Docket Nos. 2019-2078 (L), -2080, -2090, -2316

In the

United States Court of Appeals

For the

Federal Circuit

GARY E. ALBRIGHT, et al.,
Plaintiffs-Appellants,

CLAUDE J. ALLBRITTON, et al.,
Plaintiffs,

– v. –

UNITED STATES,
Defendant-Appellee.

PERRY LOVERIDGE, et al.,
Plaintiffs,

NEAL ABRAHAMSON, et al.,
Plaintiffs-Appellants,

– v. –

UNITED STATES,
Defendant-Appellee.

Appeals from the United States Court of Federal Claims in Case Nos. 1:16-cv-00912-NBF, 1:16-cv-01565-NBF, and 1:18-cv-00375-NBF · Senior Judge Nancy B. Firestone.

CORRECTED OPENING BRIEF OF THE ABRAHAMSON APPELLANTS

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GARY E. ALBRIGHT, et al.,
Plaintiffs,

DANIEL EARL HIGGINS, III, MICHAEL J. OPOKA, ZELDA L. OPOKA,
Plaintiffs-Appellants,

– v. –

UNITED STATES,
Defendant-Appellee.

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

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Gary E. Albright, et al. **v.** United States

Case No. 2019-2078, -2080, -2090, -2316

CERTIFICATE OF INTEREST

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

Thomas S. Stewart

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

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
See attached list		

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

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

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

Albright, et al. v. United States, Case No. 2019-2078 and Allbritton v. United States, Case No. 2019-2080; Loveridge v. United States, Case No. 2019-2090 and Abrahamson v. United States, Case No. 2019-2316; Albright, et al. v. United States, Case No. 2019-2078 and Higgins, et al. v. United States, Case No. 2019-2080. This Court consolidated all of the pending cases for purposes of this appeal.

11/7/2019
Date

/s/ Thomas S. Stewart
Signature of counsel

Please Note: All questions must be answered

Thomas S. Stewart
Printed name of counsel

cc: Elizabeth A. McCulley, Steven M. Wald

Reset Fields

1. Full Name of Party Represented by Me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent Corporations and publicly held companies that own 10% or more of stock in the party
Randy & Judy Anderson;	N/A	None
Braukman Loving Trust	N/A	None
Hannelore Drugg	N/A	None
Sharon Newman	N/A	None
Thompson Revocable Living Trust (Barbara L. Thompson)	N/A	None
William E. Waibel Living Trust and Pamela A. Waibel Living Trust	N/A	None
Lenhart A. Gienger Trust	N/A	None
Cheri Heath-Rickert	N/A	None
David Hirschfeld	N/A	None
Roberta J. Hoffard Revocable Living Trust	N/A	None
Claudia Jameson	N/A	None
Darleen Johnson	N/A	None
William Neuman	N/A	None
Donald & Linda Aten	N/A	None
Farmington Hubbard Adams Enterprises, LLC	N/A	None
Martha Lynn Trost Gray	N/A	None
Ronald & Julie Koch	N/A	None
Oregon Conference of Methodist Church	N/A	None
Jerry Schlegel	N/A	None
Deslee Kahrs	N/A	None
Donna Kahrs	N/A	None
Advance Resorts of America, Inc.	N/A	None
Neal Abrahamson	N/A	None
Diane Walters	N/A	None
Richard Young	N/A	None
Berrie Beach LLC	N/A	None
Maureen Berrie-Lawson	N/A	None
Angelina Best	N/A	None
Neil Brown	N/A	None
Randall S. Burbach Trust	N/A	None
Chastain Family Limited Partnership	N/A	None
Rick & Barbara Hass	N/A	None
Betsy A. King Revocable Trust	N/A	None
Kevin & Carol Thomas	N/A	None

Brummond Family Revocable Living Trust	N/A	None
Falconer Family Trust	N/A	None
Stephan & Teresa Jones	N/A	None
LOLA OTT IV, LLC	N/A	None
Ebben McCarty	N/A	None
Synthia McIver	N/A	None
Oregon-Idaho Annual Conference of the United Methodist Church	N/A	None
Michael Sabin	N/A	None
Mary Judith Upright Living Trust	N/A	None
Andrea Lynn Wallace	N/A	None
James Haley	N/A	None
Terry Kline & Debbie Kline	N/A	None
Brecht Family Trust	N/A	None
Douglas Burrows	N/A	None
Rosalie Gehlen	N/A	None
James Henriksen	N/A	None
Patricia Shotwell	N/A	None
Shirley M. Thomas Revocable Living Trust	N/A	None
Zapp Family Revocable Living Trust	N/A	None
Paul D. Ancheta	N/A	None
David William Bruneau Trust	N/A	None
Kim Kristina Bruneau Trust (Daniel Stokes & Judith Stokes)	N/A	None
Mark & Maryann Escriva	N/A	None
Eileen George	N/A	None
James Harper	N/A	None
Georgia Gettman	N/A	None
Zhiming Mei	N/A	None
Oregon Writers Colony, Inc.	N/A	None
Rockaway Sandwood LTD	N/A	None
Fred Wale	N/A	None
Ruffo Family Revocable Living Trust	N/A	None
Won Wha Kim	N/A	None
Jeong Ho Kim	N/A	None
Mascott, LLC	N/A	None
Terry S. McCamman	N/A	None
Cheryl A. McCamman	N/A	None
Cheryl D. Runnels Trust	N/A	None
William & Jacqueline Appleton	N/A	None

Gary L. & Mary E. Dowen	N/A	None
Scott Ford	N/A	None
Franklin Byrnes	N/A	None
Alice Yetka	N/A	None
James & Sally McDonald	N/A	None
Ardyce K. Osborn Revocable Living Trust	N/A	None
Van's Camp, LLC	N/A	None

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STATEMENT OF RELATED CASES

There are 3 pending related cases within the meaning of Federal Circuit Rule 47.5. The cases are: (1) *Albright, et al. v. United States,* Case No. 2019-2078 and *Allbritton v. United States,* Case No. 2019-2080*;* (2) *Loveridge v. United States,* Case No. 2019-2090 and *Abrahamson v. United States,* Case No. 2019-2316; and (3) *Albright, et al. v. United States,* Case No. 2019-2078 and *Higgins, et al. v. United States,* Case No. 2019-2080. This Court consolidated all of the pending cases for purposes of this appeal. *See* ECF No. 36.

INTRODUCTION

In *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"), this Court explained that whether a Plaintiff is entitled to compensation in a Rails-to-Trails case is subject to a three-prong test: (1) who owned the strip of land involved, specifically did the Railroad acquire only easements, or did it obtain fee simple estates; (2) if the railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as a public recreational trail; and (3) even if the grants of the railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements. *See Preseault II,* 100 F.3d at 1533. In this case, the Appellants contest the CFC's ruling that 5 of the original source

conveyance deeds to the railroad under the first prong of *Preseault II* conveyed fee simple to the railroad, as the CFC concluded, rather than easements.

The 5 deeds at issue are:

1)	The Smith deed[1]	Book 16, Pg. 515, Appx4871-4872
2)	The Wheeler Lumber Co. deed[2]	Book 16, Pg. 5, Appx4773-4774
3)	The Watt deed[3]	Book 12, Pg. 343, Appx4812

[1] The Smith deed was often referred to as the "Smith, Lloyd" deed (16/515) in the briefing but will be referred to herein as merely the "Smith" deed. There are 20 Appellants who collectively own 28 parcels who are impacted by the Smith deed: Randy and Judy Anderson; Braukman Loving Trust; Hannelore Drugg; Sharon Newman; Barbara L. Thompson Revocable Living Trust; William E. Waibel Living Trust and Pamela A. Waibel Living Trust; Lenhart A. Gienger Trust; Cheri Heath-Rickert; David Hirschfield; Roberta J. Hoffard Revocable Living Trust; Claudia Jameson; Darleen Johnson; William Neuman; Donald and Linda Aten; Farmington Hubbard Adams Enterprises, LLC; Martha Lynn Trost Gray; Ronald and Julie Koch; Oregon Conference of Methodist Church; Oregon-Idaho Annual Conference of the United Methodist Church; Jerry Schlegel.

[2] There are 2 Appellants who collectively own 6 parcels who are impacted by the Wheeler Lumber Co. deed (16/5): Deslee Kahrs and Donna Kahrs; and Advance Resorts of America, Inc.

[3] There are 22 Appellants who collectively own 26 parcels who are impacted by the Watt deed (12/343): Neal Abrahamson; Diane Walters; Richard Young; Berrie Beach, LLC; Maureen Berrie-Lawson; Angela Best; Neil Brown; Randall S. Burbach Trust; Chastain Family Limited Partnership; Rick Barbara Hass; Betsy A. King Revocable Trust; Kevin and Carol Thomas; Brummund Family Revocable Living Trust; Falconer Family Trust; Stephan and Teresa Jones; LOLA OTT IV, LLC; Ebben McCarty; Synthia McIver; Oregon-Idaho Annual Conference of the United Methodist Church; Michael Sabin; Mary Judith Upright Living Trust; Andrea Lynn Wallace.

