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.

REPLY 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 Abrahamsonv. United States, CaseNo. 2019-2316; Albright, et al. v. United States, Case No. 2019-2078 and Higgins, et al. v. UnitedStates, Case No. 2019-2080. This Court consolidated all of the pending cases for purposes of thisappeal.

3/30/2020
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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INTRODUCTION

These consolidated appeals arise out of a 2016 Rails-to-Trails conversion in Oregon and, although all of the appeals collectively contest the CFC's Judgment as to 26 deeds under Oregon law, there are only 5 deeds at issue in this particular appeal. The 5 deeds pertain to 75 Plaintiffs who collectively own 92 parcels of land,[1] as follows:

The Smith deed	Book 16, Pg. 515, Appx4871-4872	20 Plaintiffs who collectively own 28 parcels
The Wheeler Lumber Co. deed	Book 16, Pg. 5, Appx4773-4774	2 Plaintiffs who collectively own 6 parcels
The Watt deed	Book 12, pg. 343 Appx4812	22 Plaintiffs who collectively own 26 parcels
The Woodbury deed	Book 23, Pg. 399, Appx4829	12 Plaintiffs who collectively own 12 parcels
The Woodbury deed	Book 16, Pg. 481, Appx4864	19 Plaintiffs who collectively own 20 parcels

The CFC erred in concluding that these 5 deeds conveyed fee simple to the railroad rather than easements. The CFC did not take into account that the railroad

[1] A listing of each Plaintiff-Appellant relevant to each deed at issue is contained within the Corrected Opening Brief of the Abrahamson Appellants, ECF No. 50, at 2-3, fns. 1-5.

acquired its rail line under the compulsion of eminent domain, and further did not correctly apply the relevant factors identified in *Bernards*[2] and *Bouche*.[3]

In defense of the CFC's error, the government's response contains a myriad of misstatements and misinterpretations of Oregon law. First, the government bases its analysis on the false premise that Oregon law includes a presumption of fee. In reality, the extent of the grant is limited to the railroad's uses, which is an easement, as a matter of law. Second, the government misunderstands and ignores the circumstances surrounding the original source conveyances to the railroad and the obvious "compulsory consent" identified and specifically applied by this Court in *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"). Finally, the CFC and the government both ignore and misinterpret several "factors" contained within each deed. These factors, considered in light of the exigent circumstances under which the deeds were executed, indicate that the grantors intended to convey an easement as enunciated in *Bernards* and *Bouche*.

[2] *See Bernards v. Link,* 248 P.2d 341 (Or. 1952).
[3] *See Bouche v. Wagner,* 293 P.2d 203 (Or. 1956).

ARGUMENT

I. THE GOVERNMENT'S ENTIRE ARGUMENT IS BASED ON THE FALSE PREMISE THAT OREGON LAW CREATES A PRESUMPTION OF FEE

The government's entire response brief is based on the false premise that the intent of the grantor should be ascertained based on a presumption that the grantor intended to convey fee simple rather than an easement.[4] The government's position is ostensibly based upon Or. Rev. Stat. § 93.120,[5] which states that "any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, **or is necessarily implied in the terms of the grant**."[6]

Although this statutory language was indeed present at the time of the conveyances, it is a quantum leap of logic and law to say that the statutory language creates a presumption that the parties intended to pass a fee simple interest in the strips of land for the railroad's right-of-way during construction. The statute simply removed the requirement of the words "and his heirs" to create a fee simple interest. There is nothing in the statutory history to indicate that the legislature desired to ensure that railroads held the fee simple in their rights-of-way.

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[4] *See* Govt.'s Br., ECF No. 72, at 8, 11-17.
[5] *Id.* at 12.
[6] *Id.* (emphasis added).

Nonetheless, the statute still requires careful examination of the terms of each deed to actually see if the intent to pass a lesser estate "is necessarily implied in the terms of the grant." In fact, the Supreme Court of Oregon specifically rejected the false premise advanced by the government in *Cappelli v. Justice,* 496 P.2d 209, 212 (Or. 1972): "The statute is not helpful; it was enacted principally to abolish the ancient rule that the words 'in his heirs' were necessary to create a fee simple. **The statute was not designed to inhibit inquiry into the grantor's intent where he has used ambiguous language in his deed"** (emphasis added).

