No. 19-1793

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

UNITED STATES OF AMERICA,
Defendant/Appellant.

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

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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INTRODUCTION

The United States' opening brief demonstrated that the Court of Federal Claims ("CFC") misapplied Georgia law in interpreting both a first set of form deeds conveying land to a railroad and a second set of form deeds conveying land to the State for use as a public road. Georgia law has long established that deeds granting "land," as here, convey land in fee unless explicitly limited. No such limitations are present in these deeds.

In response, Plaintiffs misread Georgia statutes and case law to support the CFC's erroneous judgment. A proper application of Georgia law, however, confirms to the contrary that each of the deeds at issue here transferred fee title, precluding the relevant Plaintiffs' takings claims. Plaintiffs fare no better in defending the CFC's erroneous conclusion that properties beyond the eastern terminus of the Notice of Interim Trail Use ("NITU") were subject to a taking. The NITU had *no effect* on properties beyond its terminus (even accepting Circuit law on NITUs that the government has challenged in a related pending appeal).

ARGUMENT

I. The railroad deeds and road deeds conveyed a fee under Georgia law.

The United States' opening brief established that the Middle Georgia & Atlantic Railway Company ("MG&AR") form deeds granting lands to the railroad and the deeds granting land for County Road 213 all conveyed fee

interests.[1] Plaintiffs fail to rebut our showing that those who claim an interest in the portion of the rail corridor conveyed by these deeds lack any property interest that could give rise to a Fifth Amendment taking.

A. Georgia Code § 1689 did not preclude the railroad from purchasing a fee interest.

Plaintiffs' (and Amici's) arguments rest in large part on their claim that Georgia Code § 1689 (1882) (relevant portions included in Addendum hereto) authorized the railroad to acquire only an easement for its rail line. This argument finds no support in the law or in the record of this case.

Plaintiffs' argument is premised on § 1689(*l*), which provided a power of condemnation that a railroad could use to acquire an interest for its desired corridor if it was unable to otherwise "procure from the owner or owners thereof, by contract, lease or purchase, the title to the lands, or right of way, or other property necessary or proper for the construction of connection of said railroad." Plaintiffs appear to argue (yet present no supporting evidence) that MG&AR used condemnation to take the lands described in these deeds, and that the resulting interest acquired was therefore limited. This argument is incorrect for two reasons.

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[1] This appeal concerns the MG&AR form deeds "listed in the CFC's initial liability decision at Appx0009-0010 (omitting two that the government conceded conveyed only an easement)." Opening Brief 20-21. In listing these deeds, *id.*, the United States inadvertently omitted the Smith deed, Appx0505-0511, which is listed in the CFC decision at Appx0009. The government does not concede that this deed conveyed a mere easement. *See, e.g.*, Appx0905 (conceding as to the Stanton deed and Stanton & Bateman deed); Appx0351 (table indicating United States' position as to Smith deed).

First, Plaintiffs identify *no evidence* that the railroad used the § 1689(*l*) condemnation process for acquisition of the lands described in the MG&AR form deeds. As described below, the statute sets forth three distinct methods that the railroad could use to obtain an interest in property; the three share overlapping features (such as the ability of the railroad to conduct a survey) but have key differences (such as presence or absence of limitations on the estate acquired). *See generally* Ga. Code § 1689(i), (*l*).

(1) The railroad could "take and hold such voluntary grants of real estate and other property as may be made to it." Ga. Code § 1689(i). The statute provides that "voluntary grants[s] shall be held and used for the purpose of such grant only," *id.*, suggesting a potential reversion (e.g., in the event that the land was no longer need for railroad purposes). Under the common law, a "voluntary grant" is a grant of property "[w]ithout valuable consideration." "Voluntary," *Black's Law Dictionary* 1212 (2d ed. 1910); *see also Powell on Real Property* § 78A.06 (2019) (discussing various states' treatment of railroad acquisitions by condemnation, purchase, and gift).[2] The MG&AR form deeds at issue in this appeal are not voluntary grants because they *did* include valuable consideration. Accordingly, any limitations applying to voluntary grants are of no moment in interpreting these deeds. *See* Answering Brief 26; Amicus Brief 11.

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[2] Even nominal consideration is "valuable" consideration, "no matter how small the sum or the value may be." *Hollomon v. Board of Education*, 147 S.E. 882, 884-85 (Ga. 1929) (citing *Martin v. White*, 42 S.E. 279 (Ga. 1902); *Pierce v. Bemis*, 48 S.E. 128 (Ga. 1904); *Dix v. Wilkinson*, 99 S.E. 437 (Ga. 1919)).

(2) Separate from the ability to accept a voluntary grant, the railroad could "purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of its road." Ga. Code § 1689(i). This "purchase" of property does not come with any limitation on the type of interest acquired. *See id.*[3] All of the deeds at issue here (apart from the Lee deed discussed below) appear to have been made through this kind of ordinary purchase.

(3) If the railroad was unable to "procure from the owner or owners thereof, by contract, lease or purchase, to title to the lands, or right of way, or other property necessary or proper for the construction of said railroad" (i.e., by the methods described above), the railroad could acquire property by condemnation. Ga. Code § 1689(*l*). Under this process, the railroad could take its interest after paying just compensation in an amount (if not agreed to) to be determined by a panel of three assessors who would state their decision in writing and would file that award in the county Superior Court, where it would have the force and effect of a judgment or decree by that court. *Id.*

Plaintiffs argue that language in the description section of some of the MG&AR form deeds, indicating that the grantee's land had been surveyed for the railroad's proposed corridor, make it "obvious" that the railroad used

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[3] Plaintiffs and Amici present a muddled reading of these the first and second options as two parts of a single option. *See* Answering Brief 26; Amicus Brief 11. That reading cannot be squared with the text of the statute, and it fails to appreciate the difference between a "voluntary grant" and a "purchase," which are treated differently under the statute.

condemnation to take the relevant land. Answering Brief 23. Plaintiffs are incorrect. The railroad was authorized to survey (and did survey) lands before acquiring an interest in those lands *through an ordinary purchase* (not condemnation) that resulted in a deed. *See* Ga. Code § 1689(i). Nothing in the statute indicates that if lands were surveyed, the railroad would be using its power of condemnation. And nothing in the statute indicates that if the lands were surveyed, the interest ultimately acquired must be limited to an easement.

