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 ARENT FOX APPELLANTS

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Caption Continued on Inside Cover

GARY E. ALBRIGHT, et al.,
Plaintiffs

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

v.

UNITED STATES,
Defendant-Appellee

_____

Arent Fox Plaintiffs-Appellants include: Gary E. Albright, Carla C. Albright, Barbara Reimers Family Trust, Edward J. Bates, Judith A. Bates, Carol Beer, Mark Beer, Rebecca A. Bridge, Todd A. Bridge, Sherry D. Crocker, Howard N. Dietrich, Sr., Bradley C. Donohue, Erickson Realty, Ltd., Evers Family Farms, Inc., Beverly J. Evers, Joseph A. Evers, Daniel E. Higgins, III, Christy Hitz, Jason Hitz, James P. Calpin Trust, JC Purinton Group, LLC, Dmitri Kosten, Kurt Langeberg, Linda Langeberg, Lardner Family Revocable Trust, M& GT Land Management LLC, James E. McConnell, Rita J. McConnell, Michael J. Opoka, Zelda L. Opoka, Lyal T. Purinton, Sandra K. Purinton, Roderick Michael Gordon Living Trust, Schwietert Enterprises II, LLC, Brady A. Smith, Dominique Toews, Patrick Toews, Upper Crust Real Estate. LLC, Eric P. Williams, Karen J. Williams, and Charles Winders

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. 19-2078, -2080, -2090, -2316

CERTIFICATE OF INTEREST

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

James H. Hulme

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
Gary E. Albright	None	None
Carla C. Albright	None	None
Rebecca A. Bridge	None	None
Todd A. Bridge	None	None
Howard N. Dietrich, Sr.	None	None
Erickson Realty, Ltd.	None	None
Christy Hitz	None	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:

Mark F. Hearne, II (formerly Arent Fox LLP, now True North Law Group)
Stephen Davis (formerly Arent Fox LLP, now True North Law Group)
Abram Pafford (formerly with Arent Fox)

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 v. United States, Case No. 19-2080 (consolidated with Case No. 19-2078 pursuant to Court Order of July 9, 2019); Loveridge v. United States, Case no. 19-2090 (consolidated with Case No. 19-2078 pursuant to Court Order of Aug. 13, 2019); Albright v. United States, Case No. 19-2316 (consolidated with Case No. 19-2078 pursuant to Court Order on Sept. 16, 2019)

March 30, 2020
Date

/s/ James H. Hulme
Signature of counsel

Please Note: All questions must be answered

James H. Hulme
Printed name of counsel

cc: All Counsel of Record

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:
JASON HITZ	None	None
CAROL BEER	None	None
MARK BEER	None	None
LARDNER FAMILY REVOCABLE TRUST (BARBARA DUNN LARDNER)	None	None
DOMINIQUE TOEWS	None	None
PATRICK TOEWS	None	None
DMITRI KOSTEN	None	None
KURT LANGEBERG	None	None
LINDA LANGEBERG	None	None
JAMES E. MCCONNELL	None	None
RITA J. MCCONNELL	None	None
BARBARA REIMERS FAMILY TRUST	None	None
SCHWIETERT ENTERPRISES II, LLC	None	None
BRADY A. SMITH	None	None
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RODERICK MICHAEL GORDON LIVING TRUST	None	None
JC PURINTON GROUP, LLC	None	None
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UPPER CRUST REAL ESTATE, LLC	None	None
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EVERS FAMILY FARMS, INC.	None	None

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:
LYAL T. PURINTON	None	None
SANDRA K. PURINTON	None	None
JAMES P. CALPIN TRUST	None	None
DANIEL E. HIGGINS, III	None	None
MICHAEL J. OPOKA	None	None
ZELDA L. OPOKA	None	None

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INTRODUCTION

The Government's brief ignores language described as "controlling" by the Oregon Supreme Court.[1] It elevates and misreads a statutory presumption described as "not helpful" by that same Court.[2] It improperly engages in what that Court denounced as "highly technical" analysis that ignores the purpose for which the deeds were conveyed.[3] It ignores what the Oregon Supreme Court called the "highest public policy" against creating strips of land.[4] And, it discounts this Court's admonition that deeds issued to railroads in the process of exercising their eminent domain powers are essentially "compulsory" and typically convey only an easement.[5] As a consequence, the Government wrongly argues that the deeds in this case all conveyed fee simple absolute. But those deeds all use language showing they were meant to permit the railroad to "build, maintain and operate a line of railway thereover," or granted access "through" the grantors' lands or conveyed a "right of way." And *all twelve* of them were executed by landowners after the

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1 *Wason v. Pilz*, 48 P. 701, 702 (Or. 1897).

