2019-2078, -2080, -2090, -2316

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.

(Caption Continued on Inside Cover)

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

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS URGING REVERSAL

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(*Caption Continued)*

GARY E. ALBRIGHT, *et al.*,

Plaintiffs,

DANIEL EARL HIGGINS, III, MICHAEL J. OPOKA, ZELDA L. OPOKA,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

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)
National Association of Reversionary Property Owners

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
National Association of Reversionary Property Owners	Same	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are: Counsel for amicus curiae, Mark F. (Thor) Hearne, II, and Stephen S. Davis, formerly served as counsel for plaintiffs in the U.S. Court of Federal Claims in Albright, et al. v. United States and Aeder, et al. v. United States.

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 of be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary.)
n/a.

November 12, 2019
Date

/s/ Mark F. (Thor) Hearne, II
Signature of counsel

Mark F. (Thor) Hearne, II
Printed name of counsel

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Reversionary Property Owners is a Washington State-based nonprofit foundation defending landowners' Fifth Amendment right to compensation when the government takes private property under the federal Trails Act.[2] Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interest in their land subject to active and abandoned railroad right-of-way easements. See, *e.g.*, *National Association of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), and *Brandt Rev. Trust* v. *United States*, 572 U.S. 93 (2014).

[1] This brief is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person other than *amicus curiae*, its members or counsel contributed money intended to fund the preparation or submission of this brief. The president of the National Association of Reversionary Property Owners authorized the filing of this brief on behalf of *amicus curiae*. All parties have consented to the filing of this brief.

[2] National Trails System Act of 1968, as amended in 1983, 16 U.S.C. §1241, *et seq.*

BACKGROUND

A. In the early-1900s, Oregon landowners granted the railroad a right-of-way easement.

The railroad line in this case was established in the early 1900s by the Pacific Railway & Navigation Company. Most recently, Port of Tillamook Bay Railroad held the railroad right-of-way. Trains stopped running across portions of the right-of-way many years ago. Port of Tillamook Bay Railroad completely abandoned the line after a storm in 2007 caused "catastrophic damage." Appx000798. In the early-1900s, the original landowners whose successors-in-interest bring these appeals granted the railroad an easement to use a strip of land across their property for operation of a railroad.[3] Under Oregon law that easement terminated when the railroad no longer used the land for operation of a railway.

The Pacific Railway & Navigation Company was chartered in October 13, 1905. Appx001839-001843. The company planned to build a railroad between Portland and Astoria by way of the Willamette Valley. *Id.* The Articles of Incorporation stated that the railroad was established "under the general incorporation laws of the State of Oregon, for a railway and steamship corporation, with all the rights, power, duty and obligation of a common carrier, under the laws of the State of Oregon." *Id.* Article II states that the railroad will "have the following

[3] The majority of these deeds were executed in 1907.

powers: 1. 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 therefor" between Portland and Astoria. Appx001839-001840. Article II, Paragraph 10, of the railroad's articles of incorporation stated:

> The corporation now formed shall likewise have all power and authority necessary or incidental to the main purposes of its organization and shall have all the authority and power which by the existing law of the State of Oregon, or any law of said state which may hereafter be passed, has been or may be conferred on corporations of the character now hereby formed.

Appx001842.

In November 1905, the railroad filed "supplementary articles of incorporation" providing that the railroad would now be building a right-of-way between Buxton in Washington County and Tillamook in Tillamook County, which is the line at issue in these appeals.[4] See Appx001845-001846. The railroad's charter clearly stated the limited purpose for which the Pacific Railway & Navigation Company was established and the authority it was granted was for a limited purposes of building and operating a railroad between these cities.

[4] In 1915, the Pacific Railway & Navigation Company was dissolved and sold to the Southern Pacific Railroad. See Appx001848-001850.

B. The railroad abandoned this right-of-way.

The railroad's easement terminated (or would have terminated), but for the Board's order invoking section 8(d) of the Trails Act. The railroad explicitly sought to abandon this right-of-way as evidenced by its filings with the Board. In its letter dated May 26, 2016, the railroad stated,

> In December 2007, a portion of the rail line suffered catastrophic damages due to severe storms, making it impossible to provide service over the Subject Line. [Port of Tillamook Bay Railroad] immediately embargoed the line, and no service has been provided over the Subject Line since that time. …[Port of Tillamook Bay Railroad] does not believe it will be able to obtain the necessary funding to repair and rehabilitate the line, Accordingly, ***[Port of Tillamook Bay Railroad] is giving this notice of its intent to terminate service over (fully abandon) the Subject Line.***

Appx000797-000798 (emphasis added).

