-weekly, monthly, and ad hoc management reports, *e.g.,* a within grade increase (WGI) projection report for the employees' pay increase and budget cost within an organization.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Data is stored in this system on a dedicated server.

RETRIEVABILITY:

Records are retrievable by last name, organization code and pay period.

SAFEGUARDS:

The production environment is located in a secure zone behind a firewall, called a Demilitarized Zone (DMZ) that enables secure connections from the Internet.

DOT Crisis and Security Management Center (CSMC) monitors all traffic within the department looking for any possible attacks. CSMC works with the modes during possible attacks. MARAD has Cisco ASA devices to monitor events on the system, detect attacks, and provide identification of unauthorized use of the system.

The Stennis Data Center in Mississippi hosting PMIS is occupied by the Department of Navy contractor personnel and is not open to the general public. The Data Center is uniquely constructed. It was formerly an ammunition manufacturing facility and as such, its external walls are constructed completely of steel reinforced concrete that is 12 to 48 inches thick. It has no windows. The construction materials as well as its location inside of the Stennis Space Center significantly reduces its vulnerability to most conventional types of external threats *i.e.* vehicle born improvised explosive devices (VBIEDs), burglary, trespassing, and unauthorized entry.

The facility operates in a secure closed manner. Outside personnel do not have unescorted access to the facility. Mail deliveries are received by facility personnel who screen all material before being brought into the facility. All equipment is delivered and sent through a secure loading dock. All equipment is installed either by or under the supervision of facility personnel.

The test and development environments are available only to local personnel and selected users connecting via a Virtual Private Network.

System data is protected by daily backups to Linear Tape Open (LTO3) tape. In addition, daily backups of data to a local server hard drive, which are kept for a period of 14 days to safeguard the data.

RETENTION AND DISPOSAL:

The files are retained and disposed of according to the MARAD Records Schedule, according to the National Archives and Records Administration, and DOT policy. Schedule No. 232 (Dispose of when superseded by master file processing updates.)

SYSTEM OWNER(S) AND ADDRESS:

Deputy Chief Financial Officer (CFO), Maritime Administration, 1200 New Jersey Ave, SE., Washington, DC 20590. 202–366–5110.

NOTIFICATION PROCEDURE:

Individuals wishing to know if their records appear in this system may make a request in writing to the FOIA/Privacy Act Officer, Maritime Administration 1200 New Jersey Ave, SE., W26–499, Washington, DC 20590. The request must include the requester's name, mailing address, telephone number and/or e-mail address, a description and, if possible, the location of the records requested, and verification of identity (such as, a statement under penalty or perjury that the requester is the individual who he or she claims to be).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about them in this system should apply to the FOIA/Privacy Act Officer, following the same procedure as indicated under ''Notification procedure.'' Mariners can log into the system to view their documents.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest the content of information about them in this system should apply to the FOIA/Privacy Act Officer, following the same procedure as indicated under ''Notification procedure.''

RECORD SOURCE CATEGORIES:

Information in PMIS is obtained from U.S. Department of Interior (DOI) and DOT/FAA Federal Personnel and Payroll System (FPPS).

The data from DOI includes employees' payroll data such as SSN, name (first, middle, last), hours worked, and salary.

The information from FPPS contains number of employees for each organization, SSN, name (first, middle, last), salary, type of pay plan, and leave balance.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: September 10, 2009.

**Habib Azarsina,**

*Departmental Privacy Officer.*

[FR Doc. E9–22388 Filed 9–16–09; 8:45 am]

BILLING CODE 4910–9X–P

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 35294]**

### Squaw Creek Southern Railroad, Inc.—Lease and Operation Exemption—Central of Georgia Railroad Company

Squaw Creek Southern Railroad, Inc. (SQS), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease and to operate, pursuant to an amendment dated August 31, 2009, to a lease agreement

(Agreement) entered into on April 21, 2008, with Central of Georgia Railroad Company (CGA), a wholly-owned subsidiary of Norfolk Southern Railway Company (NSR), approximately 12.5 miles of CGA's rail line between milepost E–53–3 at Machen, Jasper County, GA, and milepost E–65.8 at Newborn, Newton County, GA.