4)	The Woodbury deed[4]	Book 23, Pg. 399, Appx4829
5)	The Woodbury deed[5]	Book 16, Pg. 481, Appx4864

The CFC erroneously concluded that each of the 5 deeds at issue conveyed fee simple grants to the railroad rather than easements. Appellants request that this Court reverse the CFC's erroneous legal conclusion that the 5 deeds at issue conveyed fee simple grants to the railroad because, under Oregon law, the deeds at issue conveyed easements to the railroad under prong 1 of *Preseault II*.

STATEMENT OF JURISDICTION

The CFC had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) and entered Judgment pursuant to Rule 54(b) of the Rules of the Court of Federal Claims ("RCFC") on April 30, 2019. *See* Appx518-526. The Appellants filed

[4] There are 11 Appellants who collectively own 11 parcels who are impacted by the Woodbury deed (23/399): Won Wha and Jeong Ho Kim; Mascott, LLC; Terry S. and Cheryl A. McCamman; Cheryl D. Runnels Trust; William and Jacqueline Appleton; Gary L. and Mary E. Dowen; Scott Ford; Franklin Byrnes and Alice Yetka; James and Sally McDonald; Ardyce K. Osborn Revocable Living Trust; Van's Camp, LLC Trust.

[5] There are 19 Appellants who collectively own 20 parcels who are impacted by the Woodbury deed (16/481): James Haley; Terry and Debbie Kline; Brecht Family Trust; Douglas Burrows; Rosalie Gehlen; James Henriksen; Ruffo Family Revocable Living Trust; Patricia Shotwell; Shirley M. Thomas Revocable Living Trust; Zapp Family Revocable Living Trust; Paul D. Ancheta; David William Bruneau Trust, Kim Kristina Bruneau Trust, Daniel and Judith Stokes; Mark and Maryann Escriva; Eileen George; James Harper and Georgia Gettman; Zhiming Mei; Oregon Writers Colony, Inc.; Rockaway Sandwood LTD; Fred Wale.

their Notice of Appeal on June 27, 2019 (Appx6159-6161) and this Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the five original conveyance deeds at issue granted easements or fee simple ownership to the railroad under Oregon law.

STATEMENT OF THE CASE

The Port of Tillamook Bay Railroad ("POTB") is the owner of a railroad line that is located between Milepost 775.01 near Banks, Washington County, Oregon, and Milepost 856.08 near Tillamook, Tillamook County, Oregon ("Railroad Line"). Appx3213-3215. On May 26, 2016, POTB filed a Notice of Exemption with the Surface Transportation Board ("STB") regarding the Railroad Line. Appx3198-3201. The interests in the segments of the Railroad Line relevant to the Appellants' claims were originally acquired by the Pacific Railway and Navigation Company and the Southern Pacific Company in the early 1900's. Appx4664-4909.

On or about June 17, 2016, the Salmonberry Trail Intergovernmental Agency ("STIA"), filed with the STB its Statement of Willingness to Assume Financial Responsibility with respect to the Railroad Line. Appx3203-3204. On July 26, 2016, the STB issued a Notice of Interim Trail Use ("NITU") relating to the Railroad Line. Appx3213-3215. Following extensions of the NITU granted by

the STB, the POTB and the STIA notified the STB that they entered into a trail use/railbanking agreement regarding the relevant railroad segment on October 27, 2017. Appx5785-5791.

Appellants filed the present action on August 1, 2016. Appellants alleged that they owned land adjacent to the Railroad Line on the date of the NITU (*i.e.*, the date of the taking, July 26, 2016), which includes fee title to all that property to the centerline of the right-of-way that is now subject to an easement for interim trail use pursuant to the NITU. Appellants further alleged that upon abandonment of the easement and/or authorization of use beyond the scope of the easement, Appellants' property would have been unburdened by any easement and that, but for operation of the Trails Act, Appellants would have the exclusive right to physical ownership, possession, and use of their property free of any easement for recreational trail use or future railroad use. Thus, Appellants alleged, by operation of the Trails Act,[6] the United States took the Appellants' property and is Constitutionally obligated to pay just compensation.

On October 10, 2017, Appellants filed their motion for partial summary judgment and their memorandum in support. Appx3190-5029. Appellants argued that the United States took Appellants' property and is liable for "just compensation" under the Fifth Amendment of the United States Constitution,

[6] See National Trail System Act Amendments of 1983, 16 U.S.C. § 1247(d) ("Trails Act").

because (1) Appellants owned fee simple title to property in the railroad corridor subject only to the railroad's easements, and (2) the railroad's easements were limited to use for railroad purposes, and the government's issuance of the NITU authorizing conversion of the railroad line for use as a public recreational trail under the Trails Act is beyond the original scope of the easements. Appx5038. *See Preseault II*, 100 F.3d at 1533. In support of their argument regarding the first prong, which is the only issue relevant to this appeal, Appellants presented to the CFC the conveyances to the original acquiring railroad and argued that such conveyances only granted railroad easements. On December 1, 2017, the government filed a cross-motion and response. Appx5089-5713.

On April 19, 2018, the CFC filed, under seal, a statement of preliminary conclusions and findings for the parties to consider and address before the scheduled oral argument. *See* Appx5817-5837 (sealed) and Appx2919-2939 (sealed). The CFC received the parties' objections to the CFC's preliminary conclusions and findings on May 3, 2018. On May 7, 2018, the CFC filed under seal an order setting forth the points of agreement and disagreement between the parties. Appx5853-5908 (sealed) and Appx3010-3076 (sealed).

On August 13, 2018, the CFC significantly amended its preliminary conclusions and issued its ruling on the parties' cross-motion for summary judgment (the "Opinion"), holding that the Appellants' claims must be dismissed

because each of the five deeds at issue granted to the original acquiring railroad a fee simple estate and not an easement. Appx262-389. Following the CFC's denial of Appellants' motion for reconsideration (Appx390-508), Judgment was issued against the Appellants (Appx518-526), and Appellants thereafter appealed (Appx6159-6161).

SUMMARY OF THE ARGUMENT

As a matter of law, the five deeds at issue conveyed easements to the railroad. First, just like the deed at issue in *Preseault II,* the railroad received these five deeds after they had already surveyed, staked out, and located the corridor pursuant to their power of eminent domain and, as a result, all 5 deeds conveyed easements because of the railroad's "compulsory consent" process under Oregon law. Second, the Court's analysis is governed by Oregon law and the Supreme Court of Oregon has listed numerous factors to consider when interpreting deeds to railroads, which these deeds contain, so the deeds conveyed easements to the railroad separate and distinct from the obvious compulsory consent. Therefore, the CFC's ruling that each deed granted a fee simple interest should be reversed.

Each of the 5 deeds at issue in this appeal involve grants to the railroad for the construction and operation of the railroad's right-of-way after the railroad had already entered upon the landowners' land and surveyed, located, and laid out their tracks pursuant to their eminent domain authority. In *Preseault II,* when this Court

was confronted with a similar deed to a railroad that was also granted to the railroad after the railroad had staked out and located their right-of-way pursuant to their eminent domain authority, this Court concluded that the deed conveyed an easement even though it looked like a fee simple transfer because the "voluntary transfers" merely confirmed and memorialized the railroad's action in furtherance of their eminent domain authority and the deed "retained its eminent domain flavor." *See Preseault II,* 100 F.3d at 1537. As a result, all 5 deeds at issue in this case fall squarely within the "compulsory consent" analysis and this Court's decision in *Preseault II.*

Because the nature of the conveyances at issue must be analyzed under state law, Oregon law governs whether each deed at issue conveyed an easement or fee simple to the railroad. The Oregon Supreme Court has issued 2 benchmark decisions that interpret deeds to railroads, *Bernards v. Link,* 248 P.2d 341 (Or. 1952) and *Bouche v. Wagner,* 293 P.2d 203 (Or. 1956). *Bernards* and *Bouche* pointed to 8 different factors for the Court to consider when interpreting whether a deed to a railroad conveyed an easement or fee simple. In this case, in addition to the "compulsory consent" evidenced by each deed, each deed at issue contains a majority of the factors that indicate that an easement was intended by each grantor.

The first deed for this Court to analyze is referred to as the Smith deed. While Oregon law provides a non-exhaustive list of factors to consider to

determine whether an easement or fee is granted, if the phrase "right of way" is present in such a way that is not "incidental" and refers to the interest granted rather than to a geographical description, Oregon courts will consider such to be an easement irrespective of the other factors to consider. The body of the Smith deed uses the phrase "said right of way hereby conveyed," which is clearly not "incidental" and obviously refers back and incorporates by reference the granting clause. If the phrase "right of way" was being used to describe geography, the phrase would have read, "said right of way hereby **described**" and **not** "hereby **conveyed**." Therefore, the CFC erroneously concluded that the deed's use of the phrase "right of way" is not a description of the interest being conveyed but provides a geographic location. Because the "right of way" language describes the interest conveyed, the deed conveyed an easement under Oregon law, and there is no need to examine the other parts of the deed or other factors.