On July 1, 2016, the railroad wrote to the Board that it would be "willing to negotiate with the [Salmonberry Trail] concerning the acquisition of the subject property for the trail use…." Appx000809. The Board approved the abandonment, and issued a Notice of Interim Trail Use or Abandonment on July 26, 2016. Appx000816-000818. And, the railroad subsequently sold its interest to the Salmonberry Trail Intergovernmental Agency. Appx000838-000839.

By every measure, the railroad has abandoned the railroad right-of-way. Salmonberry Trail does not operate a railroad and has no legal authority or plans to operate a railroad. The railroad's easement was, by its own account, not in use and

the railroad sought to abandon the line. The railroad's non-use, coupled with its intent to abandon would have terminated the original easement as a matter of Oregon law.

Had it not been for the Board's order invoking section 8(d) of the Trails Act, these Oregon landowners would have unencumbered use and possession of their land. See *Brandt*, 572 U.S. at 104-05. The Board's invocation of section 8(d) of the Trails Act encumbered these owners' land with a new and different easement. See *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) ("Congress and the Trails Act intended to convey to the interim trailuser a property interest that includes the right to use the acquired right-of-way for recreational trail purposes. …[A]s a matter of federal law it granted 'a new easement for a new use.'") (quoting *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*)).

The abandoned railroad line was converted into the Salmonberry Trail recreational trail and the first segment of the completed trail opened in May 2019.[5] The Salmonberry Trail hosts recreational activities, such as the "Gravel Ride"[6] and "Pedalpalooza"[7] cycling events. The Salmonberry Trail organization's goals include "[p]roviding access for multiple users by improving and increasing access to public

[5] See https://www.salmonberrytrail.org/history.

[6] See https://www.salmonberrytrail.org/trail-news/2019/1/16/gravel-ride

[7] See https://www.salmonberrytrail.org/trail-news/2019/5/29/june-27th-pedalpalooza-ride-max-to-manning.

lands for a wide range of uses – including walking, biking, hunting, fishing and equestrian" and "creating a world-class recreational attraction that will draw people to the region and fortify Oregon's standing as an unparalleled and diverse tourist destination."[8]

SUMMARY OF ARGUMENT

The Court of Federal Claims erred in its application of Oregon law. Oregon law provides that a railroad may only obtain that interest – by either its eminent domain power or by conveyance – necessary to carry out its chartered purpose. Oregon case law and scholarly interpretation of that law (relied upon by both this Court and the Oregon Supreme Court) further explain that deeds conveying a "strip of land" as surveyed/located across the grantor's land convey only an easement.

The railroad unequivocally abandoned its easement across these Oregon owners' land. Were it not for the federal government's invocation of section 8(d) of the Trails Act, these landowners would now enjoy unencumbered use and possession of their land. Under the Fifth Amendment, these owners are entitled to just compensation for the federal government's taking of their land.

[8] See https://www.salmonberrytrail.org/about-full.

ARGUMENT

I. Oregon law defines these owners' property.

The government may not redefine established property interests without compensating the owner. The U.S. Supreme Court declared, "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).

In *Preseault I*, 494 U.S. at 8, the Supreme Court held the Trails Act "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." The Court explained that "While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." *Id.*

Justice O'Connor, joined by Justices Scalia and Kennedy, concurred to emphasize the "basic axiom that '[p]roperty interests…are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Preseault I*, 494 U.S. at 20 (quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

"[A] sovereign, 'by *ipse dixit,* may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Id.* at 22-23. See also *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot*., 560 U.S. 702, 713, 715 (2010) ("States effect a taking if they recharacterize as public property what was previously private property."). This year the Supreme Court reaffirmed this principle, stating, "We explained that government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' …A property owner acquires an irrevocable right to just compensation immediately upon the taking." *Knick v. Scott Township*, 139 S.Ct. 2162, 2172 (2019) (citing *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321 (1987)).

This Court held, "[i]t is elementary law that if the Government uses…an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use." *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004).

The Board's order invoking section 8(d) "destroyed" and "effectively eliminated" these owners' state-law right to their land. See *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) ("It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined

property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.") (emphasis added) (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use.") (emphasis added)) (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*en banc*) (*Preseault II*)).