SQS states that the line connects with CGA and CSX Transportation, Inc. SQS believes its Agreement does not include an interchange commitment that violates 49 CFR 1150.43(h) (requiring submission of complete version of agreement that may limit future interchange with a third-party connecting carrier). Nevertheless, SQS has concurrently filed with its notice a complete version of the Agreement, marked ''highly confidential'' and submitted under seal pursuant to 49 CFR 1104.14(a). SQS also states that under the Agreement, it will receive per car handling charges from NSR for each car originating or terminating on SQS and interchanged with CGA. According to SQS, the Agreement also provides for an annual amount of minimal rental which SQS may pay in full or against which it can receive an offset from cars interchanged to CGA. However, the Agreement provides that there is no restriction on SQS's ability to interchange traffic with any other connecting carrier and that SQS is permitted local and switch rates without interchange restrictions.

SQS certifies that its projected annual revenues as a result of the transaction will not result in SQS becoming a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

SQS states that it expects to consummate the transaction on or after September 30, 2009. The earliest this transaction may be consummated is October 1, 2009, the effective date of the exemption (30 days after the exemption was filed).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 24, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35294, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Andrew P. Goldstein, McCarthy, Sweeney & Harkaway, P.C., 2175 K Street, NW., Suite 600, Washington, DC 20037.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: September 14, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. E9–22387 Filed 9–16–09; 8:45 am]

BILLING CODE 4915–01–P

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### Financial Management Service; Proposed Collection of Information: Electronic Funds Transfer (EFT) Market Research Study

**AGENCY:** Financial Management Service, Fiscal Service, Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Financial Management Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection. By this notice, the Financial Management Service solicits comments concerning the ''Electronic Funds Transfer (EFT) Market Research Study.''

**DATES:** Written comments should be received on or before November 16, 2009.

**ADDRESSES:** Direct all written comments to Financial Management Service, Records and Information Management Branch, Room 135, 3700 East-West Highway, Hyattsville, Maryland 20782.

**FOR FURTHER INFORMATION CONTACT:** Request for additional information should be directed to Edita Rickard, EFT Strategy Division, 401 14th Street, SW., Room 304C, Washington, DC 20227, 202–874–7165.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995, (44 U.S.C. 3506(c)(2)(A)), the Financial Management Service solicits comments on the collection of information described below:

*Title:* Electronic Funds Transfer (EFT) Market Research Study.

*OMB Number:* 15 10–0074.

*Form Number:* None.

*Abstract:* Study of Federal benefit recipients to identify barriers to significant increases in use of EFT for benefit and vendor payments.

*Current Action:* Extension of currently approved collection.

*Type of Review:* Regular.

*Affected Public:* Individuals or households, Federal Government.

*Estimated Number of Respondents:* 19,500.

*Estimated Time per Respondent:* 3 hours 30 minutes.

*Estimated Total Annual Burden Hours:* 7,500.

*Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up cost and cost of operation, maintenance and purchase of services to provide information.

Dated: September 10, 2009.

**Rita Bratcher,**

*Assistant Commissioner and Chief Disbursing Officer, Payment Management.*

[FR Doc. E9–22407 Filed 9–16–09; 8:45 am]

BILLING CODE 4810–35–M

## DEPARTMENT OF VETERANS AFFAIRS

### Reasonable Charges for Inpatient MS–DRGs and SNF Medical Services for 2010; Fiscal Year Update

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

Board decisions and notices are available on our Web site at ''*www.stb.dot.gov.*''

Decided: December 9, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2013–29754 Filed 12–12–13; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35786]**