Nevertheless, the following additional factors indicate the Smith deed granted an easement: the strip is not defined with precision; the term "through" is used, which is synonymous with "over and across;" consideration was nominal under the circumstances; and "strip of land" is used. The only two factors not present, that could indicate fee, are that the deed does not mention the possibility of reverter if the use stops and the deed does not include covenants to build structures, such as fences, crossings, or cattle guards, in connection with the grant.

Therefore, while presence of "right of way" language as used in the deed should end the inquiry in favor of an easement construction, an analysis of all aspects of the deed and the surrounding circumstances yields the same result.

There are four other deeds for the Court to analyze, which are referred to as the Wheeler Lumber Co. (16/5[7]) deed, the Watt (12/343) deed, the Woodbury (23/399) deed, and the Woodbury (16/481) deed. These deeds grant (1) "a strip of land" (2) "through" (3) imprecisely described premises,[8] with (4) nominal consideration. An additional fact supports Appellants' conclusions regarding the Wheeler Lumber Co. (16/5) deed: It contains language in the habendum clause that "grantors [confirm] also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover." Appx4773. The fact that the parties chose to insert this phrase clarifies that the parties intended to convey an easement. The most reasonable explanation for why the phrase was written into the deeds was to make clear that the railroad had the right to use the land for railroad purposes, which would have been unnecessary if the fee had been conveyed.

All five deeds at issue were granted to the railroad based on "compulsory consent" as explained in *Preseault II.* In addition, all five deeds at issue contain a majority of the factors indicating that an easement was intended as set forth in

[7] This is a reference to book and page numbers which Appellants use to distinguish the deeds from others bearing the same name that were considered below but are not the subject of this appeal.

[8] The Woodbury deed (16/481) deed does provide a precise description.

Bernards and *Bouche.* As a result, Appellants submit that the five deeds at issue conveyed easements to the railroad and that the CFC's ruling should be reversed.

STANDARD OF REVIEW

The CFC's legal conclusion concerning whether the deeds at issue conveyed an easement or fee simple ownership is a question of law that is subject to *de novo* review. *See Casitas Municipal Water District v. United States,* 708 F.3d 1340, 1351 (Fed. Cir. 2013).

ARGUMENT

I. THE OREGON SUPREME COURT HAS PROVIDED TWO BENCHMARK DECISIONS FOR DETERMINING WHETHER CERTAIN CONVEYANCES TO A RAILROAD CONVEYED AN EASEMENT OR FEE

Whether the Appellants have a property interest in the land underlying and abutting the railroad's right-of-way depends upon the language of the original conveyances to the railroad. *See Ellamae Phillips Co. v. United States,* 564 F.3d 1367, 1373-74 (Fed. Cir. 2009); *Toews v. United States,* 376 F.3d 1371, 1376 (Fed. Cir. 2004). Because property rights arise under state law, Oregon law governs whether the Appellants have a compensable property interest. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984); *Preseault v. Interstate Commerce Comm'n.,* 494 U.S. 1, 20 (1990) ("*Preseault I*"). As a result, the only issue on this appeal, whether the railroad received an easement or fee simple interest under prong 1 of *Preseault II,* must be determined under Oregon law.

In construing these five deeds under Oregon law, "the courts must construe the instrument as a whole and effect be given, if possible, to each of the grantor's expressions therein to determine the intention of the parties." *See O'Gorman v. Baker,* 347 P.2d 85, 90-91 (Or. 1959). The intention of the parties is ascertained "by looking first to the language of the instrument itself and considering its text in the context of the document as a whole." *See Realvest Corp. v. Lane Cty.,* 100 P.3d 1109, 1112 (Or. App. 2004). In construing the instrument as a whole in order to determine the grantor's intent, "the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting." *See* Or. Rev. Stat. § 42.220. As a result, the reviewing court must examine each deed as a whole and must attempt to ascertain the grantor's intent given the circumstances of the conveyance and must give meaning to all of the deed's terms rather than focusing on one term to the exclusion of others. *See Cimarron W. Properties, Inc. v. Lincoln Loan Co.*, 860 P.2d 871, 872 (Or. App. 1993).

The first benchmark decision from the Oregon Supreme Court to interpret a deed to a railroad is *Bernards*. The Court pointed to 8 different factors to consider, which read in combination convinced the Court that the property interest conveyed by the deed was an easement:

> (1) whether the parties named the interest as a "right of way" in the title of the document which would usually imply that only a "right"

> or easement and not a fee was granted; (2) whether in the body of the deed the phrase "right of way" is used to describe the interest, which would again weigh in favor of construing the deed as granting an easement; (3) whether the deed uses the phrase "over and across" to describe the interest which would also suggest that an easement was conveyed and not a fee; (4) whether the deed mentions the possibility of reverter if the use stops, which would favor finding an easement; (5) whether the deed includes covenants to build structures such as fences, crossings, or cattle guards, in connection with the grant, which would indicate an easement was conveyed; (6) whether the strip is defined with precision, which if not would indicate an easement rather than a fee was granted; (7) whether the consideration paid for the grant was substantial or nominal, which if nominal would indicate that only an easement was conveyed; and (8) whether the deed uses the phrase "strip of land" to describe the interest, which would indicate that the deed conveyed only an easement and not fee title to the railroad.

See Bernards, 248 P.2d at 341.

Four years later, in *Bouche*, the Oregon Supreme Court examined another railroad deed and concluded that it conveyed fee ownership and not an easement. In reaching the conclusion that the deed at issue conveyed fee simple ownership because the factors enunciated in *Bernards* were not present, the Oregon Supreme Court focused on 6 of the 8 factors that were previously set forth in *Bernards:*

> (1) The conveyance is not entitled a 'right of way deed'; (2) the granting clause conveys land, not a right; (3) the consideration was substantial ($650); (4) there is no reverter provided for; (5) the words 'over and across the lands of the grantors' do not appear; and (6) the land conveyed is described with precision.

See Bouche, 293 P.2d at 209.

The Oregon Supreme Court, through *Bernards* and *Bouche,* has provided a list of potential factors to examine in interpreting the deeds at issue here. Under Oregon law, if a particular deed features the 8 factors identified in *Bernards,* it undoubtedly conveys an easement and, conversely, if the deed does not contain the 6 factors identified by *Bouche,* it undoubtedly conveys the fee. The issue of interpretation becomes more difficult when a particular deed contains some, but not all, of the features present in the deeds at issue in *Bernards* and *Bouche*.[9]

The government has advanced the false premise that the later decision in *Bouche* had the effect of overruling the *Bernards* decision to the extent that two of the factors identified in *Bernards,* the commitment to build structures and the use of the term "strip of land," should no longer be considered as factors in support of construction of an easement. Appx5117-5119. The government's position is a clear overreading of *Bouche* because the obvious reason why certain factors presented and discussed in the *Bernards* deed were not likewise addressed in *Bouche*, even though they were present, is due to the overwhelming number of factors supporting the interpretation that granted the fee. In the *Bouche* deed, for example, there was no indication that the grant was of a right to the land, "right-of-way" did not appear in the title, there was substantial consideration, there were no

[9] The most complete discussion of deeds that contain some, but not all, of the features present in the deeds at issue in *Bernards* and *Bouche* may actually be the CFC's analysis in *Boyer v. United States,* 123 Fed. Cl. 430, 437 (Fed. Cl. 2015).

words indicating the grant of a right that would pass over or through the land, and the land was described with precision, so there was no need to examine the other factors further. *See Bouche,* 293 P.2d at 209.

The process and reasoning of *Bernards* should be followed in examining a deed where some, but not all of the factors, are present. In *Bernards,* the Oregon Supreme Court entertained a discussion of the various tests employed by various commentators and various states in reaching decisions when various factors were considered. *See Bernards,* 248 P.2d at 343-44. The process undertaken in *Bernards* was to first take note of the various tests employed and then analyze how the deed at issue "fit" with those tests. The Oregon Supreme Court ultimately found that the deed had a sufficient number of factors that indicated that the deed as whole evidenced an intent to convey an easement. *Id.* at 344. The Oregon Supreme Court did not require that a multitude of factors be present before the property interest is determined to be an easement or that the list of factors provided was even an exhaustive list.[10]

Contrary to the government's argument and position, there is no "presumption" of a fee conveyance to a railroad.[11] The parties have been unable to

[10] In *Boyer,* the CFC recognized that deeds with a number of easement factors present conveyed an easement to the railroad. *See Boyer,* 123 Fed. Cl. at 437-38.