There simply is no presumption of a fee conveyance to a railroad under Oregon law. All of the parties, including the government, have been unable to locate any Oregon decision that refers to any presumption of a fee simple grant in the context of grants to railroads. In fact, the Oregon Supreme Court had the opportunity to announce such a rule in *Bernards* and *Bouche* and obviously did not do so.

If anything, the common law of Oregon, which adopts the basic property law concepts concerning the scope and purpose of easements, appears to favor the conclusion that grants to railroads are easements rather than fee simple whenever the grant is consistent with and serves the manifested purpose of the grant to the railroad, which is to operate its railway. In *Hall v. Meyer,* 527 P.2d 722 (Or. 1974), the Oregon Supreme Court stated that "**the general prevailing attitude is**

favorable to the finding of an easement whenever that type of interest serves the manifested purpose of the parties."[7] The government attempts to distinguish *Hall* by stating that *Hall* "is fully consistent with the statutory and common law rule in Oregon that the entire estate is passed unless the parties… manifest their intent to transfer something less."[8] This argument contradicts their premise that a presumption of fee simple exists since it supports a conclusion that an easement was intended because the manifest purpose of each grant was specifically limited to railroad purposes.

In *Preseault II,* this Court cited the Oregon Supreme Court's decision in *Bernards* for the proposition that a grant to a railroad typically means that the railroad merely acquires an easement because that is all that is needed for the railroad's purposes:

> [P]ractically 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, fn. 10 (citing *Bernards,* 248 P.2d at 341) (emphasis added).

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[7] *See Hall,* 527 P.2d at 724 (citations omitted) (emphasis added).
[8] *See* Govt's Br., ECF No. 72, at 15-16.

This Court's citation to *Bernards* is directly on point. In *Bernards,* when ruling on a deed that was executed in 1910, the Oregon Supreme Court stated that "when we construe the meaning of the parties, we must endeavor to place ourselves in their position and that cannot be done effectively without retreating in time about two score of years." *See Bernards,* 248 P.2d at 352. As a result, as a starting point, as pointed out by the Oregon Supreme Court in *Bernards* and confirmed by this Court in *Preseault II,* when attempting to ascertain the intent of the parties, it is essential to examine the railroad's charter, the statutes that governed grants to railroads in the early 1900's, and the common law at the time the railroad was constructed. In this case, since the entire purpose of each grant was to allow the railroad to acquire the land to lay its track and operate its "railroad equipment thereon," the "estate acquired is no more than that needed for the purpose and that typically means an easement." *See Preseault II,* 100 F.3d at 1535, fn. 10.

In *Bernards,* the Oregon Supreme Court analyzed the circumstances at the time the original source conveyances were executed and applied the basic common law that a grant to a railroad for the construction of the railroad conveyed land for a particular use, which is an easement under common law. *See Bernards,* 248 P.2d at 343-44. Specifically, the Oregon Supreme Court looked to the 1897 Opinion in *Wason v. Pilz,* 48 P. 701 (Or. 1897), and the Court observed that there should be

"no difficulty in reaching the conclusion that the deed granted an easement only" because the deed was specifically to a railroad for the construction and operation of the railroad. *See Bernards,* 248 P.2d at 343.

In *Wason,* the Oregon Supreme Court cited and relied on a case from Vermont,[9] which in turn relied on the accepted treatise REDFIELD ON RAILWAYS, which was written by Vermont Judge Isaac D. Redfield.[10] Interestingly, an earlier opinion from the Oregon Supreme Court in the case *Oregon Railway & Nav. Co. v. Oregon Real Estate Co.*, 10 Or. 444 (Or. 1882), also relied on Redfield's analysis.[11] Citing the historic context set forth by Redfield, the Oregon Supreme Court stated as follows:

> **So land can only be taken for the particular use for which it is sought to be appropriated—that is, in this case, for the purpose of a railway, and an easement was all that was called for, and all that the respondent could acquire.**

See Oregon Railway & Nav., 10 Or. at 445-46 (*citing 1 Redfield on Railways*, 246) (emphasis added).

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[9] *See Wason,* 49 P. at 13 (citing *Robinson v. Railroad Co.,* 10 A. 522 (Vt. 1887)).

[10] The relevant excerpts from Redfield's treatise entitled REDFIELD ON RAILWAYS is located at Appx1909-2087.