### CaterParrott Railnet, LLC—Change in Operators Exemption—Rail Lines of Central of Georgia Railroad Company

CaterParrott Railnet, LLC (CPR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to change operators from Squaw Creek Southern Railroad, Inc. (SCS), to CPR on the following rail lines located in Georgia and owned by Central of Georgia Railroad Company (CGR), a wholly owned subsidiary of Norfolk Southern Railway Company: (1) Approximately 21.75 miles of rail line between milepost F–53.75 at Machen, Jasper County, and milepost F–75.5 at Madison, Morgan County; [1] and (2) approximately 12.5 miles of rail line between milepost E–53.3 at Machen, Jasper County, and milepost E–65.8 at Newborn, Newton County.[2]

According to CPR, an agreement has been reached between the parties under which CPR will lease and operate the lines. CPR will accept transfer and/or assignment of SCS's common carrier obligation. SCS has agreed to terminate its lease with CGR. CPR states that its proposed lease of the lines does not contain a provision that prohibits, restricts, or would otherwise limit future interchange of traffic with any third-party rail carrier. This change in operators is exempt under 49 CFR 1150.41(c).[3]

[1] SCS obtained Board authority to lease and operate this line in 2008. *Squaw Creek S. R.R.—Lease & Operation Exemption—Cent. of Ga. R.R.,* FD 35134 (STB served May 16, 2008).

[2] SCS obtained Board authority to lease and operate this line in 2009. *Squaw Creek S. R.R.—Lease & Operation Exemption—Cent. of Ga. R.R.,* FD 35294 (STB served Sept. 17, 2009).

[3] Under 49 CFR 1150.42(b), a change in operators requires that notice be given to shippers. CPR certifies that notice has been given to all known shippers on the lines.

The transaction may be consummated on or after December 29, 2013 (30 days after the notice of exemption was filed).

CPR certifies that its projected annual revenues as a result of this transaction will not result in CPR's becoming a Class I or Class II rail carrier and will not exceed $5 million.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 20, 2013 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35786, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Chris Parrott, CaterParrott Railnet, LLC, 700 East Marion Avenue, Nashville, GA 31639.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: December 9, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2013–29753 Filed 12–12–13; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0709]**

### Agency Information Collection (Regulation on Reduction of Nursing Shortages in State Homes; Application for Assistance for Hiring and Retaining Nurses at State Homes) Activities Under OMB Review

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before January 13, 2014.

**ADDRESSES:** Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0709'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492 or email *crystal.rennie@va.gov.* Please refer to ''OMB Control No. 2900–0709.''

**SUPPLEMENTARY INFORMATION:**

*Title:* Regulation on Reduction of Nursing Shortages in State Homes; Application for Assistance for Hiring and Retaining Nurses at State Homes, VA Form 10–0430.

*Type of Review:* Revision of currently approved collection.

*Abstract:* State Veterans' Homes complete VA Form 10–0430 to request funding to assist in the hiring and retention of nurses at their facility. VA will use the data collected to determine State homes eligibility and the appropriate amount of funding.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on Vol. 78 No. 176, at pages 55788.

*Affected Public:* State, Local or Tribal Government.

*Estimated Annual Burden:* 30.

*Estimated Average Burden per Respondent:* 2 hours.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 15 per year.

Dated: December 9, 2013.

By direction of the Secretary.

**Crystal Rennie,**

*VA Clearance Officer, U.S. Department of Veterans Affairs.*

[FR Doc. 2013–29732 Filed 12–12–13; 8:45 am]

**BILLING CODE 8320–01–P**

implementation period of the proposal from one year to 18 months.

The Commission finds that requiring members to include a reference or hyperlink to a security-specific TRACE Web page and include the time of trade on all retail customer confirmations is responsive to commenters' requests for harmonization of the FINRA Proposal and MSRB Proposal and therefore helped the Commission find that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Act,[244] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(9) of the Act,[245] which requires, among other things, that FINRA's rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission notes that the addition of the term ''offsetting'' to the rule is solely a clarification for the avoidance of doubt and that the change does not alter the substance of the rule. Furthermore, extension of the implementation period of the proposal from one year to 18 months is appropriate and responsive to the operational and implementation concerns raised by commenters. The Commission also notes that after consideration of the comments the MSRB received on its proposal to require a security-specific hyperlink to EMMA and the execution time of the transaction, the MSRB amended its proposal in a manner that is identical to the Amendment No. 1 that FINRA has filed.[246] The Commission notes that it today has approved the MSRB Proposal, as modified by MSRB Amendment No. 1, and believes that in the interests of promoting efficiency in the implementation of both proposals, it is appropriate to approve FINRA's proposal, as modified by Amendment No. 1, concurrently. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[247] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