Plaintiffs also insist that the MG&AR form deeds limit the use of the grant, consistent with the use of the power of condemnation. But as shown in the United States' opening brief (pp. 19-31) and as discussed below (pp. 9-17), the deeds contain no such limitation in use.[4]

Only the Lee deed includes any indication that it was the product of a condemnation. That deed is accompanied by a document stating that "a committee of arbiters," selected to ascertain just compensation for the interest acquired from W.B. Lee, awarded damages of $150. Appx0747. This does appear (unlike the other deeds at issue) to be consistent with the condemnation

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[4] Plaintiffs repeatedly insinuate that the government has attempted to conceal important parts of the deeds at issue here. *See, e.g.*, Answering Brief 8, 19. That insinuation is meritless. The government presented the relevant parts of the deeds at issue in the brief, clearly indicated omissions, and cited the full deeds reproduced in the Appendix. In any event, as discussed herein, the parts of the deeds about which Plaintiffs complain are not material to their interpretation.

process described in § 1689(*l*). For all other deeds at issue here, any limitations on the estate to be taken through condemnation are irrelevant.[5]

Second, that the Lee deed was made after condemnation (and even if Plaintiffs were correct that other deeds were also made after condemnation), has no bearing on the interpretation of the deed. As explained in the opening brief (pp. 18, 30-31), when the owner of property subject to a condemnation proceeding chooses to ultimately convey property by deed (because he "does not see fit to rely upon the proceedings to condemn and the statutory results flowing therefrom"), the language of the deed controls, even if the conveyance by that deed is "a greater estate than the law would have required." *City of Atlanta v. Jones*, 69 S.E. 571, 572 (Ga. 1910); *cf.* Appx0348; Appx0461 (United States' concession that railroad held only an easement where the "Samuel Johnson Condemnation" did not result in a deed). The context of a deed's making is extrinsic evidence, properly considered only if the deed's meaning cannot be discerned from its face. *See Turk v. Jeffreys-McElrath Manufacturing Co.*, 60 S.E.2d 166, 168 (Ga. 1950); *Atlanta, Birmingham & Atlantic Railway Co v. Coffee County*, 110 S.E. 214, 215 (Ga. 1921) (holding that the estate conveyed should be "determined by the terms of the conveyance," regardless of the context of that conveyance).

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[5] Georgia Code § 5233 (1910) likewise has no relevance. *See* Answering Brief 12; Amicus Brief 11. By its own terms, that statute applied to condemnation proceedings only, and it post-dated the deeds here. *See* Acts and Resolutions of the General Assembly of Georgia 1894, at 99-100 (enacted Dec. 18, 1894).

Moreover, Amici's related argument that railroads could only acquire easements for rights of way, Amicus Brief 14-16, is belied by Georgia Supreme Court cases that recognize deeds—much like those here—conveying a fee interest for a railroad corridor. *See infra* pp. 18-20.

B. Plaintiffs cannot avoid the ordinary presumption of fee transfer by deed.

The fundamental principle of deed construction under Georgia law codified since 1821 is that "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.").[6] The corollary of this principle is that if the parties desire less than a fee simple estate, "they should so state." *Jones*, 69 S.E. at 572.

Plaintiffs' characterization of this code section as "unremarkable" and giving no "assistance" to the interpretation of deeds, Answering Brief 14-15, is incorrect. Georgia Code § 2248 (1880), specifically provides: "The word 'heirs,' or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance." In other words, no

[6] All incarnations of this statute, from 1821 to present, are included in the Addendum hereto.

specific words are required to transfer fee through a deed; specific words *are* required if a lesser estate is desired. That is, by definition, a presumption of fee transfer through a properly executed deed.

Nor are Plaintiffs correct that this rule is illusory or limited to the context of life estates and the like. *See* Answering Brief 14-16. In *Knight*, for example, the Georgia Supreme Court applied the principle in determining whether a deed for a road conveyed fee versus "a mere easement or conditional estate." 232 S.E.2d at 74 (citing Ga. Code § 85-503 (1933)). In *Holloman*, that court likewise applied the principle in weighing whether a deed conveying property to be used for a specific purpose granted a fee versus an easement or a conditional estate. 147 S.E. 882 at 884-86 (citing Ga. Civil Code § 3659 (1910)). There is no indication (and indeed Plaintiffs provide no support for their theory) that this rule does not apply where a railroad is involved in the transfer of property. Indeed, Plaintiffs' theory is refuted by *Holloman*'s and *Knight*'s citation of numerous railroad cases without suggestion that any different rule applies.

Moreover, Plaintiffs attempt without basis to flip this presumption when they suggest that the United States must demonstrate that there was something to be gained by the railroad's acquiring fee rather than an easement. *See* Answering Brief 14-15. Their preferred rule—that the railroad should be limited to holding only whatever interest that a court in hindsight determines was needed by the railroad at the time of acquisition—cannot be squared with

Georgia law on deed construction, which unambiguously establishes that a conveyance is by fee unless by its terms a deed states otherwise.

C. Plaintiffs erroneously rely on cases interpreting fundamentally different deeds.

Whether or not the presumption of fee transfer through properly executed deeds applies here, the deeds at issue in this case are properly construed as granting fee title under sound principles of Georgia law.