[11] The Oregon Supreme Court cited REDFIELD ON RAILWAYS as authority prior to and after 1910: *see, e.g., Ford v. Oregon Elec. Ry. Co.*, 117 P. 809 (Or. 1911); *Shively v. Hume*, 10 Or. 76 (Or. 1881); *Cogswell v. Oregon & C.R. Co.*, 6 Or. 417 (Or. 1877); *Luse v. Isthmus Transit Co.*, 6 Or. 125 (Or. 1876); *Holladay v. Patterson*, 5 Or. 177 (Or. 1874); *Seely v. Sebastian*, 4 Or. 25 (Or. 1870); *Oregon Cent. R. Co. v. Wait*, 3 Or. 428 (Or. 1869).

The common law of Oregon as set forth in the above cases matches the basic property law concept that easements are granted for a particular purpose (otherwise, it would not be an easement). In this case, the Oregon common law matches perfectly with the railroad's charter which specifically delineates the railroad's purpose in obtaining the grant. The railroad at issue, the Pacific Railway & Navigation Company, was chartered on October 13, 1905.[12] The railroad was granted the rights "to construct, equip and operate a line of railroad in the state of Oregon… and to acquire the necessary rights of way and other property therefore…" *See* Appx1839-1843. Clearly, the railroad's charter stated the purpose for which the railroad was established, which was to build and operate a railroad between certain cities in Oregon, and no other purpose. Since each deed at issue was supplied to the railroad between 1909 and 1912, approximately five years after the railroad received its charter, each deed was given to the railroad for the construction and operation of the railroad. Accordingly, the construction and operation of the railroad was the limited purpose of each grant.

The common law, the railroad's charter, Redfield's analysis, and the law of Oregon as set forth in *Oregon Ry. & Nav.*, *Wason*, and *Bernards* all point to a finding that the grantors intended to convey an easement to the railroad because the construction and operation of the railroad was the limited purpose that was being

[12] The railroad's original Articles of Incorporation are set forth in Appx1839-1843 and the supplementary Articles of Incorporation are cited at Appx1845-1846.

granted. Pursuant to Oregon law, the Court should start with the presumption that an easement was intended whenever and wherever the grant of an easement serves the underlying manifest purpose of the parties at the time.[13] *See Hall,* 527 P.2d at 724 ("the generally prevailing attitude is favorable to the finding for an easement wherever that type of interest serves the manifested purpose of the parties"). Such is in keeping with the Oregon rule of construction that "[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. Ann. § 42.220.* If anything, based on the "compulsory consent" as set forth in the Oregon statutes and cases and this Court's decision in *Preseault II*, it is more apt to say that there is a "presumption" of an easement in this context.

II. THE "COMPULSORY CONSENT" THAT LED TO THE EXECUTION OF THE 5 DEEDS AT ISSUE CREATES A STRONG PRESUMPTION THAT THE RAILROAD ACQUIRED MERE EASEMENTS RATHER THAN FEE SIMPLE INTERESTS

This Court recognized the significance of the railroad's eminent domain powers in *Preseault II.* This Court recognized that railroads "acquire needed land either… through the exercise of eminent domain or by consent of the landowner"

[13] This is, of course, every instance where railroad rights-of-way are granted, since a railroad only requires an easement to conduct is railroading operations. *See Great N. R. Co. v. United States*, 315 U.S. 262, 272 (1942) ("a railroad may be operated though its right of way be but an easement").

and that, because of the railroad's eminent domain power, "even in the latter case [consent of the landowner] 'the proceeding is, in some sense, compulsory.'" *See Preseault II,* 100 F.3d at 1536. As this Court correctly noted, because railroads possess the ability to acquire a right-of-way by use of eminent domain, even a purported voluntary transfer from a landowner "retained its eminent domain flavor." *Id.* at 1537.

Almost every state, after the civil war and through the early 1900's, conferred the eminent domain power on railroads by statute. As a consequence of this power of eminent domain, this Court recognized 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**…." *See Preseault II,* 100 F.3d at 1537 (emphasis added). Oregon also allowed railroads to enter an owner's land and survey and locate a railway across the land.[14] Under the law of Oregon, just like in every other state, the general rule regarding the interest taken in a right-of-way condemnation proceeding by a railroad is that, unless otherwise expressly provided by statute or in the instrument of taking, only an easement is acquired.[15]

The "compulsory consent" involving these grantors and the "eminent domain flavor" as a result is obvious under these circumstances. The statute

[14] *See* Oregon Code of 1902 §§ 5074, 5075, 5095 (Appx1866-1868, Appx1873-1874).