**V. Conclusion**

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[248] that the proposed rule change (SR–FINRA–2016–032), as modified by Amendment No. 1, is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[249]

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016–28190 Filed 11–22–16; 8:45 am]

**BILLING CODE 8011–01–P**

[244] 15 U.S.C. 78o 3(b)(6).

[245] 15 U.S.C. 78o 3(b)(9).

[246] *See* MSRB Amendment No. 1, *supra* note 13, at 4–5.

[247] 15 U.S.C. 78s(b)(2).

[248] 15 U.S.C. 78s(b)(2).

[249] 17 CFR 200.30–3(a)(12).

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## SURFACE TRANSPORTATION BOARD

**[Docket No. FD 36069]**

### Kokomo Rail, LLC—Acquisition and Operation Exemption—Rail Line of Kokomo Rail Co., Inc.

Kokomo Rail, LLC (KR), a noncarrier, has filed a verified notice of exemption[1] under 49 C.F.R 1150.31 to acquire, from Kokomo Rail Co., Inc. (KRC),[2] and to operate, approximately 12.55 miles of rail line between milepost 134.48 at or near Marion and milepost 147.07 at or near Amboy, in Howard and Grant Counties, Ind. (the Line).

According to KR, KRC acquired the 12.55-mile line from CSX Transportation, Inc.[3] KR states that KRC was voluntarily dissolved as a corporation, and that dissolution makes it necessary to transfer KRC's authority to own and operate the Line from KRC to KR.

KR states that the proposed transaction does not involve any interchange commitments. KR certifies that its projected annual revenues as a result of this transaction will not result in the creation of a Class I or Class II rail carrier and that its projected annual revenues do not exceed $5 million.

The transaction may be consummated on or after December 7, 2016, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than November 30, 2016 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36069, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on applicant's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604.

According to KR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV.*''

Decided: November 18, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

**Rena Laws-Byrum,**

*Clearance Clerk.*

[FR Doc. 2016–28222 Filed 11–22–16; 8:45 am]

**BILLING CODE 4915–01–P**

[1] The verified notice was originally filed on October 27, 2016. On November 7, 2016, KR filed supplemental information, including the relevant mileposts, and noted that KRC was dissolved in 1999. Therefore, November 7, 2016, is the official filing date.

[2] KR is an affiliate of Kokomo Grain Co., Inc., as was KRC.

[3] *See Kokomo Rail Co.—Acquis. & Operation Exemption—Line of CSX Transp. Between Marion & Amboy, Ind.,* FD 32231 et al. (ICC served Dec. 15, 1993).

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## SURFACE TRANSPORTATION BOARD

**[Docket No. AB 290 (Sub-No. 343X)]**

### Central of Georgia Railroad Company—Abandonment Exemption—in Newton County, Ga.

**AGENCY:** Surface Transportation Board.

**ACTION:** Correction to notice of exemption.

On July 1, 2013, Central of Georgia Railroad Company (CGA)[1] filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments* to abandon approximately 14.90 miles of rail line between milepost E 65.80 and milepost E 80.70, in Newton County, Ga. The notice was served and published in the **Federal Register** on July 19, 2013 (78 FR 43,273).

Before the exemption became effective, Newton County Trail-Path Foundation, Inc. (Newton Trail) filed a request for a notice of interim trail use (NITU). The Board issued a NITU on August 19, 2013, and on September 28, 2016, CGA and Newton Trail filed a notice informing the Board that they had entered into a lease agreement for interim trail use and rail banking for the 14.90 miles of rail line that was subject to abandonment.