Plaintiffs suggest to the contrary that the Court need not look closely at the language of the deeds but instead should follow what they claim is the Georgia Supreme Court's "routine[]" practice of holding that where a deed grants a "right of way" or land "for a right of way," that deed conveys a mere easement. Answering Brief 21. But the Georgia Supreme Court has established no such practice. Rather, in each case, the court determines the scope of a deed by examining its language. The court has found an intent to convey only an easement in deeds that expressly grant a "right of way" (as opposed to "land"), deeds that explicitly limit a grant to a specific use, and deeds that reserve rights or reversionary interests to the grantor. *See, e.g.*, *Jackson v. Crutchfield*, 191 S.E. 468, 470 (Ga. 1937); *Duggan v. Dennard*, 156 S.E. 315, 317 (Ga. 1930). But the Georgia Supreme Court has consistently found fee conveyances in deeds that lack such express features. *See, e.g.*, *Jackson v. Rogers*, 54 S.E.2d 132, 136-37 (Ga. 1949); *Johnson v. Valdosta, Moultrie & Western Railroad Co.*, 150 S.E. 845, 847-48 (Ga. 1929) ("*Valdosta*"); *Woods v. Flanders*, 181 S.E. 83 (Ga. 1935); *Knight*, 232 S.E.2d at 74.

Each case on which Plaintiffs or Amici rely is distinguishable from the present case, usually for several reasons.[7]

1. *Coffee County*

The *Coffee County* deed, unlike the MG&AR deeds, expressly grants a "right of way." 110 S.E. at 216.[8] As established in the United States' opening brief (pp. 21-23, 25-26), the Georgia Supreme Court has distinguished deeds that grant a "right of way" (as in *Coffee County*) from deeds that grant "land . . . for a right of way" (as in the MG&AR deeds). Where the grant itself is a "right of way," the court has deemed the phrase "right of way" to describe the right or interest conveyed; where "land" is granted, the court has found the phrase "right of way" to be descriptive of the proposed *use* of the land, but not necessarily the *scope* of the interest conveyed. *Valdosta*, 150 S.E. at 847-48 (considering the identical grant of "A strip of land . . . for a railroad right of way," distinguishing cases that grant a "right of way," and noting the "wide

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[7] Plaintiffs mention the title of the deeds several times, *see, e.g.* Answering Brief 28-29, but provide no argument—and cite no case—to support a theory that the title "Right of Way Deed" plays any role in Georgia courts' interpretation of the interest conveyed therein. Plaintiffs have therefore waived any such argument. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). In any event, the United States is aware of no Georgia case suggesting that a deed's title has any relevance. Moreover, the Georgia Supreme Court has explained that the phrase "right of way" has various meanings, *Valdosta*, 150 S.E. at 847; the title "Right of Way Deed" appears simply to indicate that the deed is intended for the establishment of a rail corridor (rather than indicating that the right conveyed is a mere easement).

[8] Amici incorrectly state that the *Coffee County* deed granted "a strip of land." Amicus Brief 23.

distinction" between the two uses of the phrase); *see also Coffee County*, 110 S.E. at 215 (acknowledging the twofold meaning of the phrase).

The *Coffee County* deed granted "one hundred feet in width of right of way." 110 S.E. at 215. Because the phrase "right of way" is used in the granting clause to indicate *the scope of the grant itself*, it indicated the conveyance of an easement. The MG&AR form deeds, however, grant an interest in "land," using "right of way" only as a description of the proposed use of that land. *Valdosta*, 150 S.E. at 847; *see also Holloman*, 147 S.E. at 885 (indication of intended purpose of a grant does not limit the estate conveyed); *cf. Lawson v. Georgia Southern & Florida Railway*, 82 S.E. 233 (Ga. 1914) ("for railroad purposes only" in habendum clause was not limiting). The *Coffee County* deed thus contains a key indication of easement conveyance that is absent from the deeds here. *See* Answering Brief 18.

2. *Gaston*

The deed in *Gaston v. Gainesville & Dahlonega Electric Railroad*, 48 S.E. 188 (Ga. 1904), is also fundamentally unlike the MG&AR deeds. *See* Answering Brief 17. It does not specify the location or the width of the interest to be conveyed; instead, it includes only a vague reference to "all the land necessary for roadbed and other earth to construct said railroad on each side of the track or roadway, measuring from the center any portion of land hereinafter described through which said railroad may be constructed, run and operated." 48 S.E. at 188. The decision's sparse reasoning suggests that the court took this language to indicate conveyance of a "right to construct a railroad through the

land" rather than the conveyance of land itself. *Id.* at 189. By contrast, nearly every one of the MG&AR deeds includes a fixed width and specifies the location. *See, e.g.*, Appx0566.[9]

Importantly too, the *Gaston* deed (unlike any MG&AR form deed) contains an express reservation of rights to the grantor: "reserving timber and minerals." 48 S.E. at 189. The Georgia Supreme Court has distinguished deeds qualifying what otherwise would appear to be a grant of fee through such a reservation from deeds (like the MG&AR deeds) that do not. *See Swanberg v. City of Tybee Island*, 518 S.E.2d 114, 116 (Ga. 1999).[10]

Finally, the *Gaston* court found that the tenure of the grant was explicitly limited by its habendum clause: "To have and to hold . . . for railroad purposes." 48 S.E. at 188, 189. Although more recently the Georgia Supreme Court has noted that such a phrase in the habendum clause "is not of such significance as to require a holding that an easement only was conveyed." *Rogers*, 54 S.E.2d at 137, the *Gaston* court found that this clause limited the scope of the grant. The habendum clauses in the MG&AR form deeds contain no such limiting language, and instead unconditionally state: "To Have and to Hold . . . forever." *E.g.* Appx0566; Appx0694 (Stanton, Hays & Hays deed is conveyed "in FEE-SIMPLE" and warranted "forever").

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[9] The Lee deed does not include a fixed width. Appx0751. The Bagby deed includes a fixed width but does not describe the location of the grant. Appx0654.

[10] Amici wrongly suggest, without support, that the MG&AR deeds include such a reservation. *See* Amicus Brief 21-22. They do not.