[15] *See Egaas v. Columbia County,* 673 P.2d 1372, 1373-74 (Or. App. 1983).

allows the railroad to obtain conveyances from the landowners after it has already entered upon the landowners' land and constructed its tracks, and that is precisely what occurred in this case. All of the deeds at issue state that, at the time of the conveyance, the railroad was already "surveyed, located, and/or constructed through the grantor's land."[16] As a result, the conveyances in this case fall squarely within the analysis and rule this Court provided in *Preseault II,* which is consistent with Oregon law. It is more likely that the landowners acted under compulsory circumstances, *i.e.*, they assumed that they had no choice but to concede to the railroad's desire to locate its right-of-way through their lands.

Contrary to the government's assertion that Oregon law does not recognize the railroad's compulsory powers and the eminent domain flavor,[17] the Oregon Supreme Court specifically cited and relied on Redfield in *Oregon Ry. & Nav.* in 1882 and Redfield specifically identified and recognized the railroad's compulsory powers in such instances:

> In this country, most of the railway charters contain a power to the company to acquire lands, by agreement with the owner. **In such case it has been held the rights of the company are the same as where they take their land under their compulsory powers**.

See 1 REDFIELD ON RAILWAYS at 221 (§ 61 ¶ 5) (emphasis added) (Appx1911).

[16] *See* Corrected Opening Brief of the Abrahamson Appellants, ECF No. 50, at 20-22.

[17] *See* Govt's Br., ECF No. 72, at 8, 20-24.

> In case of a deed to a railway company of land, on which to construct their road… **the rights and duties of the company, in such case, are precisely the same as if the land had been condemned by proceedings *in invitum*, under the statute**.

Id. at 220 (§ 61 ¶ 7, fn. 6) (emphasis added) (Appx1912).

The procedure contained within Oregon's statute at the time these original source conveyances were granted to the railroad fits perfectly with the "compulsory consent" recognized by Redfield, the Courts in Oregon, and this Court in *Preseault II*. The statutes set forth the procedure that the railroad had to follow and required the railroad to attempt to reach an agreement with the landowners whenever they invoked their powers to survey and stake out their rail line pursuant to the statute. Importantly, the railroad could only resort to its condemnation powers under the statute after it failed to reach an agreement with the landowners.

The statute first provided that the railroad "may appropriate so much of said land as may be necessary for the line of such road… not exceeding 60 feet in width…," and then specifically set forth the procedure to be followed by the railroad for the appropriation of the land:

> Whenever any corporation authorized as in the provision of this act, to appropriate lands, right of way,… or other right or easement in lands, **is unable to agree with the owners thereof as to the compensation to be paid therefor, or if such owner be absent from the state, such corporation may maintain an action in the circuit court of the proper county, against such owner, for the purpose of having such lands… or other right or easement**

> **appropriated to its use**, and for determining the compensation to be paid to such owner therefor.

See Or. Ann. Code of 1902 § 5095 (Appx1873-1874) (emphasis added).

Although the statutes were later amended to allow the railroad to acquire up to a 200-foot width, the substance of the law stayed the same. Thus, the compulsory consent identified by this Court in *Preseault II* is identical to the compulsory consent set forth in Oregon and endured by the original landowners when the Pacific Railway & Navigation Co. acquired its right-of-way over their lands. In this case, the railroad, emboldened by the powers of eminent domain granted to it by the Oregon legislature, staked out and located and constructed their right-of-way on the landowners' property, then negotiated with the landowners to execute a conveyance deed to them. If the landowners refused, the railroad could merely initiate condemnation proceedings to acquire the right-of-way anyway. The requirement that the railroad had to make an effort to agree on compensation with the landowner before the railroad could exercise its statutory power to acquire its right-of-way by eminent domain was specifically recognized by the Oregon Supreme Court in *Oregon Ry. & Nav.* and the Court recognized that when private land is appropriated for public use for the purpose of a railway, "an easement was all that was called for, and all that the railroad could acquire." *See Oregon Ry. & Nav.*, 10 Or. at 445.