As this Court explained in *Ladd*, "[t]he [Board's order invoking §8(d)] is the government action that prevents the landowners from [having] possession of their property unencumbered by the easement." 630 F.3d at 1023. In *Bright v. United States*, 603 F.3d 1273, 1276 (Fed. Cir. 2010), this Court held, "[t]he effect of the [Board's invocation of section 8(d)]….was to accrue an action for compensation by any affected landowners based on a Fifth Amendment taking." In *Navajo Nation v. United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2010), this Court reaffirmed *Ladd*, *Caldwell*, *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006), and *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008). The Department of Justice confirmed and sustained this Court's holdings in this line of cases. See Brief for the United States in Opposition to Petition for Writ of Certiorari in *Illig*, 2009 WL

1526939, *12-13. Then-Solicitor General Elena Kagan wrote, "When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date." *Id.*

Oregon law defines these owners' interest in their property. See *Preseault I*, 494 U.S. at 20 (O'Connor, Scalia, Kennedy, JJ., concurring). And, under settled Oregon law, these owners held title to the fee estate in the land and would have enjoyed unencumbered ownership of their land but for the Board's invocation of section 8(d), which imposed new easements across these owners' land. "Precedent that creates a rule of property…is generally treated as inviolate." Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* (2016), p. 421 (contributing authors include Justices Gorsuch and Kavanaugh). *Judicial Precedent* notes, "The [rule-of-property] doctrine holds that stare decisis applies with 'particular force and strictness' to decisions governing real property [and] vested rights…." "Stability in rules governing property interests is particularly important because those rules create unusually strong reliance interests…." *Id.* at 421-22.

Judicial Precedent illustrates this point with "[a] classic example applying the rule-of-property doctrine…." As the authors explain,

> Heyert [ ] held title to land that extended underneath the town road running over her property. She had presumptively granted the town an easement…. When the town authorized a utility company to install gas pipes under the street, Heyert brought a takings claim, arguing the

> town's easements…were only "reservation[s] of a mere 'right of way' and so, without more, include[ed] only the right of passage over the surface of the land" …Although the use of public streets had evolved, "thousands of deeds conveying rights of way…ha[d] been made under this rule, which ha[d] existed since the common law began…. This "long succession of decisions…fits the classic definition of a rule of property," the court said. Declining to overrule all that horizontal precedent, the court held that Heyert was entitled to recover for the appropriation of her land for the gas mains.

Id. at 423-24.[9]

II. The Court of Federal Claims incorrectly applied Oregon law when it held the railroad was granted title to the fee estate.

A. Oregon limits the railroad's interest to an easement.

1. Under Oregon statute, the railroad obtained only an easement.

Oregon granted railroads the extraordinary power of eminent domain. See Or. Ann. Code §5095 (Appx001873-001874). 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 & William Elliott, *A Treatise on the Law of Railroads* (2nd ed. 1907) §925, p. 392 ("Railroad companies are given power by the

[9] Citing and quoting *Heyert v. Orange & Rockland Utils., Inc.*, 218 N.E.2d 263, 269 (N.Y. 1966).

statutes of almost all of the states to enter…upon the land of any person, and cause an examination and survey of the proposed route to be made.…").

But Oregon balanced its grant of eminent domain power with a limitation upon the interest a railroad could obtain when it acquires a right-of-way under this eminent domain authority. This limitation applies not only to land the railroad condemned but also to rights-of-way a railroad acquires by other means, such as purchase by deed. The statute in effect at the time the Pacific Railway & Navigation Company entered into these early-1900s deeds provided:

> Upon making and filing the articles of incorporation…the [railroad]…shall thereafter be deemed a body corporate, with power, – To purchase, posses, and dispose of such real and personal property *as may be necessary and convenient to carry into effect the objects of the incorporation*…for the purpose of aiding in the objects of such corporation….
>
> In case *the object or purpose* for which any such corporation is incorporated *is in whole or in part to construct, or construct and operate a railroad*, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operation a railroad….

Or. Ann. Code §5056 (Appx001857-001858) (emphasis added).

The Pacific Railway & Navigation Company was chartered "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 therefor…" Appx001839-001840. The railroad's charter makes clear that it is vested only with the rights given to it by way

of the Oregon statutes. Thus, the railroad did not have authority to purchase more than what was necessary to build and operate its railway – an easement.