2 *Cappelli v. Justice*, 496 P.2d 209, 212 (Or. 1972).

3 *Id*.

4 *Cross v. Talbot*, 254 P. 827, 828 (Or. 1927)

5 *Preseault v. United States*, 100 F.3d 1525, 1536-37 (Fed. Cir. 1996) (*en banc*).

railroad had *already exercised* its power of eminent domain to enter upon the land and survey and stake it and even, in some cases, only after the railroad was built. Accordingly, this Court should reverse the lower court's decision finding that the deeds in question conveyed fee simple absolute.[6]

ARGUMENT

A. WHEN A DEED DESIGNATES A USE OR CONVEYS A STRIP OF LAND "OVER AND ACROSS" IT CREATES AN EASEMENT.

In its earliest case interpreting deeds for roads, *Wason v. Pilz*, 48 P. 701 (Or. 1897), the Oregon Supreme Court focused on language of use in the deed. There, the deed conveyed "[a] parcel of land for road purposes.…" 48 P. at 702. The Court found that the deed "conveys only an easement," and held that "the words 'a parcel of land for road purposes' are indicative of an easement only, *and are controlling* as the measure of the estate granted…." *Id*. (emphasis added). And *Bernards v. Link*, 248 P.2d 341, 344 (Or. 1952), found that "the *Wason* decision is *determinative*" when the deed recites a use even though "'the deed otherwise purported to be an absolute grant,'" quoting *Wason* (emphasis added).

[6] We note that a number of the Arent Fox appellants have land tied to conveyances covered by the Lewis Rice brief, ECF No. 60, and adopt its arguments as to these deeds. This is done to avoid a duplication in effort. This brief covers only those deeds for which there was no overlap with the Lewis Rice appellants. A chart identifying the various deeds was included in these appellants' opening brief.

The Government claims that *Wason* is somehow less controlling in this case because it involves a road instead of a railroad. Gov't Br. 16. It is enough to observe that the Oregon Supreme Court explicitly found *Wason* "determinative" in *Bernards*, which was a railroad case. The Government brief recognizes *Bernards'* reaffirmation of *Wason*, Gov't Br. 20, but simply discounts it because *Bernards* allegedly "did not further explain its conclusion" — refusing to acknowledge that the *Bernards* discussion of the *Wason* test covers two full pages of the Oregon Reports. It takes more than that to write off two Oregon Supreme Court cases that describe the "use" test as "controlling" and "determinative." And there is no "more" that writes off those cases.

Indeed, *Bouche v. Wagner*, 293 P.2d 203, 209 (Or. 1956) — relied on almost exclusively by the Government, Gov't Br. 10-13 & 16-19 — reaffirmed this rule, stating that the courts have little difficulty" concluding that a deed conveying land to a railroad creates only an easement when the "grant is a use to be made of the property…." *Bouche* itself states its limits, limits the Government ignores: *Bouche* only applies where the deed "do[es] not contain additional language *relating to the use or purpose* to which the land is to be put *or in other ways* cutting down or limiting, directly or indirectly, the estate conveyed …." 293 P.2d at 209 (citation omitted, emphasis added). What other meaning can such words of use have? If the parties had intended to convey fee simple absolute interests in the strips of land,

there would have been no reason or purpose to identify a use, for by its legal nature the fee simple absolute allows the grantee to make *any* legal use of its property. A number of the applicable deeds specify a use for the land.[7]

Bouche is the only case where an Oregon court has interpreted a railroad deed to find it conveyed a fee simple *absolute*[8] and the Government relies entirely on it. But *Bouche* expressly relied on the absence of *all* of the *Bernards* factors to find that the deed at issue there was a fee simple absolute deed and expressly limited itself to those circumstances. The *Bouche* Court explicitly observed that the deed before it did not specify *any* use, and that "the words 'over and across the lands of the grantors' [did] not appear" anywhere in the deed. *Id*., 293 P.2d at 209. *See also Egaas v. Columbia Cty.*, 673 P.2d 1372, 1375 (Or. Ct. App. 1983) ("'over and across'