Redfield, who was repeatedly cited by and repeatedly relied on by the Oregon Supreme Court at the time, anticipated this exact issue concerning the precise title acquired by the railroad when following statutes of this type—"it is certain, in this country, upon general principles, 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**."[18] The railroad's right of eminent domain meant that any negotiation between the railroad and the landowner could not be an arm's length transaction. Either the landowner consented to the railroad's occupation of the landowners' land, and executed a voluntary conveyance memorializing the railroad's right-of-way, or the railroad would merely initiate condemnation proceedings, and that is the definition of "compulsory consent."

Preseault II was an *en banc* decision of this Court which specifically recognized and applied the "compulsory consent" analysis. The government's attempt to distinguish this Court's analysis in *Preseault II,* particularly in conjunction with the common law of Oregon, Redfield's treatise, and *Oregon Ry. & Nav.,* should be flatly rejected. Under these circumstances, not only is there no presumption that the landowners intended to grant a fee simple interest to the railroad, the "compulsory consent" identified by this Court in *Preseault II* leads to

[18] *See 1 Redfield On Railways* at 221, § 69, at p. 255 (emphasis added) (Appx1945).

the conclusion that the grantors undoubtedly intended to grant an easement to the railroad. That conclusion is buttressed by a close examination of all of the "factors" contained in each of the deeds.

III. THE FIVE DEEDS AT ISSUE ALL CONVEYED AN EASEMENT TO THE RAILROAD BASED ON THE FACTORS IDENTIFIED IN *BERNARDS*

After relying on the false premise that Oregon law includes a statutory presumption of fee, and after ignoring and misstating the fact that Oregon law does include a presumption of easement based on "compulsory consent," the government misinterprets the law of Oregon as set forth in *Bernards* and *Bouche* and then misapplies the law as it relates to the actual terms of each conveyance deed at issue. Incredibly, the government goes so far as saying that the deeds at issue on appeal "do not present close questions"[19] when, in fact, in analyzing the deeds at issue in relation to the factors set forth in *Bernards* and *Bouche,* the CFC initially ruled that all of the deeds at issue conveyed easements to the railroad because the deeds contained a majority of the factors identified in *Bernards. See* Appx5817-5837 (sealed).[20] Although the CFC should have entered a final order confirming the preliminary order, and whether this Court recognizes and affirms the "compulsory consent" conclusion of *Preseault II* or not, all of the deeds at

[19] *See* Govt's Br., ECF No. 72, at 9.

[20] The CFC's final order reversed the preliminary order and concluded that all five of the deeds at issue in this appeal conveyed fee simple to the railroad. *See* Appx2919-2939 (sealed).

issue contain a majority of the relevant factors to be considered under Oregon law based on *Bernards*.

A. If a Particular Deed Contains a Majority of the *Bernards* Factors, It Conveys an Easement to the Railroad Because It Necessarily Implies the Grantors' Intent to Convey a Lesser Estate Than the Fee

The first benchmark decision from the Oregon Supreme Court to interpret a deed to a railroad is *Bernards.* The Oregon Supreme Court pointed to eight different factors to consider, which read in combination, convinced the Court that the property interest conveyed was an easement. Four years later, in *Bouche,* the Oregon Supreme Court examined another railroad deed and concluded that it conveyed fee ownership. In *Bouche,* the Oregon Supreme Court focused on 6 of the 8 factors from *Bernards* and, since none of the factors were present, concluded that the deed conveyed fee simple to the railroad.

Based on *Bernards,* if a particular deed features the 8 factors that were identified in *Bernards,* the deed undoubtedly conveys an easement to the railroad. Under *Bouche,* on the other hand, if the deed does not contain any of the factors, it undoubtedly conveys the fee simple interest to the railroad. The issue of interpretation becomes more difficult, however, when a particular deed contains some, but not all, of the factors present and listed in *Bernards* and *Bouche.* In this case, since the deeds at issue contain a majority of the factors identified in *Bernards,* the CFC should have concluded that the deeds conveyed an easement to

the railroad just as the CFC previously concluded in *Boyer v. United States,* 123 Fed. Cl. 430, 437 (Fed. Cl. 2015) and preliminarily concluded in this case. *See* Appx5817-5837 (sealed).