3. *Duggan*

Duggan addressed a grant of "all the right" to the "right of way" conveyed. 156 S.E. at 317. As shown in our opening brief (pp. 21-23, 25-26) and discussed above regarding *Coffee County* (pp. 10-11), there is a "wide distinction" under Georgia law between (1) the grant of "land" (as here), which conveys fee absent other qualifications; and (2) the grant of a "right of way" (as in *Duggan*), which suggests the grant of an easement.

This difference alone is enough to distinguish *Duggan*, but the deed in that case contains an important additional difference. In *Duggan*, the habendum clause is followed by what the Georgia Supreme Court called a "qualification" of the grant of "[t]he right of way"—namely, that it was "to be used . . . in the construction and equipment of its railroad." 156 S.E. at 317. The court found that the 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.* By contrast, and contrary to Plaintiffs' argument, Answering Brief 29, the phrase "for a right of way of said Railroad" in the MG&AR form deeds, *see* Appx0566, is not a limitation of or qualification on the "use" of the land (nor is it found in the habendum clause). As discussed above, this phrase is merely descriptive and, under Georgia law, does not limit the estate conveyed. *Valdosta*, 150 S.E. at 847-48; *see also supra* pp. 10-11.

4. *Pitchford*

Although the deed at issue in *Rogers v. Pitchford*, 184 S.E. 623 (Ga. 1936), contains a purported grant of a "strip of land," as do the MG&AR deeds, the *Pitchford* deed is materially different in three ways that render Plaintiffs' comparison inapt. *See* Answering Brief 19. First, the MG&AR deeds contain no reservation of rights to the grantor whatsoever, but the *Pitchford* deed states: "Reserving the right to cultivate any of the above-described land until needed for railroad purposes, depot, warehouses, or building purposes." 184 S.E. at 623. This reservation is inconsistent with a grant of fee simple. *See Askew v. Spence*, 79 S.E.2d 531, 532 (Ga. 1954); *supra* p. 12.

Second and third, the deed was not to the "successors and assigns" of the railroad company (as the MG&AR form deeds are), and it did not contain a warranty clause (as the MG&AR form deeds do). *See Valdosta*, 150 S.E. at 847-48 (warranty, grant to successors and assigns, forever in fee simple are "potent" evidence of fee conveyance). These three differences from the MG&AR deeds led the Georgia Supreme Court to conclude the conveyance of only an easement in the *Pitchford* deed. 184 S.E. at 624.

5. *Byrd*

Plaintiffs similarly misplace reliance on *Byrd v. Goodman*, 25 S.E.2d 34 (Ga. 1943), to again argue that the grant of a "right of way" conveys only an easement. Answering Brief 19-20. First, as with *Coffee County*, *see supra* pp. 10-11, that deed granted a "right of way," not (as here) a "strip of land."

Second, the *Byrd* deed contains an express reservation of "the right to cultivate the [land] up to the road-bed, and provided said [railroad] put in the necessary crossings to and from the farm, and also reserve the timber that may be cut down on said right of way." 25 S.E.2d at 37. Just as in *Jackson v. Sorrells*, 92 S.E.2d 513, 514 (Ga. 1956) (discussed below), this reservation to the grantor and placement of affirmative duties on the railroad grantee (both absent from the MG&AR deeds) is inconsistent with a grant of a fee. *See also supra* p. 12.

Third, the deed in *Byrd* expressly states that "should the said railway . . . be not located and established on and along said strip of land," the deed is "wholly null and void, and of no effect." 25 S.E.2d at 37. This express condition is inconsistent with a grant of a fee simple and weighs in favor of a grant of an easement or other limited estate. *See Askew*, 79 S.E.2d at 532. No such condition for reversion is present in the MG&AR deeds, which are transferred "forever." Appx0566.

6. *Askew*

Plaintiffs suggest that *Askew* supports the conveyance of a "strip of land" as an easement. Answering Brief 20. But *Askew*'s deed features three material differences from the MG&AR deeds. First, the deed contains reservations of rights to the grantor, such as the right to cross or cultivate the granted land. 79 S.E.2d at 532; *see also Swanberg*, 518 S.E.2d at 116; *supra* p. 12. Like *Byrd*, the deed also contains a reversionary clause: "If work is not commenced on said road in two years said property is to revert to party of the first part." 79 S.E.2d

at 532. Finally, the *Askew* deed lacks a warranty clause, which is present in the MG&AR deeds. *Id.*; *see also supra* p. 14.

These features—which are distinct from the MG&AR deeds—weigh in favor of the easement found by the *Askew* court in that deed.

7. *Sorrells*

As demonstrated in the opening brief (pp. 27-28), and contrary to the CFC's erroneous conclusion and Plaintiffs' similarly erroneous assertion, the *Sorrells* deed is plainly not "nearly identical" to the MG&AR deeds. *See* Appx010; Answering Brief 31. The Georgia Supreme Court specifically relied upon the features that distinguish the *Sorrells* deed from the MG&AR deeds: the presence of (1) the retained "right to cultivate the land not in actual use as a roadbed" and (2) language stating "that the grantee was required to keep up stock gaps." 92 S.E.2d at 514. That court recently confirmed that the reservation of rights to the grantor meant the *Sorrells* deed conveyed only an easement. *Swanberg*, 518 S.E.2d at 116. The MG&AR deeds lack these features or any other language indicating conveyance of an easement.

8. *Crutchfield*

The *Crutchfield* deed features a combination of the aspects of deeds discussed above that indicate the conveyance of an easement. *See* Answering Brief 31. First, Plaintiffs inaccurately state that *Crutchfield* indicates that "a deed that grants a strip of land for use as a 'right-of-way' usually conveys an easement." Answering Brief 31. *Crutchfield* did not grant a "strip of land"; it

granted "the right of way over which to pass." 191 S.E. at 470. As in *Byrd*, *Duggan*, and *Coffee County*, the grant of a "right of way," rather than "land," is distinguishable from the MG&AR deeds. *See supra* pp. 10-11, 13, 14.