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[7] *See, e.g.*, Appx1282, DuBois 24/40 ("the right to build, maintain and operate a line of railway thereover"); Appx1410, Goodwin 81/147 ("together also with the right to maintain and operate a railroad thereover"); Appx1462-1463, Slattery 94/161 ("with the right to construct, maintain and operate a railway thereover"); and Appx2133-2134, Wheeler Lumber Co. 16/3 ("the right to build, maintain and operate a line of railway thereover").

[8] The Government claims, Gov't Br. 15, that *State Highway Commission v. Deal*, 233 P.2d 242 (Or. 1951), and *Wiser v. Elliott*, 209 P.3d 337 (Or. Ct. App. 2009), also interpreted deeds to railroads to find fee simple absolute conveyances, but neither case did so. In both cases, the courts assumed based on the parties' statements or stipulations that that was the case, and/or made no actual finding and explicitly declined to reach the issue.

language suggests the grant of an easement," and observing that "the *Bouche* court found [such language] to indicate the creation of an easement"). Notably, eleven of the twelve deeds contain such "over and across" or "through" language.[9]

Under Oregon law, if the deed identifies a purpose or use of the grant that recitation is "controlling" and the deed conveys only an easement. And if the deed contains "over and across" or "through" language it also conveys only an easement.

B. THE GOVERNMENT'S RELIANCE ON THE STATUTORY PRESUMPTION IS "NOT HELPFUL" AND IS IMPROPERLY "HIGHLY TECHNICAL."

1. The Government's Reliance on ORS 93.120 Is Misplaced.

The Government relies heavily on an 1854 statute[10] designed to clarify the drafting of habendum ("to have and to hold … and heirs") clauses by no longer

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[9] *See, e.g.*, Appx1219, Beals 18/40 ("[a] strip of land…surveyed and located *through* Lot three"); Appx1238, Burgholzer 83/99 ("surveyed and located *through* the East one half"); Appx1281, DuBois 24/40 ("surveyed and being constructed *through* the following described tract"); Appx1310, Goodwin 81/147 ("surveyed and located *through* the east half"); Appx1446, Rupp 13/245 ("surveyed and located *through* the following described real property"); Appx1462-1463, Slattery 94/161 ("surveyed, staked out and located *through* the northwest quarter"); Appx1478, Thayer 11/355 ("now surveyed and located *through*"); Appx1502, Watt 12/344 ("surveyed and located *through* Lot one"); Appx1504, Watt 12/345 ("surveyed and located *through* Lots two"); Appx1524, Wilson 75/244 ("surveyed and located *through* the East half"); and Appx2133, Wheeler Lumber Co. 16/3 ("surveyed *through* the following described three parcels of real property").

[10] *See* source history at Gov't Br. A4.

requiring the words "and heirs" in order to convey a fee simple. That statute, now found at O.R.S. § 93.120, provides that:

> [t]he term 'heirs,' or other words of inheritance, is not necessary to create or convey an estate in fee simple. Any conveyance … 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*."

(Emphasis added.) The Government's analysis conveniently reads the italicized words out of the statute.[11] Indeed, the Government's very Section heading misstates the test and ignores the italicized words.[12]

The Government also ignores the Oregon Supreme Court's instructions both to limit over-reliance on the presumption and not to engage in "overly technical" readings of deeds. In *Cappelli v. Justice*, 496 P.2d 209, 212 (Or. 1976), the Oregon Supreme Court chastened a litigant who relied excessively on the statute, instead of reading the deed as a whole:

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[11] Indeed, rather than quote the statute, the Government quotes a case that, in turn, only paraphrases the first half of the second sentence and omits the entire "unless the intent to pass a lesser estate" clause. Gov't Br. 13, quoting *Wiser v. Elliott*, 209 P.3d 337, 341 n.4 (Or. Ct. App. 2009), which in turn paraphrases half the statute. And when the Government does paraphrase the "unless" clause, it leaves out the second half ("or is necessarily implied") of that clause. *See* Gov't Br. 14 (stating that the presumption applies "unless the intent to convey something less is manifest in the deed's express terms," but leaving out the "or is necessarily implied in the terms of the grant" language).