The government repeatedly attempts to diminish the *Bernards* opinion based on the *Bouche* opinion to establish some purported presumption of a fee conveyance.[21] Although *Bouche* was handed down 4 years after *Bernards,* the analysis and the factors listed in *Bernards* have been cited far more often and provide more authoritative guidance as to Oregon law than *Bouche.* Not only was *Bernards* cited by this Court in *Preseault II* as authoritative guidance (*Bouche* could have been cited and was not), but the Oregon courts have only cited the *Bouche* decision twice and neither case determined that the railroad acquired fee simple ownership in the right-of-way. *See Egaas,* 673 P.2d at 1372; *Wiser v. Elliot,* 209 P.3d 337 (Or. App. 2009). *Bernards,* on the other hand, has been cited by the Oregon Courts on 27 different occasions, including the Federal District Court in Oregon and the Ninth Circuit in addition to this Court.

The CFC contradicted its earlier ruling in *Boyer,* changed its preliminary ruling in this case, and mischaracterized the impact of *Bouche* on the proper analysis of the *Bernards* factors in order to reach a conclusion that the deeds at issue conveyed a fee simple interest to the railroad. The CFC stated that *Bouche*

[21] *See* Govt's Br., ECF No. 72 at 18-20.

"focused its analysis on whether the deed contains language that can be fairly read as limiting the railroad's use of the estate conveyed to only a 'right.'"[22] The CFC didn't cite where *Bouche* purportedly said that, *Bouche* did not actually say that, and that is not a correct statement of Oregon law. In essence, the CFC completely changed the law of Oregon to apparently require multiple explicit statements limiting the railroad's use to an easement in order to find an easement. Oregon law as set forth in *Bernards* leads to a different conclusion—that the grantor intends to convey an easement whenever a majority of the *Bernards* factors are present.

The government's interpretation that all of the factors of *Bernards* must be present before the deed grants an easement to the railroad cannot be the law in Oregon because many deeds that have contained a subset of the factors would have reached a contrary result. For example, in *Wason,* even though the deed did not use "strip of land," "right-of-way," or "over and across," the Court had no difficulty reaching the conclusion that an easement was intended and conveyed. *See Wason,* 48 P. at 702. More recently, in *Egaas,* the Oregon Court had no difficulty concluding that an easement was conveyed through condemnation even though several of the factors, including "right-of-way" and a provision requiring the railroad to construct fencing, were not present. *See Egaas,* 673 P.2d 1372. Most recently, and most telling, in 2015, the CFC considered a significant number

[22] *See* Appx14.

of deeds that contained most of the factors contained in *Bernards,* but not all of them, and had no difficulty whatsoever concluding that the deeds conveyed an easement to the railroad. *See Boyer,* 123 Fed. Cl. at 430-437.

B. The Five Deeds At Issue All Conveyed an Easement to the Railroad Because They All Contain a Majority of the *Bernards* Factors

In *Bernards,* the Oregon Supreme Court described the earlier *Wason* case that it relied on. The Court had no difficulty in finding that the deed to the railroad was limited to an easement, and set forth 8 factors to consider when determining whether the grantor intended to convey an easement or fee simple:

> (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.

Inexplicably, even though the CFC first considered all of the factors in its preliminary ruling, the CFC completely disregarded three of the factors in its final ruling. Specifically, the CFC disregarded factors 3, 6, and 8, ostensibly because "virtually all of the disputed deeds" possessed them:

> In examining the deeds remaining in dispute, the court recognized that virtually all of the 102 disputed deeds, like most of the ones agreed upon by the parties, used phrases like "strip of land" and "through the land" in the body of the deed and also described the property conveyed with similar degrees of specificity. **As such, the Court has determined that these factors are of limited value in discerning intent.**

See Appx14 (emphasis added).

The CFC's decision to completely disregard 3 of the 8 factors listed by the Oregon Supreme Court as being essential to the inquiry as to whether the grantor conveyed an easement or fee simple is a monumental and fundamental error. The CFC's decision is inconsistent and contrary to Oregon law and contradicts the CFC's earlier decision in *Boyer*. *See Boyer,* 123 Fed. Cl. at 437.

All of the deeds at issue specifically grant a "strip of land," factor 8, "over and across" or "through" the land of the grantor, factor 3, and describe the strip of land without specificity, factor 6. With respect to factor 6, the CFC misconstrued the specificity that is required for a fee conveyance compared to an easement conveyance. The deeds at issue merely state that the grantor granted a "strip of land," which was defined as a set number of feet from the centerline of the tracks based on temporary survey stakes that were already on the land. Since the survey stakes are long gone, and the tracks are now gone too, the delineation of the right-of-way cannot be ascertained by the deed. That is nothing close to the specificity required for a fee simple conveyance (like a metes and bounds description).