Another Oregon statute provides that "Such [railroad] corporation may appropriate so much of said land as may be necessary for the line of such road…*to enable such corporation to construct and repair its road*…." Or. Ann. Code §5095 (1902) (emphasis added) (Appx001867).

Oregon statute also provided the railroad the right of entry on private land to survey and locate a railroad line. The statute provides, "Corporation may go on Land to Survey Line" and states, "[a] corporation organized for the construction of any railway…shall have a right to enter upon any land between the termini thereof for the purpose of examining, locating, and surveying the line of such road…." Or. Ann. Code §5074 (1902) (Appx001866).[10] The annotation to this section states, "In an action for right of way, an easement is all that can be acquired by a railway. A title that may be freed from public use cannot be acquired by a private corporation my eminent domain. Land can only be taken for the particular use for which it is sought

[10] The annotators of the statute note, "See note to Oregon Constitution, article I, §18. Statutes providing for the taking of property by the right of eminent domain are in derogation of the common law and must be strictly construed: *Oregonian Ry. Co. v. Hill*, 9 Or. 378; *Thompson-Houston Co. v. Simon*, 20 Or. 62, 25 Pac. 147." Appx001866.

to be appropriated. *Oregon Ry. & Nav. Co. v. Oregon Real Estate Co.*, 10 Or. 444." Appx001867.

These provisions are not unique to Oregon. The Kansas Supreme Court, applying a statute identical to §1689, stated, "[t]his Court has uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed. The rule…gives full effect to the intent of the parties who execute right-of-way deeds rather than going through lengthy and expensive condemnation proceedings." *Harvest Queen Mill & Elevator Co. v. Sanders*, 370 P.2d 419, 423 (Kan. 1962) (citations omitted). See also *Brown v. Weare*, 152 S.W.2d 649, 652 (Mo. 1941) (the "law is settled in this state that where a railroad acquires a right of way whether by condemnation, by voluntary grant or by a conveyance in fee upon a valuable consideration the railroad takes but a mere easement over the land and not the fee") (citations omitted); *Illinois Cent. R.R. Co. v. Roberts*, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996) (where "land is purportedly conveyed to a railroad company for the laying of a rail line, the presence of language referring in some manner to a 'right of way' operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee"); *Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964) ("[p]ublic policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation"); *Michigan Dep't of Natural Res. v.*

Carmody-Lahti Real Estate, Inc., 699 N.W.2d 272, 280 (Mich. 2005) ("a deed granting a right-of-way typically conveys an easement"); *Pollnow v. State Dep't of Natural Res.*, 276 N.W.2d 738, 744 (Wis. 1979) ("normally a right of way condemned by a railway would only constitute an easement"); *Neider v. Shaw*, 65 P.3d 525, 530 (Idaho 2003) ("use of the term right-of-way in the substantive portions of a conveyance instrument creates an easement"); *Atlanta Birmingham & Atlantic Railway v. Coffee County*, 110 S.E. 214, 216 (Ga. 1921) ("where [there] is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the company, but vests such as an estate – an easement – as is requisite to effect the purposes of which the property is acquired.").[11]

This Court noted in *Preseault II* that, because railroads possess the power to acquire a right-of-way by eminent domain, even voluntary transfers from a landowner "retained its eminent domain flavor." 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*.

[11] See also Ga. Code §1689 (1890) ("the real estate received [by a railroad corporation] by voluntary grant shall be held and used for the purposes of such grant only").

This Court's decision in *Preseault II* is especially compelling here because this Court directly cited Vermont cases 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," and examined the Oregon Supreme Court's decision in *Bernards v. Link*, 248 P.2d 341 (Or. 1952). *Preseault II*, 100 F.3d at 1535, 1542-43. The Oregon Supreme Court has repeatedly acknowledged when it observed that the courts have "little difficulty" in finding that a conveyance was only an easement when it is to a railroad. *Bouche v. Wagner*, 293 P.2d 203, 209 (Or. 1956).

Professor James W. Ely, Jr., co-author of the leading treatise on the law of easements,[12] has explained, "[p]rominent 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." *Railroads & American*

[12] See Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* (rev. ed. 2019) (earlier edition relied upon by this Court in *Preseault II*, 100 F.3d at 1542).

Law, pp. 197-98 (citing Simeon F. Baldwin, *American Railroad Law* (1904), p. 77).[13] Professor Ely continued:

> "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.

Id. at 198 (emphasis added).

This Court held "the act of survey and location is the *operative determinant*, and not the particular form of transfer." *Preseault II*, 100 F.3d at 1537 (emphasis added). "[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." *Id.* at 1535.