Second, similar to *Sorrells* and *Gaston*, the *Crutchfield* deed also contains an express reservation absent from the MG&AR deeds: "the grantor reserved the right to cultivate the land not necessary for the use of the railroad company 'in its full and free right of way.'" 191 S.E. at 470; *see also supra* pp. 12, 16.[11]

* * *

In short, each case on which Plaintiffs rely is distinguishable for one or more important reasons. Unlike in those cases, the MG&AR deeds here include no language limiting the conveyances to less than fee simple. The MG&AR deeds grant a "strip of land" rather than a "right of way" or a right to cross or construct; use the phrase "right of way" in a descriptive and not a limiting way; contain no reservation of rights to the grantor; place no affirmative duties on the grantee; make a conveyance to the railroad, plus "its successors and assigns"; contain a habendum clause indicating the tenure of the grant is "forever"; contain a warranty clause; and lack any reversionary clause. *See* Opening Brief 19-31; *see also id.* at 21 n.6 (observing that the

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[11] A final case cited—*Cole v. Thrasher*, 272 S.E.2d 696 (Ga. 1980)—has no relevance here whatsoever. *See* Answering Brief 29-30. *Cole* involved a deed that stated: "This deed grants a life estate." 272 S.E.2d at 697. The court found that the interest conveyed was indeed a life estate. Moreover, the many out-of-state cases relied upon by Amici, Amicus Brief 12-13, 15, have no application; as Amici themselves acknowledge, *id.* at 8, Georgia law controls here.

Stanton, Hays & Hays deed, Appx0694, takes a different form but contains effectively the same language).

D. *Valdosta* is good law, on point, and consistent with other Georgia caselaw.

Plaintiffs also urge the Court to disregard the most relevant Georgia Supreme Court case: *Valdosta*, 150 S.E. 845 (finding a fee conveyance to a railroad where the deed granted a "strip of land," and distinguishing a case involving a deed conveying a "right of way"). Amici altogether fail even to acknowledge *Valdosta*, a case that severely undermines their misplaced arguments based on the foregoing distinguishable cases.

Unlike the those cases, the *Valdosta* deed shares nearly every feature with the MG&AR deeds, as it conveys "A strip of land [of fixed width] for a railroad right of way"; transfers to the railroad, "its successors and assigns, forever"; contains a warranty clause; and lacks any express limitation of the estate conveyed, contains no reservations to the grantor, places no burdens on the grantee, and has no reversionary clause. The Georgia Supreme Court determined that these features evidenced the grant of a fee. *Valdosta*, 150 S.E. at 847-48. The Georgia Supreme Court has not overruled *Valdosta*, nor (contrary to Plaintiffs' argument, Answering Brief 37-39) has that decision been undermined by subsequent decisions. Rather, *Pitchford*, *Askew*, and *Duggan* merely distinguish *Valdosta* based on material differences in the deeds at issue in those cases. Indeed, the Georgia Supreme Court in 1977 cited *Valdosta* favorably in *Knight*, 232 S.E.2d at 73, and the Georgia Court of

Appeals more recently cited *Valdosta* in *Safeco Title Insurance v. Citizens & Southern National Bank*, 380 S.E.2d 477, 479 (Ga. App. 1989).

Moreover, contrary to Plaintiffs' suggestion, *Valdosta* is far from a one-off. Also on point:

- *Swanberg* confirms *Valdosta*'s most basic premise: a grant of less than fee must be indicated through express terms, or the intent to create such a limited estate must be manifest from a reading of the entire instrument. 518 S.E.2d at 116 (citing *Knight*, 232 S.E.2d 72).

- *Knight* also confirmed that "every properly executed conveyance 'shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance'" and it held that a deed granting "land" for a "right of way for said road" "in fee simple" indeed conveyed land in fee simple. 232 S.E.2d at 74.

- In *Samuel Mitchell Estate v. Western & Atlantic Railroad*, 146 S.E. 556, 556, 559 (Ga. 1929), the court found that a deed that granted an undefined amount of land ("of sufficient space and breadth to answer all convenient and necessary purposes of" a railroad) "for the use and purposes of said road" in fee simple, forever, conveyed fee simple title. The MG&AR deeds have even stronger evidence of fee conveyance, as they nearly all define the width and location of the grant.[12]

- In *Woods*, 181 S.E. 83 (citing *Valdosta* in the syllabus), the court determined that deeds conveying "a strip of land" to a railroad with just $1 in recited consideration conveyed fee simple. Here, too, conveyance of "a strip of land" even with relatively low consideration, indicates a fee transfer in the absence express terms identifying any lesser estate.

- In *Rogers* (which cites *Valdosta* approvingly), a deed conveyed fee-simple title to a railroad where it granted "land" and recited nominal ($10) consideration, noting that the inclusion of the phrase "for railroad

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[12] The undefined amount of land in *Samuel Mitchell* is very similar to that in the Lee deed, namely, "the width to be what is necessary for Railroad purposes," Appx0751, confirming that this language does not render the Lee deed an easement-only conveyance.

purposes" was not an express limitation on the land's use. 54 S.E.2d at 137. The court considered and distinguished many of the cases on which Plaintiffs rely here—*Coffee County*, *Gainesville*, *Duggan*, *Pitchford*, and *Crutchfield*—"for the reason that the conveyances therein dealt with differ from the one here under consideration." *Id.* at 138.

- In *Tift v. Savannah, Florida & Western Railway Co.*, 30 S.E. 266 (Ga. 1898), the court confirmed that the interest conveyed by deed granting lots "for depot purposes" was not "qualified or affected" by those words and conveyed "absolute title." Here, too, the presence of words indicating intended use did not limit the scope of the interest conveyed.