[11] *See* Appx5089-5713. The government's position is purportedly based upon Or. Rev. Stat. § 93.120, which simply removes the requirement of the words "and

locate any Oregon decision that refers to any presumption of a fee simple grant in the context of grants to railroads and, in fact, the Oregon Supreme Court had the opportunity to announce such a rule in both *Bernards* and *Bouche* and obviously did not do so. If anything, Oregon appears to favor construction of a grant of an easement over the fee. *See Hall v. Myers,* 527 P.2d 722, 724 (Or. 1974) ("the generally prevailing attitude is favorable to the finding for an easement wherever that type of interest serves the manifested purpose of the parties"). If anything, as further discussed below, it is more apt to say there is a "presumption" of an easement in the present context and in light of *Bouche* and this Court's decision in *Preseault II.*

II. THE CFC ERRED IN HOLDING THAT THE FIVE DEEDS AT ISSUE CONVEYED FEE TITLE BECAUSE THE DEEDS CONVEYED EASEMENTS TO THE RAILROAD UNDER THE COMPULSION OF EMINENT DOMAIN

In *Bouche,* the Oregon Supreme Court recognized that "a study of the cited cases suggests that the Courts have little difficulty where a railroad company is the grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, described as for use as a right of way in the grant." *See Bouche,* 293 P.2d at 209. Appellants contend this is especially so when the railroad obtains the conveyance from the

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his heirs" to create a fee simple interest. *See Cappelli v. Justice,* 496 P.2d 209, 212 (Or. 1972).

adjacent landowner after it has already entered upon the landowners' land and surveyed and laid out its tracks.

In *Preseault II,* this Court said "[h]ere, the evidence is that the Railroad had obtained a survey and location of its right-of-way, after which the Manwell deed was executed confirming and memorializing the Railroad's action." *See Preseault II,* 100 F.3d at 1537. This is precisely what occurred here. The deeds at issue in this case all make clear that the railroad was already "surveyed and located" upon the land **before** the conveyance from the landowner.[12] Therefore, all 5 deeds at issue in this case fall squarely within the rule and analysis of this Court's *Preseault II* decision.

In *Preseault II*, this Court noted that, because railroads possess the ability to acquire a right-of-way by use of eminent domain, even voluntary transfers from a landowner "retained its eminent domain flavor." *See Preseault II,* 100 F.3d at 1537. "Thus it is that a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes..." *Id.* As this Court's decision in *Preseault II* noted, this was a common

[12] *See* discussion of the deeds at issue *infra*. The Smith deed specifically states that the grant is 50 feet on each side of the centerline of the railway of the grantee "as the same is surveyed and located;" the Wheeler Lumber deed states "as the same is last located, staked out, surveyed and being constructed;" the Watt deed states "as the same is surveyed and located;" the Woodbury deed (23/399) states "as the same is now located, staked out, and operated;" and the Woodbury deed (16/481) states "as the same is surveyed and located."

rule applied to the interpretation of right-of-way deed to railroads.

Similarly, Professor Ely,[13] in his work RAILROADS AND AMERICAN LAW, noted:

> Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use. '**It is certain, in this country, upon general principles,' Redfield declared, 'that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes**.' Judicial decisions tended to adopt this line of analysis.

See Ely, RAILROADS AND AMERICAN LAW, at 198 (emphasis added) (citing a Virginia statute prescribing certain general regulations for the incorporation of rail-road companies, Ch. 118, Laws of Virginia, 1837; Simeon F. Baldwin, AMERICAN RAILROAD LAW (Boston 1904) 77; and quoting Redfield, THE LAW OF RAILROADS I, p. 255). Professor Ely's observation is entirely consistent with the established precedent of the Oregon Supreme Court's jurisprudence in both *Bernards* and *Bouche* and the Federal Circuit's analysis in *Preseault II*.

The rule recognized by this Court in *Preseault II,* which is consistent with the reality of Oregon decisions favoring easements, is this: When a railroad has "surveyed and located" a railway across an owner's land, no matter the form of a

[13] The Supreme Court twice looked to Professor Ely's scholarship on railroad rights-of-way and easements in *Brandt v. United States,* 134 S. Ct. 1257, 1264 (2014).

subsequent conveyance from the owner and whether the conveyance purports to convey title to the fee estate, the railroad obtains only an easement. This is so because the railroad possesses the power of eminent domain and the railroad's entry upon an owner's land to survey and locate its railway is an exercise of that power. Any subsequent conveyance retains that "flavor."

This Court in *Preseault II* said "the evidence is that the Railroad had obtained a survey and location of its right-of-way," and the subsequent deed merely "[confirmed and memorialized] the Railroad's action." *See Preseault II*, 100 F.3d at 1537 (emphasis added). This is precisely what occurred here. The explicit language of each of these five conveyances states that the railway was existing and located across these owners' land when the deeds were issued and, in similar circumstances, this Court held "the act of survey and location is the operative determinant, and not the particular form of transfer." *Id.*

Oregon, like almost all states, granted railroads the extraordinary power of eminent domain to allow a railroad to enter an owner's land and survey and locate a railway across the land. *See* Or. Laws 1913, §§ 6839, 6859, 6862, and 6866; *see also* Simeon E. Baldwin, AMERICAN RAILROAD LAW (1904), p. 80 ("Railroad companies are generally empowered by law to make an entry [upon an owner's land] for that purpose [surveying a right-of-way], without the consent or against the will of the landowner, and without making preliminary compensation"); Byron

and William Elliott, A TREATISE ON THE LAW OF RAILROADS (2d ed. 1907), § 925, p. 392 ("Railroad companies are given power by the statutes of almost all of the states to enter ...upon the land of any person, and cause an examination and surveyof the proposed route to be made....").

The principle upon which this Court decided *Preseault II* is not unique to the facts of that case but is a fundamental principle governing interpretation of conveyances of strips of land to railroads. The *Preseault II* decision is especially compelling here because the this Court directly cited *Bernards* for the proposition that "practically without regard to the documentation and manner of acquisition, when a railroad for its purposes acquires an estate in land for laying track and operating railroad equipment thereon, the estate acquired is no more than that needed for the purpose, and that typically means an easement, not a fee simple estate." *See Preseault II*, 100 F.3d at 1535. The Oregon Supreme Court similarly observed that the courts have "little difficulty" in finding that a conveyance was only an easement when it is to a railroad. *See Bouche*, 293 P.2d at 209.

Specifically, the Smith deed conveyed an easement to the railroad because it was granted under the compulsion of eminent domain pursuant to *Preseault II*. As clearly stated in the deed, Lloyd Smith conveyed a strip of land to the railway after the railroad had already "surveyed and located" the corridor "through" his property. As this Court specifically stated in *Preseault II* pertaining to the

Manwell deed, "here, the evidence is that the Railroad had obtained a survey and location of its right-of-way, after which [the Smith deed] was executed confirming and memorializing the Railroad's action." *See Preseault II,* 100 F.3d at 1537. Because the Smith deed was executed pursuant to the railroad's eminent domain power, the Smith deed conveyed an easement to the railroad necessary for the railroad's limited purposes because "the act of survey and location is the operative determinate, and not a particular form of transfer." *Id.*

Similar to the compulsory consent contained within the Smith deed, each of the remaining 4 deeds also specifically state that each deed was granted after the railroad had already exercised its eminent domain powers:

1) **The Wheeler Lumber Co. (16/5) deed**—"a strip of land 60 feet in width… as the same is last located, staked out, surveyed and being constructed through…"

2) **The Watt (12/343) deed**—"a strip of land sixty (60) feet wide… as the same is surveyed and located through…"

3) **The Woodbury (23/399) deed**—"a strip of land sixty (60) feet in width… as the same is now located, staked out, and operated through…"

4) **The Woodbury (16/481) deed**—"a strip of land sixty (60) feet in width… as the same is surveyed and located through…."

As clearly stated in each deed, a strip of land was conveyed to the railroad after the railroad had already "surveyed and located" the corridor "through" the property. As this Court specifically stated in *Preseault II,* the evidence is that the

railroad obtained a survey and the location of its right-of-way pursuant to the railroad's eminent domain authority and all 4 of the deeds were executed confirming and memorializing the railroad's action. *See Preseault II,* 100 F.3d at 1537. Although the entire argument will not be repeated again, each of the 4 remaining deeds conveyed an easement to the railroad necessary for the railroad's limited purposes because "the act of survey and location is the operative determinate and not a particular form of transfer." *Id.*

The Oregon Supreme Court specifically directs that each deed must be interpreted to accomplish the intention of the parties. *See Bouche,* 293 P.2d at 208 (quoting 28 C.J.S., Easements, § 27, at 681) ("whether an instrument conveys ownership of land or only an easement depends upon the intention of the parties"). The intention of the parties must be determined from both the text of the instrument and the context in which the instrument was created. Even though these deeds should be interpreted as easements based on this Court's reasoning and conclusion as set forth in *Preseault II,* these deeds are also easements based on the fact that a multitude of factors exist within the deeds which demonstrate that it was the intention of the parties to convey an easement as set forth in both *Bernards* and *Bouche.*

III. THE CFC ERRED IN HOLDING THAT THE FIVE DEEDS CONVEYED FEE TITLE TO THE RAILROAD BECAUSE THE FACTORS IDENTIFIED IN *BERNARDS* AND *BOUCHE* COMPEL A CONCLUSION THAT AN EASEMENT WAS INTENDED

A. The Smith Deed Conveyed an Easement Under the Factors Enunciated in *Bernards*

Even if this Court does not follow the precedent set forth in *Preseault II,* the Smith deed also conveyed an easement to the railroad because six of the factors listed in *Bernards* are actually present within the deed. The Smith deed provides:

> Know All Men by These Presents: **That for and in consideration of the sum of One Hundred Fifty …Dollars**, the receipt whereof is hereby acknowledged, I, Lloyd C Smith a widower, of Garibaldi, Tillamook County[,] Oregon[,] hereinafter called the grantor, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> **A strip of land one hundred(100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through** Lot 3 of Section 8, Lot 4 of Section 7, Lots 1, 2, 3, and 4 and North-West [sic] quarter of South-West[]quarter of Section 17, Lot 3 of Section 20 and Tide Land fronting and abutting upon Lots 3 and 4 of Section 20, all in Township 1 North of Range 10 West of Willamette Meridian; save and except that from Station No 651 to Station No. 677 ***said right of way hereby conveyed*** **shall be only 65 feet wide being 50 feet on the Easterly side and 15 feet on the Westerly side of said center line.**
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantor above named does covenant that he is seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises

> herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

See Appx4871-4872 (emphasis added).