2. Oregon common law limits the railroad's interest to an easement.

Oregon analyzes deeds to railroads exactly as this Court did in *Preseault II*. Oregon provides that railroads possessing the power of eminent domain can only

[13] The Supreme Court relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96-97. So, too, the Supreme Court of Georgia, in *Fulton County v. City of Sandy Springs*, 757 S.E.2d 123 (Ga. 2014), and this Court in its *en banc* decision in *Preseault II*, 100 F.3d at 1542.

exercise that power to the extent necessary to achieve the specific public purpose for which they were granted the power of eminent domain. The Supreme Court of Oregon, as noted in the annotated railroad statute, held:

> A title that may be freed from public use, cannot be acquired by a private corporation, by eminent domain. 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, an easement was all that was called for, and all that the respondent could acquire*.
>
> *Oregon Railway & Navigation Co. v. Oregon Real Estate Co.*, 10 Or. 444, 445 (1882).[14]

In *Egaas v. Columbia County*, 673 P.2d 1372, 1374-75 (Or. Ct. App. 1983), the Oregon court of appeals held:

> [Oregon] statutes granted broad powers of eminent domain to private railroad corporations. .... The general rule regarding the interest taken in a right-ofway condemnation proceeding by a railroad is that, unless otherwise expressely provided for by statute or in the instrument of taking, only an easement is acquired…the condemnation statutes limit the nature of the estate taken to that necessary to accomplish railroad purposes. An easement was all that was necessary for railroad purposes [to construct and operate a railway line].

The only interest the railroad needed to operate its railway line across these owners' land was an easement. The railroad did not need title to the fee estate in the land to achieve its chartered purpose of operating a railroad. Accordingly, as *Oregon Railway* and *Egaas* held, Oregon directs instruments such as those here grant no greater interest than an easement.

[14] Emphasis added.

Oregon also follows the common law "strips and gores" doctrine, which holds strips of land used for railroads are easements. In *Paine v. Consumers' Forwarding & Storage*, 71 F. 626, 629-30, 632 (6th Cir. 1895), Judge Taft (later President and Chief Justice Taft) wrote: "[The] existence of 'strips or gores' of land…to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are 'strips and gores' of land along highways or running streams." Judge Taft continued, "The litigation that may arise therefrom after long years…[is] vexatious…. [P]ublic policy [seeks] to prevent this by a construction [of a deed] that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands." *Id.*

Judge Posner explained:

> The presumption is that a deed to a railroad…conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple…. [R]ailroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.

Penn Cent. Corp. v. U.S. R.R. Vest Corp.,
955 F.2d 1158, 1160 (7th Cir. 1992) (citations omitted).

Oregon courts describe the strips and gores doctrine as necessary for "prevent[ing] the existence of innumerable strips and gores of land, along the margins of streams and highway." *Cross v. Talbot*, 254 P. 827, 828 (Or. 1927)

(quoting Buck v. Squiers, 22 Vt. 484 (1850). See also *McAdam v. Smith*, 350 P.2d 689 (Or. 1960).

B. The text of the early-1900s deeds granted the railroad only an easement.

The prevailing view in Oregon is that when a railroad acquires title via conveyance, the railroad most likely acquired an easement. As observed by the Oregon Supreme Court,

> 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 for use as a right of way in the grant.

Bouche, 293 P.2d at 209 (emphasis added).

The Oregon Supreme Court directs that the instrument be interpreted to accomplish the intention of the parties. *Id.* at 208 (quoting 28 C.J.S. Easements §27, p. 681 ("Whether an instrument conveys ownership of land or only an easement depends upon the intention of the parties")). That intention is gathered from the text of the instrument and the context in which the instrument was created. *Id.*

1. The right-of-way deeds by their explicit language granted only an easement.

The Oregon Supreme Court has repeatedly held the conveyance of a "strip of land" "over and across" the land of the grantor conveys an easement to a railroad. See *Wason v. Pilz*, 48 P. 701, 702 (Or. 1897), *Bernards*, 248 P.2d at 344, *Powers v.*

Coos Bay, 263 P.2d 913, 944 (Or. 1953); *Bouche*, 293 P.2d at 209; *Cappelli v. Justice*, 496 P.2d 209, 213 (Or. 1976); *Egaas*, 673 P.2d at 1375. We have found no Oregon case where a conveyance describing a strip of land "over and across" "across" or "through" the grantor's land was held to have conveyed fee estate in the land. Here, because all of the conveyances described the grant to the railroad as being "across," "on," or "through" the grantor's land, pursuant to Oregon law, the railroad held only an easement.