The CFC's failure to consider 3 of the 8 factors listed in *Bernards* that indicate that the grantors intended to grant an easement is clear error. In fact, not only is there no Oregon case where any Court disregarded 3 of the 8 factors to be considered, but there is no Oregon case where a conveyance to a railroad that contained the 3 factors that the CFC disregarded was held to convey anything other than an easement. *See Wason,* 48 P. at 702; *Bernards,* 248 P.2d at 344; *Powers v. Coos Bay Lumber Co.,* 263 P.2d 913, 944 (Or. 1953); *Bouche,* 293 P.2d at 209; *Cappelli,* 496 P.2d at 213; *Egaas,* 673 P.2d at 1372.

The Smith deed, when properly examined through the *Bernards* lens, satisfies 6 of the 8 factors listed by the Oregon Supreme Court.[23] The language within the deed identifying the "right of way hereby conveyed" relates back to the granting clause and compels the conclusion that an easement was conveyed pertaining to factors 1 and 2 of *Bernards*. The presence of these two factors alone are controlling. In addition, the "through" language indicates an easement and satisfies factor 3, which is a factor that the CFC ignored. Moreover, the grant does not describe the interest conveyed with precision, which satisfies factor 6, which is another factor that the CFC ignored, and the grant of the "strip of land" satisfies factor 8, which is another factor ignored by the CFC. Finally, under the circumstances, the consideration of $150 was actually nominal as well, which satisfies factor 7.[24]

The government's only attack against the Smith deed misapplies the law of Oregon pertaining to the phrase "said right of way hereby conveyed."[25] In essence, the government argues that the grantor utilized "right-of-way" to describe the land itself rather than as a limit to the interest conveyed.[26] The government's interpretation of the phrase "said right of way hereby conveyed" misconstrues the

[23] *See* Corrected Opening Brief of the Abrahamson Appellants, ECF No. 50, at 24-35.
[24] *Id.* at 32-35.
[25] *See* Govt's Br., ECF No. 72, at 27-29.
[26] *Id.* at 28.

language itself because, by its very terms, it refers back to and incorporates the reference in 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 is not describing a geographic description.[27]

The phrase "right of way hereby conveyed" should be determinative on the easement issue regardless of the other factors. This is because the Oregon Supreme Court declared that an easement is granted nearly without fail any time the deed utilizes or describes the use as a right-of-way in the grant. *See Bouche,* 293 P.2d at 209 ("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 for use as a right of way in the grant"). Because "said right-of-way hereby conveyed" refers back to the granting clause, and because the Smith deed actually contains 6 of the 8 factors identified by the Oregon Supreme Court in *Bernards,* the only conclusion to be reached under Oregon law is that the Smith deed conveyed an easement.

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,[28] in addition to the obvious "compulsory consent" contained within each deed, also conveyed easements to the railroad under Oregon law. Each deed includes the 3

[27] *See* Corrected Opening Brief of the Abrahamson Appellants, ECF No. 50, at 25.
[28] *Id* at 35-41.

factors that the CFC completely ignored and also include nominal consideration of one dollar, factor 7. In addition, The Wheeler Lumber Co. (16/5) deed contains specific language in the habendum clause that allows the railroad "the right to build, maintain and operate a line of railway thereover,"[29] and Oregon law considers a statement of the purpose to which the land is to be put to be a strong indication of an intention to convey an easement. *See Bouche*, 293 P.2d at 209.

IV. CONCLUSION

Because there is no presumption of fee, because all of the deeds demonstrate the "compulsory consent" analyzed and followed by this Court in *Preseault II,* and because all of the deeds at issue contain a majority of the factors identified by the Oregon Supreme Court in *Bernards* that would indicate that the grantor intended to grant an easement, the landowners ask this Court to reverse the decision of the CFC that the 5 deeds at issue conveyed fee simple to the railroad.

Respectfully submitted,

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[29] *See* Appx4773-4774; *see also* Corrected Opening Brief of the Abrahamson Appellants, ECF No. 50, at 39-40.

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