The Smith deed, when examined through the *Bernards* lens, satisfies six of the eight factors listed by the Oregon Supreme Court. First, the "right-of-way hereby conveyed" language squarely satisfies factors 1 and 2 of *Bernards* and is controlling. Second, the "through" language indicates an easement and satisfies factor 3, the grant does not describe the interest conveyed with precision which satisfies factor 6, the consideration was actually nominal under the circumstances which satisfies factor 7, and the grant of the "strip of land" satisfies factor 8. Although the deed does not contain a reverter clause pursuant to factor 4 and Mr. Smith did not retain the right to build structures on the right-of-way pursuant to factor 5, a reading of the deed as a whole indicates that Mr. Smith intended to convey an easement to the railroad because 6 of the 8 factors are satisfied.

1. The "Right Of Way Hereby Conveyed" Language Pertaining to the First 2 Factors of *Bernards* Plainly Refers Back To The Granting Clause, Which Should Compel The Conclusion That An Easement Was Conveyed Without Regard To Other Factors

In Oregon, it is recognized that the term "right of way" can have two different meanings. *See Bouche*, 293 P.2d at 209. It can describe the right of passage over a tract, but can also be used to describe the land taken by railroad companies to build their railway. *Id*. (*citing Joy v. City of St. Louis*, 138 U.S. 1, 44

(1891)). Yet, as explained in *Bouche*, so long as the term does not appear in such manner that it is "incidental," the appearance of the phrase will result in a determination that the parties intended to convey an easement. *Id*. Most importantly, the use of the phrase "right of way hereby conveyed" in the Smith deed is a description of the interest conveyed/granted rather than a description of the geographic location.

The Smith deed's use of the phrase "said right of way hereby conveyed" is clearly not "incidental." By its very terms, it refers back and incorporates by reference the granting clause. That is, "hereby **conveyed**," as a matter of standard English, is obviously referring to the grant/**conveyance** of a right of passage and definitively **not** to a geographic description. Otherwise, the word "conveyed" would not be used. Indeed, if the phrase "right of way" was being used to describe geography, the phrase would have read "said right of way hereby **described**" and **not** "hereby **conveyed**." By referring to the grant/conveyance when using the phrase "right of way," it is evident that the grantor and grantee intended to communicate that the subject of the conveyance is a right in the land as opposed to the land itself. Therefore, the CFC erroneously concluded that the deed's use of the phrase "right of way" is not a description of the interest being conveyed but provides a geographic location. Appx5924-5925.

This conclusion is highly important because, although the entire deed must be considered, where the "right of way" factor indicates an easement, such is determinative that an easement exists regardless of the other factors. As the Oregon Supreme Court correctly stated: "A study of the cited cases suggests that the courts have little difficulty, where a railroad company is grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, described as a use as a right of way in the grant." *See Bouche*, 293 P.2d at 209. Because "said right of way hereby conveyed" refers back to the granting clause, the only conclusion to be reached under Oregon law is that the Smith deed conveyed an easement.

2. The Majority of the Other Factors Mentioned in *Bernards* Are Also Present in the Smith Deed

In addition to the fact that the Smith deed was already "located and staked out" at the time the deed was executed and the fact that the deed actually conveys the right-of-way, the deed also meets the majority of the other factors identified in *Bernards.* First, the deed's "through" language indicates an easement pursuant to factor 3 and the grant of a "strip of land" indicates an easement pursuant to factor 8. Second, the deed describes the interest conveyed without any precision which satisfies factor 6. Third, under the circumstances, the consideration was actually nominal, which satisfies factor 7.

First, the "through" language, factor 3, and the grant of a "strip of land," factor 8, indicate that an easement was intended. The Smith deed contains the phrases (a) "strip of land" and (b) "through" other land, to describe the interest conveyed, which Oregon courts hold to indicate an easement. The word, "through" is synonymous with "over" or "over and across." *See* Black's Law Dictionary (6th ed. 1990) (defining through as "within; over; from end to end, or from one side to the other."). As noted above, Oregon courts construe the phrase "over and across" to indicate an easement. *See Bouche,* 293 P.2d at 209. In fact, the *Bouche* deed did not possess this factor, which certainly influenced the court's opinion. *Id*. ("the words over and across the lands of the grantors' do not appear").

Oregon follows the reasoning that a given strip of land that is said to pass "over and across," "over and through," or "through" described premises, should naturally pass over, though, or across the land. Thus, *Bernards* set forth that Oregon recognized that it is an indication the parties intended to convey a right in the land as opposed to the land itself. *See Diaz v. Home Fed. Sav. & Loan Ass'n of Elgin,* 786 N.E.2d 1033, 1042 (Ill. App. 2002) (discussing the term "over and through" and noting that "[a]n interest that passes 'over and through' necessarily passes through something. If a fee had been created in the grantee, the right-of-way would, in fact, pass through nothing; it would simply be property held by the grantee").

Furthermore, "through" is a term that consistently appears in deeds of other jurisdictions that describe easements. *See*, e.g., *Hale v. Davis*, 195 S.E. 523, 524 (Va. 1938) (The last part of the deed conveys a right of way "*over and through* all of her other land including forty feet from the center of the roadbed… on each side thereof as the said railroad is now located and graded.") (emphasis added); *Diaz*, 786 N.E.2d at 1041 (easement granted "over and through the following described tract"); *City Motel, Inc. v. State,* 336 P.2d 375, 378 (Nev. 1959) ("all that certain right of way *over and through* the lands hereinafter described") (emphasis added).

Interpreting "through" as synonymous with the grant of a surface right is also consistent with the rule of construction that all words or phrases in a deed should be given meaning. *See O'Gorman*, 347 P.2d at 90–91. It would have been unnecessary to include the term in the deed if what the parties intended to communicate was merely the location of the land. What would have been more practical was to simply state that the strip of land was "in" or "located in" the described land rather than "through" the land.

Appellants consider the meaning of the term "through" to be unambiguous. Nonetheless, if the Court believes otherwise, Appellants welcome the Court's consideration of the circumstances surrounding execution of the deed. *See Miller v. Jones*, 302 P.3d 812, 815 (Or. App. 2013) (citing *Peace River Seed Co-Op. v. Proseeds Marketing*, 293 P.3d 1058 (Or. App. 2012) ("[A] contractual provision is

ambiguous if it is capable of more than one sensible and reasonable interpretation; a term is unambiguous if its meaning is so clear as to preclude doubt by a reasonable person"). In Oregon, "[i]f the wording at issue is uncertain or ambiguous, then the court must determine the intent of the original parties by examining the relevant surrounding circumstances." *See Tiperman v. Tsiatsos*, 964 P.2d 1015, 1019 (Or. 1998). Furthermore, it is a rule of deed construction in Oregon that the Court must consider "the circumstances under which [the deed] was made, including the situation of the subject and of the parties… so that the judge is placed in the position of those whose language the judge is interpreting." Or. Rev. Stat. § 42.220. In this case, the surrounding circumstances and actions of the parties are all consistent with the transfer of an easement. The conveyance is of a narrow strip of land with little use save for use as a right of way, all that was necessary for the railroad to conduct its railroad operations was an easement and not the fee, and there is no evidence the strips were used for any purpose other than to conduct railroad and telegraph operations.