The Court of Federal Claims' decision in this case is in clear conflict with Oregon law. In accordance with its prior, *en banc* decision in *Preseault II*, this Court should reverse the Court of Federal Claims' decision. Should this Court be inclined to affirm the decision below, against the weight of Oregon law, the proper approach is not to embrace the Court of Federal Claims' unorthodox view of Oregon property law but to certify the question to the Oregon Supreme Court. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-79 (1997) (when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error"); Or. Rev. Stat. §28.200; Or. R. App. P. 12.20.

2. These original easements terminated when the railroad no longer operated across the strip of land.

Under Oregon law and the terms of the original grants, the early-1900s easements terminated. The Board's invocation of section 8(d) established new easements for public recreation and railbanking across these owners' land. *Preseault*

II, 100 F.3d at 1550 ("The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation."). See also *Trevarton*, 817 F.3d at 1087 (citing *Preseault II*); and *Toews*, 376 F.3d at 1376.

Chief Justice Roberts explained railroad right-of-way easements are common law easements.

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." "Unlike most possessory estates, easements…may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.
>
> *Brandt*, 572 U.S. at 104-05.[15]

As Chief Justice Roberts observed, easements are a right to *use* property for a *specific* purpose and when that use ends the easement terminates. An easement is, by definition, "a nonpossessory interest in the land of another. …the holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner…." Bruce & Ely,

[15] Citing and quoting *Restatement (Third) of Property: Servitudes* (1998) §1.2(1) §1.2, Comment d, § 7.4, Comments a, f.

The Law of Easements §1:1. "'An interest so extensive that it amounts to an estate is not an easement.' As indicated in this quotation, an easement is an interest in land, but is not an estate." *Id.* §1:21 (quoting Alfred F. Conard, *Easement Novelties*, 30 Cal. L. Rev. 125, 150 (1942)). The defining feature of an easement is that it is for a limited and specific use of the land. "Since an easement or profit gives only *limited uses* of the servient land, the person entitled to general possession may make all other uses that do not unreasonably interfere with the easement or profit." Dale A. Whitman, *The Law of Property* §8.9, p.462 (emphasis added).

There is no question that the Pacific Railway & Navigation Company abandoned this right-of-way. See *Wiser v. Elliott*, 209 P.3d 337, 341 (Or. Ct. App. 2009) (""A party claiming abandonment must show in addition to nonuse 'either [a] verbal expression of an intent to abandon or conduct inconsistent with an intention to make further use.'"); *Powers*, 263 P.2d at 943 (quoting *Bitney v. Grim*, 144 P. 490, 491 (Or. 1914)) ("Time is not an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete.").

The undisputed evidence establishes the railroad unequivocally sought to abandon this right-of-way. The railroad said exactly this in its filings with the Board. See *Maier v. The Dalles & Southern R. Co.*, 90 P.2d 782, 786 (Or. 1939) (railroad's petition to abandon filed with the Interstate Commerce Commission demonstrated

the railroad's intent to abandon its railroad line). The railroad unequivocally sought to abandon this right-of-way as evidenced by its filings with the Board. The railroad stated that it "is giving this notice of its intent to terminate service over (fully abandon) the Subject Line." Appx000797-000798. In *Preseault II*, 100 F.3d at 1554, this Court observed, "While it is not disputed that an easement will not be extinguished through mere non-use, removing the tracks and switches from a railway cannot be termed non-use." By the railroad's own account, the original early-1900s right-of-way easements have been unquestionably abandoned.

CONCLUSION

This Court should reverse the Court of Federal Claims' decision because, under Oregon law, the railroad only acquired – and could only have acquired – an easement for railroad purposes. The railroad's easement terminated when the railroad abandoned its railway.

But for the federal government's invocation of section 8(d) of the Trails Act, these Oregon landowners would have regained full and unencumbered possession and use of their land. This Court should reverse and remand this case for the Court of Federal Claims to determine the amount of just compensation owed to these Oregon landowners under the Fifth Amendment.

Respectfully submitted,

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November 12, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 5,703 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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) in that the brief has been prepared in a proportionally spaced typeface using MS Word 2016 in a 14-point Times New Roman font.

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