- In *Lawson*, the court found that if the habendum clause of a deed to a railroad had stated "for railroad purposes only," that would merely be a declaration of purpose that did not limit use or cause a reversion absent that use. 82 S.E. at 233. Likewise, the phrase "for a right of way" in the MG&AR deeds, *see* Appx0566, is not accompanied by any express words of limitation and is merely a "declaration of the purpose." 82 S.E. at 234.

- In *Holloman*, the court confirmed the principle in *Valdosta* that indication of intended purpose is not a limit on the right or tenure of the grant. The court concluded that a grant of "one acre" for a specific purpose transferred land in fee, and it held that the creation of a more limited estate, such as one that reverts to the grantor on a condition subsequent, "will not be raised by implication." 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.* The deeds at issue here contain no words of reverter or limitation either.

Along with *Valdosta*, these cases establish that under Georgia law, the deeds at issue transferred fee in the rail corridor.

E. Plaintiffs fail to demonstrate that the County Road 213 deeds conveyed merely an easement.

The United States' opening brief (pp. 31-41) established that the text of the deeds to the Georgia State Highway Department for the construction of County Road 213 also confirm that they conveyed land, and not an easement. Plaintiffs nonetheless assert that the Court need not look at the deeds and should instead rely solely on the text of a statute, which they insist permitted the state to acquire only an easement for that road. Plaintiffs are wrong for two reasons.

First, Plaintiffs rely upon Georgia's statute regarding Control and Supervision of State-Aid Roads, 1935 Ga. Laws 160 (codified at Ga. Code § 95-1721 (1935)). Initially, that statute does not limit the state's authority to acquire a fee interest in land. It imposes a duty on 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.* Much like the MG&AR deeds, the statute refers to the purchase of "land . . . for a right of way." As discussed above, under Georgia law, this phrase refers to the intended use of "land," but it does not limit the type of estate to be acquired. *See supra* pp. 10-11, 13. Plaintiffs' and Amici's theory that "right of way" always means "easement" is just as incorrect in this context as it is in the MG&AR deed context.

Moreover, Plaintiffs' argument appears to be built on the assumption that the State would necessarily pay more to acquire a fee interest than for a

perpetual easement. But where the purchase of an interest in land is for a public road (or indeed for a railroad), there is no reasonable expectation of the end of that use and hence no expectation that any easement would ever be extinguished. Consequently, there is also no reason that the State would pay less for a perpetual easement (which a landowner would effectively view as a permanent use of the land) than for a fee interest. Thus, the requirement that the State acquire the corridor "as cheaply as possible" does not indicate the type of interest to be acquired.

Second, the "estate . . . actually conveyed" is determined by the deeds. *Knight*, 232 S.E.2d at 73-74 (also explaining that the intent of the parties—evidenced, in part, by a relevant statute—is one piece of evidence, but the instrument's language is paramount); *Coffee County*, 110 S.E. at 215 (the estate conveyed should be "determined by the terms of the conveyance," regardless of the context of that conveyance). Plaintiffs attempt to evade *Knight* on the basis that the road deed in that case was made under authority of a different statute. *See* Answering Brief 42-44. But *Knight*'s general principle—that the *deed* indicates the estate conveyed—is not distinguishable on this ground. The deed interpreted in that case is very similar to those at issue here: the *Knight* deed granted "land" for a "right of way for said road" conveyed "in fee simple," and the court confirmed that this language (also present in the deeds at issue here) indicated a grant of land in fee simple. 232 S.E.2d at 74. The Georgia Supreme Court's determination that the *Knight* deed 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. Accordingly, there is no basis for distinguishing *Knight* on these (or any other) grounds.

At bottom, Plaintiffs provide no convincing response to our showing in the opening brief (pp. 31-39) that the text of the County Road 213 deeds indicates that the road is held in fee by the State.

II. Plaintiffs have no response to the impropriety of the United States being held liable for a taking of lands that were never affected by the NITU.

The United States' opening brief explained that the NITU always terminated at a fixed point (milepost E65.80) and thus could have no effect on property east of that point.[13] Plaintiffs do not argue that the eastern terminus of the subject rail-line abandonment was actually east of milepost E65.80. As previously explained, the original NITU referred to a location that does not exist and so was patently incorrect. *See* Opening Brief 43-44, 47. Plaintiffs do not argue that they were genuinely confused about the milepost's location. And even if the Plaintiffs were confused about the intended eastern terminus of the milepost's location, Plaintiffs fail to show how a confusing notice of intent to abandon a rail line effected a taking in this case.

Plaintiffs simply argue that the NITU effects a taking, regardless of a railroad's intent to abandon land. Answering Brief 47. There is no precedent for this argument. This Court has held that a NITU may effect a taking in

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[13] Plaintiffs assert that one of the lots identified by the United States as east of this point is actually not. Answering Brief 45 n.56. Plaintiffs are incorrect. Part of the lot owned by Plaintiff Margaret Harker (claim 100) is beyond milepost E65.80. *See* Appx0847.

cases involving a rail-to-trail conversion or abandonment of a rail line without such conversion. *See Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010). In those circumstances, the Court has indicated that the NITU may delay the reversion to the underlying owner. But this Court has never held that a NITU effects a taking where the railroad ultimately retains the rail line and continues rail operation.[14]

In any event, this is not a case where a railroad reversed course on a plan to abandon a portion of rail line named in a NITU. Rather, at *most*, the extent of the rail line included in the NITU was unclear and may have suggested to some Plaintiffs that the railroad *possibly* intended to abandon the rail line on their land. But the corrected NITU eliminated all confusion, and operation of the rail line (beyond the intended terminus) never changed.

Moreover, as explained in the opening brief, the error in the NITU's parenthetical description does not "overcome the explicit milepost reference[]" and alter the actual location of the eastern terminus of the covered section of rail line. *Montezuma Grain Co. v. STB*, 339 F.3d 535, 540-41 (7th Cir. 2003).