Second, the Smith deed describes the interest conveyed without precision, factor 6, which also indicates that an easement was intended. The description of the interest conveyed in the Smith deed is without precision because it merely refers to the strip of land previously surveyed through Smith's land. Here is how

the Restatement, which is cited in *Bernards*,[14] explains the rationale for why a lack of precision suggests an easement was granted:

> Since the owner of an estate in land has, presently or prospectively, the privilege and the right to occupy certain space, a conveyance creating an estate must indicate the space to be occupied. **To distinguish this space from that possessed by the owners of estates in other lands, it is necessary to define its boundaries with a high degree of precision.** Where a conveyor conveys all of his land, a conveyance by reference to his own title is sufficient since the conveyance to him will have defined the space affected. **Where a conveyor conveys an estate in less than the whole of his land, the conveyance must indicate the boundaries between the land conveyed and that retained in order that the space which may be occupied by the conveyee shall be distinguishable from that which may be occupied by the conveyor.**
>
> ***
>
> Whatever form a conveyance of less than all of the conveyor's land may take, whether by metes and bounds description, or by reference to area to be determined by survey, or by a grant in terms of a physical substance only, **the more easily the space affected can be identified the stronger the inference that an estate or a right of exclusive occupation was intended to be conveyed. Conversely, the less easily it can be identified the stronger the inference that an interest other than an estate was intended to be conveyed.**

See Restatement (First) of Property § 471 (1944) (emphasis added). Thus, the more clearly defined the space, the greater the likelihood the parties intended to convey a fee simple estate. Since a grant with an imprecise description is

[14] *See Bernards,* 248 P.2d at 343.

inconsistent with the grant of the fee simple, this supports a construction of easement.

The CFC at first erroneously dismissed this factor, stating that it would "not address whether the property conveyed is described with precision, because all of the deeds describe the property conveyed with some degree of precision." Appx277. Upon reconsideration, the CFC considered this factor, but mistakenly concluded that the deed "describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee." Appx496.

While it is of course true that most deeds contain **some** degree of precision, the degree to which the premises can be identified certainly varies. That is entirely the point of why Oregon and other jurisdictions recognize that the degree of precision is an indication of the parties' intent. In the Smith deed, there was not that "high degree of precision" that would indicate a fee grant because, if a fee estate were intended, one would expect to see callouts, including positioning and angles between points on the ground, using reference points as starting points that specifically define the boundaries of the grant. Instead, the Smith deed contains only general references to the location through which the railroad would run based on the railroad's survey, which was done pursuant to the railroad's eminent domain

authority in the first place. Therefore, this factor indicates an easement was granted.

Third, the consideration of $150, factor 7, was nominal under the circumstances and also indicates that an easement was intended. The $150 consideration recited in the Smith deed, though it would not instinctively be thought of as nominal, should be considered so in the circumstances, given the huge swath of coastal land transferred by the deed. There is a significant discrepancy between the amount of consideration, the total area granted by the deed, and the value of the land. The deed conveys 22.344 acres, for a total length of right of way of **1.5 miles**, half of which is located on the Oregon coast. Appx4715-4717.

The idea that $150 represented the true value of the land is inconsistent with the total land and consideration sums set forth in other deeds litigated below (and not on appeal) that the CFC construed as conveying the fee simple. For example, the Handley (13/34) deed has a stated consideration of $400, yet conveys only one-half of an acre, and conveys land nearby the large tract conveyed by the Smith deed. Appx4705. Another example is the Large (5/536) deed, with a stated consideration of $250, which conveys nearly 1.8 acres of land. Appx4719.

Furthermore, the location along the Oregon coast indicates that the payment of $150 was nominal. The Oregon case of *Harrison v. Pac. Ry. & Nav. Co.*, 144 P.

91 (Or. 1914), provides support regarding the increased value of shorelands. *Harrison* was a condemnation action between the railroad and a Tillamook County landowner (the location of the subject deed). The landowner sought damages as a result of the loss of access to navigable waters arising from the construction and operation of the railroad's line along the Oregon coast. *Id*. The court explained that:

> [T]he mere proximity of land to tidewater is an enhancement of value not possessed by land at some inaccessible point in the distant interior. If, therefore, this adjacency to navigation is seriously impaired or practically destroyed so as to make plaintiff's lands substantially as inaccessible as the interior land, that fact ought to be submitted to the jury with others illustrating the situation, and considered in estimating the damage resulting from the acts of the defendant.

See Harrison, 144 P. at 93.

What *Harrison* and consideration recited in other deeds in the area illustrate is that although certain amounts of damages are clearly nominal, *e.g.*, $1, $5, $10, it should not automatically be assumed that values outside such a range in fact reflect the actual value of the fee simple rights. *See Scoggin v. Schloath*, 15 P. 635, 635 (Or. 1887) (characterizing $100 as nominal consideration where the true value of the property was $2500). This is what the CFC did below. It recognized that the consideration was above these values, and arbitrarily determined without considering the surrounding circumstances that $150 must represent the true value of the land and **could not** be nominal. The CFC's failure to consider the

surrounding circumstances is inconsistent with Oregon's rules concerning the construction of deeds. *See* Or. Rev. Stat. § 42.220 (explaining that "the situation of the subject" must be considered).

Black's Law Dictionary defines nominal consideration as follows: "One bearing no relation to the real value of the contract or article, as where a parcel is described in a deed as being sold for 'one dollar,' no actual consideration passing or the real consideration being concealed." Black's Law Dictionary (6th ed. 1990). The key aspect of this definition is that nominal consideration bears no relation to the actual value of what is conveyed. Here, the payment of $150 bears no relation to the actual value of the coastal land at issue, and so indicates an easement.

The factor of consideration should not be examined in a vacuum because, under Oregon law, "[i]n construing an instrument, **the circumstances under which it was made, including the situation of the subject and of the parties**, may be shown so that the judge is placed in the position of those whose language the judge is interpreting." *See* Or. Rev. Stat. § 42.220 (emphasis added). Here, landowners in the early 1900's granted a narrow strip of their land, under the threat of eminent domain, to the railroad so that the railroad could run trains. That is the circumstance at the time that must be considered. The landowners did not want or need to convey the fee to the railroad and the railroad had no need whatsoever to obtain it. *See Great Northern Ry. Co. v. United States,* 315 U.S. 262, 272 (1942)

(explaining that "a railroad may be operated though its right of way be but an easement"). Therefore, in light of the foregoing law and the totality of the circumstances, consideration is an indication of easement.

B. The Wheeler Lumber Co. (16/5) Deed, The Watt (12/343) Deed, The Woodbury (23/399) Deed, And The Woodbury (16/481) Deed Also Conveyed Easements to the Railroad Under the *Bernards* Factors

The other 4 deeds at issue, the Wheeler Lumber Co. (16/5) deed, the Watt (12/343) deed, the Woodbury (23/399) deed, and the Woodbury (16/481) deed also conveyed easements to the railroad under Oregon law. Each deed includes a majority of the pertinent factors from *Bernards* which should lead to the conclusion that an easement was intended by the grantor. The 4 remaining deeds at issue provide in pertinent part as follows:

(1) The Wheeler Lumber Co. (16/5) deed:

> Know All Men by These Presents, **that for and in consideration of the sum of One Dollar ($1.00)** to it in hand paid, the receipt whereof is hereby acknowledged, The Wheeler Lumber Company, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the county of Tillamook and state of Oregon, to-wit:
>
> **A strip of land sixty feet in width being thirty feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through** Lots Four (4), Five[](5), Six[](6) and that part of Lot Three (3) lying west of the lands in said lot heretofore conveyed by said grantor to Willie G. Du Bois, all in Section Three (3) and the East Half (E ½) of Lot One (1) in Section Four (4) and

through all tide lands fronting and abutting on all of the above described lands, all in Township Two[](2), North Range Ten (10) West Willamette Meridian.

Also, a strip of land sixty feet in width being thirty feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through all the tide lands fronting and abutting on that part of said Lot Three (3) in said Section Three (3) in said Township Two[](2) North, Range Ten (20) West, Willamette Meridian, described as follows: * * * * [Describing the land through which the strip being conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold to the above named grantee and to its successors and assigns forever; the **grantors confirming also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover**.

The aforesaid grantor does hereby covenant that it is the owner in fee simple of the above granted premises, and that it will warrant and defend same unto the said grantee aforesaid, its successors and assigns, against the lawful claims and demands of all persons whomsoever.

See Appx4773-4774 (emphasis added).

(2) The Watt (12/343) deed:
"No. 8225. Railway Deed"

KNOW ALL MEN BY THESE PRESENTS: **That for and in consideration of the sum of One and 00/100 DOLLARS** , [sic] The [sic] receipt whereof is hereby acknowledged, we, George Watt and Helen Watt, his wife[,] and Robert Watt and Lois A. Watt, his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and * * * to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway o f [sic] the grantee as the same is surveyed and located through Lots One, two and three

> of Section Seven and Lot one of Section eight, all in Township One North of Range ten West [sic] of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

See Appx4812 (emphasis added).

(3) The Woodbury (23/399) deed:

> Know All Men by These Presents: That we, E.E. Woodbury and Maude Woodbury, his wife, the grantors, **in consideration of the sum of Two … Dollars**, paid by Pacific Railway and Navigation, the grantee herein, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, transfer and convey unto said Pacific Railway and Navigation Company, an Oregon Corporation, and to its successors and assigns forever, **a strip of land sixty (60) feet in width, being thirty (30) feet on each side of the center line of the railway of said Company as the same is now located, staked out, and operated through** Section Twenty-Nine (29), Township Two (2) North, Range Ten (10) West of the Willamette Meridian. Which strip lies between the line between Sections 29 and 32 on the South and the North boundary of North Street of said Lake Lytle Tract, as the same is platted in and by Lake Lytle Plat and between Blks. [sic] 1, 7 and 3 of Lake Lytle on the East and Blks [sic] 4, 8 and 14 of Lake Lytle on the West.
>
> To Have and to Hold the above described premises unto the said Pacific Railway and Navigation Company and to its successors and assigns forever.