On October 14, 2016, CGR filed a letter stating that the map attached as

[1] CGA is a wholly owned subsidiary of Norfolk Southern Railway Company.

Appendix A to its July 1, 2013 verified notice did not properly depict the location of milepost E 65.80, and that parentheticals in the notice incorrectly refer to milepost E 65.80 as: ''(at the point of the Line's crossing of Route 229 in Newborn).'' [2] Thus, CGR requests that the Board accept the corrected map attached to the October 14, 2016 letter and clarify the parenthetical references to milepost E 65.80 in its July 1, 2013 verified notice and the notice the Board served and published on July 19, 2013, to read: ''(a point just east of the Ziegler Road crossing west of downtown Newborn)''. These corrections are recognized here. All of the remaining information in the July 19, 2013 notice remains unchanged.

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV.*''

Decided: November 18, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2016–28295 Filed 11–22–16; 8:45 am]

BILLING CODE 4915–01–P

[2] On October 14, 2016, CGA and Newton Trail also filed a letter to correct their September 28, 2016 notification that a lease agreement for interim trail use and rail banking had been reached. This filing as well as the modification of the NITU to reflect the correct location of milepost E 65.80 will be addressed in a separate decision.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Approval of Noise Compatibility Program for Bob Hope Airport, Burbank, California

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by Burbank-Glendale-Pasadena Airport Authority under the provisions of 49 U.S.C. 47501 *et seq.* (formerly the Aviation Safety and Noise Abatement Act, hereinafter referred to as ''the Act'') and 14 Code of Federal Regulations (CFR) Part 150 (hereinafter referred to as ''Part 150''). These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1990). On October 10, 2013, the FAA determined that the noise exposure maps submitted by Burbank-Glendale-Pasadena Airport Authority under Part 150 were in compliance with applicable requirements. On October 24, 2016, the FAA approved the Bob Hope Airport noise compatibility program. Fifteen (15) of the eighteen (18) total number of recommendations of the program were approved. Two (2) of the eighteen (18) total number of recommendations of the program were approved in part. For one (1) of the eighteen (18) program measures there was no action required at this time. No program elements relating to new or revised flight procedures for noise abatement were proposed by the airport operator.

**DATES:** *Effective Date:* The effective date of the FAA's approval of the noise compatibility program for Bob Hope Airport is October 24, 2016.

**FOR FURTHER INFORMATION CONTACT:** Victor Globa, Environmental Protection Specialist, Federal Aviation Administration, Los Angeles Airports District Office, Mailing Address: P.O. Box 92007, Los Angeles, California 90009–2007. Street Address: 15000 Aviation Boulevard, Lawndale, California 90261. Telephone: 310/725–3637. Documents reflecting this FAA action may be reviewed at this same location.

**SUPPLEMENTARY INFORMATION:** This notice announces that the FAA has given its overall approval to the noise compatibility program for Bob Hope Airport, effective October 24, 2016.

Under section 47504 of the Act, an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the noise exposure maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of Part 150 program recommendations is measured according to the standards expressed in Part 150 and the Act and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in Part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required. Prior to an FAA decision on a request to implement the action, an environmental review of the proposed action may be required. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where federal funding is sought, requests for project grants must be submitted to the FAA Los Angeles Airports District Office in the Western-Pacific Region.

Burbank-Glendale-Pasadena Airport Authority submitted to the FAA on June 27, 2013 the noise exposure maps, descriptions and other documentation produced during the noise compatibility planning study conducted from September 13, 2011 through October 24, 2016. The Bob Hope Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on October 10, 2013. Notice of this determination was published in the **Federal Register** (78 FR 64048) on October 25, 2013.

The Bob Hope Airport study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from December 30, 2014 to the year

**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for 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/ Erika B. Kranz*
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**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 13,630 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 2016 in 14-point Calisto MT, a proportionally spaced font.

*/s/ Erika B. Kranz*
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