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[14] Plaintiffs call the United States' argument a "collateral attack" on *Ladd* and its predecessors. Answering Brief 48. As explained in the opening brief (pp. 49-50), the government argues in a related pending appeal (*Caquelin v. United States*, No. 19-1385) that *Ladd* should be overruled or at least cabined. While the United States does not make that argument here—even under *Ladd*, there was no taking of property beyond milepost E65.80—this case presents a particularly egregious example of how the CFC has misinterpreted *Ladd* to effectively transform every NITU into a taking to the maximum extent imaginable, finding a taking here despite evidence showing that any interference with property rights past milepost E65.80 was entirely illusory.

Plaintiffs do not respond to this point or attempt to distinguish the cited Seventh Circuit decision. The evidence of the railroad's intent, described in the government's opening brief (pp. 47-49), confirms that the actual milepost location was both the explicit and the intended terminus of the section of line proposed for abandonment.

The NITU's ambiguous description effected no Fifth Amendment taking. It did not lead to a trail use agreement, did not result in railbanking, and did not cause the railroad to delay abandonment of the section of rail line beyond milepost E65.80. Absent an adverse effect caused by the government action, Plaintiffs' claims necessarily fail. *See St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) ("Causation requires a showing of 'what would have occurred' if the government had not acted."), *cert. denied*, 139 S. Ct. 796 (2019). There is no proof that the NITU caused any interference with any landowners' rights to property east of milepost E65.80, and so as a matter of law there can be no taking with regard to these lands.

CONCLUSION

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

Respectfully submitted,

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STATUTORY ADDENDUM

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Georgia Code § 1689(i) (1882)

Powers of the corporation.

Every corporation formed under this section 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 purposes of such grant only. Third, to purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road, and the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of its incorporation, and to sell, lease or buy any land necessary for its use. Fourth, to lay out its road not exceeding two hundred feet in width, and to construct the same, and for the purpose of cuttings and embankments, and for obtaining gravel and other material, to take as much land as may be necessary or the proper construction, operation and security of the road, or to cut down any trees that may be in danger of falling on the track of the road or obstructing the right of way, making compensation therefor as provided in this section for property taken for use of such company. Fifth, to construct its road across, along or upon, or to use any stream of water, watercourse, street, highway or canal, which the routes of its road shall intersect or touch, and whenever the track of any such road shall touch, intersect or cross any road, highway or street, it may be carried over or under such railroad, as may be found most expedient for the public good, and in case any embankment or cut in the construction of any railroad provided for in this section, shall make it necessary to change the course of any highway or street, it shall be lawful for the com any constructing said railroad so to change the course or direction of any road, highway or street: *Provided*, that no railroad constructed under the provisions of this section shall be allowed to cross any other railroad at a grade level, but such crossing shall be either under or over such other railroad track, unless by consent of such railroad company whose track is to be crossed, and when there is such consent, then, and in that event, the provisions of this section as to the stopping of trains before making such crossings shall apply.

Sixth, to cross, intersect, or join, or unite, its railroad with any railroad heretofore or hereafter to be constructed at any point in its route, or upon the ground of any other railroad company, with the necessary turnouts, sidelings and switches, and other conveniences necessary in the construction of such road, and may run over any part of any other railroad's right of way necessary or proper to reach its freight depot, in any city, town or village, through or near which its railroad may run, Seventh, to take and convey persons or property over their railroad by the use of steam, or animals, or any mechanical power, and to receive compensation therefor, and to do all those things incident to railroad business. Eighth, to erect and maintain convenient buildings, wharves, docks, stations, fixtures and machinery, whether within or without a city, town or village, for the accommodation and use of their passengers and freight business. Ninth, to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, subject to any law of this State upon the subject. Tenth, to borrow such sum or sums of money, at such rates of interest, and upon such terms as such company or its board of directors shall authorize or agree upon, and may deem necessary or expedient, and may execute one or more trust deeds or mortgages, or both if occasion may require, on any railroad or railroads in process of construction by such company for the amount or amounts borrowed, or owing by such company, as its board of directors shall deem expedient; and such company may make such provisions in such trust deed or mortgage for transferring their railroad track, depots, grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furniture, tools, implements, appendages and appurtenances, used in connection with such railroad or railroads, in any manner then belonging to said company, or which shall thereafter belong to it as security for any bonds, debts, or sums of money as may be secured by such trust deeds, or mortgage, as they shall think proper; and in case of sale of any railroad or railroads, or any part thereof, constructed or in course of construction by any railroad, or by virtue of any trust deed, or any foreclosure of any mortgage thereon, the party or parties acquiring titles under such sales, and their associates, successors or assigns shall have or require thereby, and shall exercise and enjoy thereafter, the same rights, privileges, grants, franchises, immunities and advantages in or by said trust deed enumerated and conveyed, which belonged to, and were enjoyed by, the company making such deed or mortgage, or contracting such debt, so far as the same relate or

appertain to that portion of said road or the line thereof, mentioned or described and conveyed by said mortgage or trust deed and no farther, as fully and absolutely in all respects, as the corporators, officeholders, shareholders, and agents of such company, might or could have done therefor had not such sale or purchase taken place, such purchaser or purchasers, their associates, successors or assigns, may proceed or organize anew by filing articles of association and electing directors as provided in this section, and may distribute and dispose of stock, and may conduct their business generally as provided in this section; and such purchaser or purchasers and their associates shall, thereupon, be a corporation, with all the powers, privileges, and franchises conferred by, and be subject to, the provisions of this section. And all such deeds of trust and mortgages shall) be recorded as is provided by law for the record of mortgages in this State, in each county through which said road runs.

Georgia Code § 1689(*l*) (1882)

Right of way, how obtained.