See Appx4829 (emphasis added).

(4) The Woodbury (16/481) deed:

> Know All Men by These Presents: **That for and in consideration of the sum of Ten ($10.00) Dollars**, to them in hand paid, the receipt whereof is hereby acknowledged, and of other valuable considerations, E. D. Woodbury and Maude Woodbury, his wife,, hereinafter called the grantors, do bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> **A strip of land sixty (60) feet in width, being thirty (30) feet on each side of the center line of the grantee's railway as the same is surveyed and located through** the following described real property, to wit:
>
> * * * [Describing the property through which the strip conveyed runs] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining,
>
> To Have and to Hold to the grantee, and to its successors and assigns forever.

See Appx4864 (emphasis added).

Each of the remaining 4 deeds contain multiple factors that indicate that each grantor intended to convey an easement as set forth in *Bernards.* All of them grant (1) "a strip of land" (2) "through" (3) imprecisely described premises (although the Woodbury deed 16/481 deed does provide a precise description), with (4) nominal consideration. Appellants discussed all of these factors above, relating to the Smith deed, and will not repeat those legal arguments but instead incorporate them by reference.

An additional fact supports Appellants' conclusions regarding the Wheeler Lumber Co. 16/5 deed. It contains language in the habendum clause that "grantors confirm also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover." Appx4773-4774. Oregon law considers a statement of the purpose to which the land is to be put to be an indication of the intention to convey easement. *See Bouche*, 293 P.2d at 209 (noting in its rejection of a construction as easement that "[t]here is nothing therein which *in anywise limits* the company in the use it might make of the land….") (emphasis added).

The fact that the parties chose to insert this phrase clarifies that the parties intended to convey an easement. The most reasonable explanation for why the phrase was written into the deeds was to make clear the railroad had the right to use the land for railroad purposes, which would have been unnecessary if the fee had been conveyed. The presence of this provision is thus reasonably and logically explained and given effect. If the parties intended to convey a fee simple title, the provision becomes mere surplusage because it was entirely unnecessary to place it in the deed. Since the law does not require it, parties who acquire fee simple title have no need to enumerate the uses and purposes for which the property will be used. If the railroad acquired the fee simple, it would enable practically unlimited utilization of the land.

The phrase re-emphasizes the parties' intention that "the right" to construct and operate a railroad line is conveyed, rather than the land itself. As noted in *Bouche*, when the deed has indications that a right to use the land is conveyed as opposed to the land itself, this is an indication of an easement. *See Bouche*, 293 P.2d at 210 (noting that the subject of the grant was not a "right" to use the land). Again, it would make little to no sense for the landowner to grant or otherwise reconfirm that a particular "right" was permissible if the fee was granted. The provision is a clear-cut statement of the purposes to which the land is to be placed which, under Oregon law, is a strong indicator of easement. *See Bernards*, 248 P.2d at 344-45 (endorsing prior decision that held that purpose statement was controlling and that the decision was "determinative of the issues under consideration"); *Bouche*, 293 P.2d at 210 ("there was no statement of the purposes for which it was granted; it described the land conveyed with a relatively high degree of precision").

If the railroad had already been granted the fee simple, it could do anything it wanted with the land over and above using the land for its railroad. There is nothing to "confirm" in the grant of an unfettered fee simple. The only way a statement that confirms a certain right is granted is if a right is granted in the first place—the right to use the land for the purpose of railroad construction and operation. That is the definition of a railroad easement. Because all of the deeds

within this section contain a significant number of easement factors pursuant to *Bernards* and *Bouche*, Appellants respectfully request the Court reverse the CFC's conclusion that said deeds conveyed fee simple.

IV. CONCLUSION

The CFC's Opinion and the resulting Judgment should be reversed.

Respectfully submitted,

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

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ADDENDUM

In the United States Court of Federal Claims

No. 16-912 L
Filed: April 29, 2019

PERRY LOVERIDGE, et al.

RULE 54(b)
JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion, filed August 13, 2018, granting-in-part, defendant's motion for summary judgment, Opinion, filed February 8, 2019, granting-in-part and denying-in-part, the plaintiffs' motion for reconsideration, and the court's Order of Dismissal, filed April 26, 2019, directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant, and the plaintiffs listed in the attached Exhibit A, and claims listed in the attached Exhibits A and B, are dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

EXHIBIT A

Cl. No.	Name	Parcel No.
1	Perry Loveridge	1N1005-CB-04700
2	Neal Abrahamson	1N1007-AA-01000
3	Randy & Judy Anderson	1N1017-CB-04600
4	Judd Berg and the Estate of Ethel J. Berg	1S1013-AA-00900
5	The Estate of Ethel J. Berg	1S1013-AA-00800
6	James Bernhardt and Lois Bernhardt	2N1029-BD-10201
7	Thomas Boquist	1S1013-A0-00300
8	Braukman Loving Trust	1N1017-CD-02200
9	Dennis Burt	1S1013-A0-00101
10	Hannelore Drugg	1N1017-CD-01300
11	Estate of William L. Fenton	1N1005-CB-08700
12	Ruth M. Fenton	1N1005-CB-08500
13	Kelly Finerty and Linda Finerty	1N1005-BC-07000
15	James Haley	2N1032-BB-01100
16	Ruth Hansen Eugene Helser	2N1029-CA-12100
17	Jackson and Son Distributors, Inc. c/o Larry Jackson	1N1021-AC-12701
18	Richard Jepson	1S1013-A0-01102
19	Christopher Jepson & Michelle Jepson	1S1013-AA-00200
20	Don Johnson	1N1005-BC-05701
21.A, B.,C., D., E.	Deslee Kahrs and Donna Kahrs	2N1003-00-00600; 2N1003-00-01000; 2N1003-00-01101; 2N1003-00-01200; 2N1003-00-01300
22.A, B, C	Terry Kandle	1N1021-BD-10700; 1N1021-BD-10800; 1N1021-BD-10900
23	Won Wha Kim and Jeong Ho Kim	2N1029-CC-02300
24	Terry Kline and Debbie Kline	2N1032-BC-07100

Cl. No.	Name	Parcel No.
25	Mascott, LLC	2N1029-CC-03300
26	Terry S. McCamman & Cheryl A. McCamman	2N1029-CC-06600
27	Sharon Newman	1N1017-CD-00901
28	Anthony Pires	2N1032-CC- 11800
29	Joseph Quan	2N1032-CC-09600
30	Cheryl D Runnels Trust	2N1029-CC-03200
32	Loretta Schutten	1N1005-BC-06500
35	Thompson Revocable Living Trust (Barbara L. Thompson)	1N1017-CD-00900
36	Throckmorton Family Living Trust	1N1005-CB-04801
37	William E. Waibel Living Trust and Pamela A. Waibel Living Trust	1N1017-CD-02300
38	Diane Walters	1N1007-AA-00390
40	Richard Young	1N1007-AA-00300
41	Advance Resorts of America, Inc.	2N1003-00-00500
45	Appleton, William and Jacqueline	2N1029-CC-08000
48	Berrie Beach LLC	1N1007-AD-00800
49	Berrie-Lawson, Maureen	1N1007-AD-00903
50	Best, Angelina	1N1007-AA-00101
51.A, B	Estate of David Bigsby	3N527-BB-02400; 3N528-AA-02100
52	Brecht Family Trust	2N1032-BB-00300
55	Brown, Neil	1N1007-AA-00600
56	Randall S. Burbach Trust	1N1007-AD-00905
57	Burrows, Douglas	2N1032-BB-05500
58	Call Systems, Inc. Employee Pension Benefit Plan	1N1005-BC-06300
60.A, B	Delores L. Cartales & Andy G. Cartales Family Trust	1N1005-CB-03301; 1N1005-CB-03200
61	Cerelli, Bob	3N0800-00-03000
62	Charles, Edward	1N1005-BC-06600