[12] *See* Gov't Br. 24, Section II heading: "Applying the statutory presumption, all of the deeds conveyed fee simple title because they do not *expressly* state the intent to convey anything less" (emphasis added).

> Plaintiffs rely on ORS 93.120 which provides, in part, 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.'
>
> *The statute is not helpful*; it was enacted *principally to abolish the ancient rule* that the words "and 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.

Id. (emphasis added.)

2. The Government's Reading of the Deeds Is Improperly "Highly Technical."

The *Cappelli* Court similarly instructed that over-reliance on the name of the document was improper:

> It is pointed out that the deed to plaintiffs was designated as a "Warranty Deed" and not simply as a "Right of Way Deed," indicating an intention to convey the fee simple title. We do not regard this as having any significance. We are sure that many deeds denominated "Warranty Deed" contain grants of easements described as rights of way.

Id. And the Court instructed courts not to be overly "technical" when interpreting deeds:

> Plaintiffs marshall [sic] a variety of rules relating to the construction of deeds to support their contention.… Plaintiffs attach significance to the fact that the "right of way" was not described as running "over and across the lands of the grantors." These words are not essential and are not invariably used in creating easements.
>
> It is argued that the use of the words "Parcel 2" is indicative of an intent to convey a portion of land and not simply a right to use it. We do not attach this significance to these words. It appears to us that they were intended only to serve as a heading for a description….

> These contentions advanced by plaintiffs strike us as *highly technical*. *We would seek the grantor's intention in something more substantial, looking at factors having relation to the purpose* for which land is conveyed ….

Id. (emphasis added). *Cappelli*, *Wason* and *Bernards*, direct courts to give controlling significance to language of use and purpose in a deed, and not to technical issues like the name of the document or the form of the conveying language. *See also Doyle v. Gilbert*, 469 P.2d 624, 626 (Or. 1970) ("It is [the court's] duty … to determine the intent of the parties from the language of the deed itself *and from the surrounding circumstances*") (emphasis added); *U.S. Nat. Bank of La Grande v. Miller*, 258 P. 205, 209 (Or. 1927) ("it is the duty of the court to give effect to the intention of the parties in a deed as to other contracts. This intention must be gathered from the entire instrument … including the situation of the subject of the instrument, and of the parties to it") (internal quotations marks and citations omitted).[13]

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[13] In another railroad case where the railroad claimed it owned the fee and the adjacent landowners argued they had conveyed only an easement, *Daugherty v. Helena & Nw. Ry.*, 252 S.W.2d 546, 547-48 (Ark. 1952), the Supreme Court of Arkansas addressed its similar state statute — "The term 'heirs', or other words of inheritance, shall not be necessary to create or convey an estate in fee simple, but all deeds shall be construed to convey a complete estate of inheritance in fee simple unless expressly limited by appropriate words in the deed," — albeit a statute even narrower than Oregon's because it does not include the "necessarily implied in the terms of the grant" language — in a similar fashion.

(footnote con't)

Cappelli, in fact, gives controlling effect to the use of the words "right of way" in the deed:

> In common parlance the term "right of way" signifies an easement. In the absence of special circumstances indicating a contrary meaning, *the*

> The [railroad's] contention that the deed conveyed the fee simple depends largely upon the fact that the property was described as "a strip of land." It is insisted that these words show that the grantors intended to convey the land itself rather than an easement therein. Reliance is also placed on Ark.Stats.1947, § 50–403 [now Ark. Code Ann. 18-12-105], which provides that words of inheritance are not necessary in the creation of a fee simple and that all deeds shall be construed to convey the fee, "unless expressly limited by appropriate words."
>
> We do not find this argument convincing. The deed refers not simply to a strip of land; it specifies "a strip of land 100 feet in width for a right of way." We realize that when the grantor unequivocally conveys the fee his designation of the property's intended use should be regarded as surplusage; but when the grantor's intention is itself subject to question then the fact that he attempts to restrict the future use of the property becomes a factor in the interpretation of his deed….
>
> Apart from this expression [that the deed conveyed a strip of land for a right of way] the deed bristles with indications that an easement alone was intended. The recited consideration reflects that the grantors accepted a nominal sum for the deed … The shape of the tract — a 100-foot strip across a quarter section — is peculiarly suited to railway purposes and to little else.