In the event of any company organized under the provisions of this section does not procure from the owner or owners thereof, by contract, lease or purchase, the title to the lands, or right of way, or other property necessary or proper for the construction or connection of said railroad and its branches or extensions, or its depots, wharves, docks, or other necessary terminal facilities, or necessary or proper for it to reach its freight depot, or the passenger depot in any city, town or village in the State, as hereinbefore provided, it shall be lawful for said corporation to construct its railroad over any lands belonging to other persons, or over such rights of way or tracks of other railroads as aforesaid, upon paying or tendering to the owner thereof, or to his or her or its legally authorized representative, just and reasonable compensation for the right of way, which compensation, when not otherwise agreed u n, shall be assessed and determined in the following manner, to-wit: when the parties cannot, or do not, agree upon the damage done, such other railroad company, for the use of its right of way or tracks as aforesaid, or to the owner or owners of the land, or other property which the corporation seeks to appropriate as a right of way, or for its purposes, the corporation created under this section shall choose one the citizens of this State as its assessor, and the person or persons, or railroad company, owning the land sought to be taken, or the right of way or tracks sought to be used, shall choose another as his, her, its or their assessor, and in case the persons owning such land, or a majority of them, if more than one person owns the land sought to be condemned, or said railroad company owning such right of way or tracks sought to be used, should fail or refuse to make such choice, or select some one to represent his, her, its or their interests, or should be an insane person, lunatic, idiot, or minor, or under any disability from any cause whatsoever, and have no legal representative, then it shall be the duty of the Ordinary of the county in which such property, or right of way, or use of tracks so sought to be condemned is situated, to make such selection for such owner or owners, or railroad company, so failing or refusing, or unable to make the same as aforesaid : *Provided*, the said corporation give notice to said Ordinary that such owner or owners, or railroad company fails or refuses to act as aforesaid, or is an insane person, lunatic, idiot, or minor, or under disability from any cause whatsoever, and has no legal representative; and the two assessors thus elected shall choose a third assessor, and the three

assessors thus selected, shall be sworn to do justice between the parties, and after hearing such evidence as maybe offered, both as to the benefits and as to the damages done the owner or owners of such right of way, and right to use the same, and of such track sought to be used, or of such lands sought to be condemned, as the case may be, they or a majority, of them shall assess the damages and value the property so sought to be condemned, and shall say in writing what sum said corporation shall pay for the right of way, right to use tracks or lands so sought to be condemned by it, and they shall file their said award within ten days after it is made, in the office of the Clerk of the Superior Court of the county where said lands or right of way, or track sought to be condemned or used, is located, and the said clerk shall record the same, and it shall have all the force and effect of a judgment or decree by the Superior Court of said county, and in case either party is dissatisfied with said award, the party so dissatisfied, and in case he or she, or they, be under disability, and have no legal representative, the Ordinary aforesaid, as the representative of such party, shall have the right, by giving written notice to the other party, within ten days from the time said award is filed as aforesaid in said Clerk's office, to enter an appeal in writing, from said award to the Superior Court of the county where said award is filed, and at the next term of said court, unless continued for legal cause, it shall be the duty of the Judge presiding in said cause, to cause an issue to be made up as to the damage or valuation of said land, right of way, or right to use such track as the case may be, and the same to be tried, with all the rights for hearing and trying said cause in the Superior Court, and in the Supreme Court, as provided for cases in common law. The entering of said appeal, and the proceedings thereon, shall not hinder or in any way delay the said corporation's work or the progress thereof, but the same may proceed without let or hindrance from the time said condemnation proceedings are begun; that if said corporation should enter said appeal, that it shall give bond and security for the payment of the amount rendered upon the final hearing of said cause. Should no appeal be entered from said award within said time, and should said corporation fail to pay the same, it shall be the duty of the Clerk of the Superior Court, upon the request of any person interested, to issue execution upon such award, as in other cases of judgments of the Superior Court, and said execution may be levied upon any of the property of such corporation, as in cases of other executions, and if such land-owner or landowners be an insane person, lunatic, idiot, or minor, or under

disability from any other cause, and have no legal representative, then, and in that event, said sum so awarded or found due by said corporation for the land so taken, shall be paid to the Ordinary, and he shall cause the same to be so invested for the use of such owner or owners, and to this end he shall appoint such guardians, or other legal representatives, to take, hold, manage and control such fund as is usual, necessary or proper, and said right of way, and right to use such track, shall vest in such corporations as fully and completely as if the same had been purchased or acquired by contract with the consent of the owners thereof.

Ga. Laws 1821, Cobb's 1851 Digest, at 169
25. Sec. II. All gifts, grants, feoffments, bequests, devises, and conveyances of every kind whatsoever, of real or personal property, hereafter hereafter made or executed within this State, shall be held and construed to vest in the person or persons to whom the same are made or executed an absolute unconditional fee-simple estate, unless it be otherwise expressed, and a less estate mentioned and limited in such gift, grant, feoffment, bequest, devise, or conveyance.

Georgia Code § 2228 (1860)
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 the same is lawful, if the same can be gathered from its contents, and if not, in such case the court may hear parol evidence to prove the intention.

Georgia Code § 2222 (1868)
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 the same is lawful, if the same can be gathered from its contents; and if not, in such case the Court may hear parol evidence to prove the intention.

Georgia Code § 2248 (1873)
What words create.
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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

same can be gathered from its contents; and if not, in such case the Court may hear parol evidence to prove the intention.

Georgia Code § 2248 (1882)
What words create.
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 same can be gathered from its contents; and if not, in such case the Court may hear parol evidence to prove the intention.

Georgia Civil Code § 3083 (1895)
What words create.
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 same can be gathered from its contents; and if not, in such case the court may hear parol evidence to prove the intention.

Georgia Civil Code § 3659 (1910)
What words create.
The word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 same can be gathered from its contents; and if not, in such case the court may hear parol evidence to prove the intention.

Georgia Code § 85-503 (1933)

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; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. If a less 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 same can be gathered from its contents; and if not, the court may hear parol evidence to prove the intention.

Georgia Code § 44-6-21 (2010)

Words necessary to create absolute estate; preference for construing as conveyance; maker's intention controls; parol evidence

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.

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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.

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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 7,000 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.

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