Cl. No.	Name	Parcel No.
63	Chastain Family Limited Partnership	1N1007-DA-00100
64.A, B, C	Kenneth Chin, Stephen Chin, Susan M. Chin Robertson, Aileen Turley, and Catherine Young	1S1013-AA-00700; 1S1013-AA-00600; 1S1013-AA-00400
65	Daugherty, Ruth	2N1032-CC-10100
66	The Ray C. Debord and Anne Jill Nelson-Debord Living Trust	2N1029-CA-09200
67.A, B, C, D	Henry M. Diem Living Trust	1N1006-DD-01700; 1N1006-DD-02000; 1N1006-DD-00700; 1N1006-DD-00100
68	Dowen, Gary L. and Mary E.	2N1029-CC-07500
69	Edwards, Robert A.	1N1022-00-00300
70	Eichhorn, Frank D.	1N1005-CB-08900
71	Ford, Scott	2N1029-CC-07400
72	Fox, Steven and Karrie	2N1029-CC-06800
73	Gehlen, Rosalie	2N1032-BC-00800
74.A, B	Lenhart A. Gienger Trust	1N1008-00-00900; 1N1017-00-00201
79	Hass, Rick and Barbara	1N1007-AA-00100
80	Heath-Rickert, Cheri	1N1017-CB-01100
81	Hennig, Donald C. and Diana L.	3N0700-00-03400
82	Henriksen, James	2N1032-BC-05601
83.A, B	Hinsdale, Karen	1N1007-AD-00402; 1N1007-AD-00403
84	Hirschfeld, David	1N1017-CB-05100
85	Roberta J. Hoffard Revocable Living Trust	1N1017-CD-01500
86	Houghtelling, Christine	2N1032-CC-13400
87	Jameson, Claudia	1N1017-CD-01201
88.A, B	Johnson, Darleen	1N1017-CB-05800; 1N1017-CB-06000
90.A, B	Betsy A. King Revocable Trust	1N1007-AD-01000; 1N1007-DA-05600

Cl. No.	Name	Parcel No.
91	Kraby, David and Alison Beck	2N1032-CB-09507
93.A, B	Martin Dairy, LLC	1S0932-00-00400; 1S0932-00-00501
94	McIsaac, Megan	2N1032-CB-09510
95	Mercer, Stewart and Cathi	2N1029-CA-10600
98	Neuman, William	1N1017-CD-01200
99.A, B	Dorothy D. Nichols Trust	1N1005-BC-07100; 1N1005-BC-05000
102	Platt, Randall	1N1005-BC-04900
104	Rulifson, Boyd and Nancy	1S0918-00-01300
106	Salter Family Trust	1N1005-CB-03300
109	Seward, Chris and Carla	2N1032-CB-09512
110	Shotwell, Patricia	2N1032-BB-06500
111	Stinnett, Jeanie	1N1021-BD-10401
114	Thomas, Kevin and Carol	1N1007-DA-00500
115	Shirley M. Thomas Revocable Living Trust	2N1032-BB-06600
116	Wesley J. Wanvig Living Trust	2N1029-CA-08200
117	Williams Family Childrens Trust	2N1029-BD-06800
118	Zapp Family Revocable Living Trust	2N1032-BC-03001
119	145 S. Miller Street, LLC	2N1032-CC-10300
120	Ancheta, Paul D.	2N1032-BB-01001
122	Arthur Investments, LLC (Jason Averill)	2N1032-CC-10401
123.A, B	Aten, Donald & Linda	1N1017-CB-05300; 1N1017-CB-05400
124	Baker, Freddy & Bette	2N404DC00807
127.A, B, C, D	Brummund Family Revocable Living Trust	1N1007-AA-01400; 1N1007-AA-01500; 1N1007-AA-01600; 1N1007-AA-01700
128	David William Bruneau Trust, Kim Kristina Bruneau Trust (Daniel Stokes & Judith Stokes)	2N1032-BB-06001

Cl. No.	Name	Parcel No.
129	Byrnes, Franklin & Alice Yetka	2N1029-CC-07200
131	Cameron, Daniel R.	1N1022-CA-00700
133	CFP, Inc. Employees Retirement Trust	2N1029-BD-02100
135	Cohen, David and Samuel	1N1005-CB-04300
136	Cruse, Martha & Donald Ballard	1S1013-A0-00103
137.A, B	Daniels, Paul and Lois	1N1022-BB-01700; 1N1022-BB-01600
138	Escriva, Mark & Maryann	2N1032-BB-00601
139	Falconer Family Trust	1N1007-AA-01200
140.A, B, C, D	Farmington Hubbard Adams Enterprises, LLC	1N1017-CB-10800; 1N1017-CB-10700; 1N1017-CB-10600; 1N1017-CB-10500
141	Fernandez Family Revocable Trust	1N1005-BC-06900
142.A, B	Forster Family Trust	2N0905-00-00202; 2N0905-00-00200
143	George, Eileen	2N1032-BC-06100
145	Gray, Martha Lynn Trost	1N1017-CD-01000
146	Griffin, Nathan	2N1032-CB-03900
147	Gundersen, Roberta	1S1003-AA-01800
149	Harmon, Howard	1N1005-BC-04300
152	Harper, James & Georgia Gettman	2N1032-BC-02300
153	Henrex Homes, LLC	1N1034-DB-04000
154	Hixson, Judith	1N1022-BB-01000
155	Jevning, Derek	1N1005-CB-04900
156	Jones, Stephan & Teresa	1N1007-AA-00900
158	Kjemperud, Rick	1N1022-BB-00400
159	Klingelhofer, Kevin	1S1002-CB-01600
160.A, B, C	Knight, Richard	3N528AA02500; 3N528AA02400; 3N527BB02600

Cl. No.	Name	Parcel No.
161	Koch, Ronald & Julie	1N1017-CB-01000
162	Kuntz, John	2N1032-CC-10000
163	LOLA OTT IV, LLC	1N1007-AA-01300
164	Lunzman, Constance	3N400C004100
165	McCarty, Ebben	1N1007-AA-00500
166	McDonald, James & Sally	2N1029-CC-03700
167	McIver, Synthia	1N1007-AA-00800
168	Mei, Zhiming	2N1032-BB-00700
169	Newcomer, James	1N1005-CB-04400
171	Opiela Raymond & Lynda	2N1032-CB-09509
172.A, B	Oregon Conference Adventist Churches	1S0930-BD-00600; 1S0930-BD-00700
173	Oregon Conference of Methodist Church	1N1000-00-01100
174.A, B. C, D	Oregon-Idaho Annual Conference of the United Methodist Church	1N1007-DD-00103; 1N1018-AD-00400; 1N1007-DA-05800; 1N1017-00-00200
175	Oregon Writers Colony, Inc.	2N1032-BB-00200
176	Ardyce K. Osborn Revocable Living Trust	2N1029-CC-03000
177	Parish, William	1N1034-DB-07500
178	Phillips, Stacey & Zeno Lagler	3N528AD00100
179.A, B	Pose, LLC	1N1021-BD-10200; 1N1021-BC-02900
180	Rebsamen, Michael & Venita	1N1005-CC-02000
181	Repass, Daniel	1N1021-BD-12100
182.A, B	Rockaway Sandwood LTD	2N1032-BB-07100; 2N1032-BB-07200
183	Sabin, Michael	1N1007-DA-00400
184	Schlegel, Jerry	1N1017-CD-02100
185.A, B	Seaview Homeowners Association, a/k/a Association of Unit Owners of Seaview Condominiums	2N1032-CB-80000; 2N1032-CB-90000

Cl. No.	Name	Parcel No.
186	Swain, Patricia	2N1032-CC-09700
189.A, B, C	Mary Judith Upright Living Trust	1N1007-AD-00300; 1N1007-AD-00301; 1N1007-AD-00290
190	Upshaw, Daniel	2N1032-CB-04200
191	Van's Camp, LLC	2N1029-CC-06500
192.A, B, C.	Vermeulen, Elizabeth & Alice Pyne	1N1005-BC-04400; 2N1029-CA-01600; 2N1032-CC-08700
193	Wachsmuth, John	2N1029-CA-05700
194	Wale, Fred	2N1032-BC-01700
196	Wallace, Andrea Lynn	1N1007-AD-00100
197	Florence C. Waters Trust	2N1029-CA-07200
198	Way, Susan	1N1034-DB-12200
199	Arline B. Wieden Revocable Living Trust	3N0810-DC-00100
200	Wilkinson, Steven H.	1N1034-DD-09300

EXHIBIT B

Cl. No.	Name	Parcel No.
42.C, D, F, G, H, I, J, K, L, N, O	Ocean West, LLC	2N1009-CC-04100; 2N1009-CC-04300; 2N1009-BC-01100; 2N1009-BC-01200; 2N1009-BC-01300; 2N1009-BC-01400; 2N1009-BC-01500; 2N1009-BB-00300; 2N1009-CB-03300; 2N1009-BB-00800; 2N1009-BB-00900
43.E, G	Old Mill Investment, LLC	1N1021-00-00500; 1N1022-BB-01400
47.A, C	Bay Air, LLC	1S1011-A0-00801; 1S1011-A0-01200
59.B	Carol H. Carson Revocable Living Trust	1N1021-BD-11000
92.B	Laviolette, Jean and Shirley	2N1029-BD-08700
96.B, C	Beverly Ann Merrill Revocable Trust	1N1022-BA-00900 1N1022-BA-00800
100.A	Painter, Ken	2N1003-DA-00100
103.B	Ruffo Family Revocable Living Trust	2N1032-BB-01002
112.A	Strong, Harvey	1S1013-A0-01101
151.B	Estate of Frank Harper	1N1034-AC-00901
157.A	Estate of John D. Karamanos, III	3N0700-00-03401
187.A	Tillamook People's Utility District	1N1022-A0-00300

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

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

/s/ Thomas S. Stewart
ATTORNEY FOR APPELLANTS

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 10,688 words.

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

/s/ Thomas S. Stewart
Thomas S. Stewart