Daugherty, 252 S.W.2d at 547-48*; see also Memmer v. United States*, 122 Fed. Cl. 350, 358 (2015), *vacated on other grounds*, Nos. 2017-02150, -2230, 2017 WL 6345843 (Fed. Cir. Nov. 16, 2017) (addressing similar statute in Indiana and nonetheless finding some of deeds in question to have conveyed easements only); *D.C. Transit Systems, Inc. v. State Roads Comm.*, 270 A.2d 793, 798-99 (Md. 1970) (in state with similar "words of inheritance are not necessary" statute, citing several Maryland cases for proposition that where words of use are included no fee was conveyed).

> *courts have generally construed the term in accordance with common usage*.

496 P.2d at 213 (emphasis added.)

3. The Government Does Not Understand *Cappelli*.

The Government attempts to argue that *Cappelli* is inapplicable to railroad cases and that *Cappelli* "distinguished cases holding that railroads had acquired rights of way in fee simple on the ground that the railroads' broad use of the land indicates an intent to create more than an easement." Gov't Br. 16-17. The *Cappelli* Court, however, was discussing a potential distinction between *easements* in the usual sense and potential fee simple *determinable* railroad deeds, a distinction which has confused the Government:

> Where land is conveyed to a railroad company for use as a right of way, there are cases holding that the deed conveys an estate and not simply an easement. This conclusion is explained on the ground that the broad use of the land by the railroad company contemplated by such conveyances indicates an intent to create more than an easement.[2]
>
> [2] See cases collected in 132 A.L.R. at 149 et seq., Deed to railroad—fee or easement, updated in 6 A.L.R.3d at 977. Bernards et ux. v. Link and Haynes, 199 Or. 579, 248 P.2d 341, affirmed on rehearing 263 P.2d 794 (1953). Other cases are analyzed in a note by Don H. Sanders, entitled Railroad Right of Way—Nature of the Interest—Easements—Ejectment, 30 Or. L. Rev. 380 (1951). See also a note by Preston Hiefield entitled Easements—Railroad Right of Way—Nature of the Interest—Condition Subsequent, 33 Or. L. Rev. 164 (1954). These notes suggest that a railroad "right of way" is a special kind of interest in land, not to be classified either as an easement or as an *absolute* fee. See also Clark, Covenants and Interests Running With the Land, 83-85 (2d ed. 1947).

Cappelli, 496 P.2d at 213 & n.2 (emphasis added). The Oregon Law Review notes cited in the *Cappelli* footnote both discuss generally the concept that deeds to railroads may convey fee simple *determinable* estates because the nature of the heavy industrial use of such rights of way tends to require the *exclusive possession* inherent in a fee simple rather than the shared possession inherent in an easement.[14] Looked at this way, "fee simple determinable" estates are the functional equivalent of easements but for the exclusive possession the railroad gains, since the granting landowner in both cases retains the reversionary interest once the railroad use is finished.

The Government misunderstands this discussion in *Cappelli*, and three times conflates the fee simple *determinable* which the *Cappelli* Court was discussing with the fee simple *absolute* which the Government argues for in the instant case. *E.g.*, Gov't Br. 15 ("As acknowledged in *Cappelli*, … decisions holding that railroads acquired their rights of way in fee simple [*which* fee simple?] are 'explained on the ground that the broad use of the land by the railroad company contemplated by such conveyances indicates an intent to create more than an easement'"); Gov't Br. 16-17 ("*Cappelli* distinguished cases holding that railroads had acquired rights of way in fee

[14] "Fee simple determinable" estates are created by "so long as" clauses in a deed that conveys the land to the grantee conditionally in fee simple determinable for "so long as" it is used for a railroad, after which time it reverts to the grantor.

simple [*which* fee simple?] on the ground that the railroads' broad use of the land indicates an intent to create more than an easement"); Gov't Br. 44 ("rights of way obtained by public entities are generally more exclusive than those transferred in conveyances between private parties, which renders the general notion about rights of way inapposite and weighs in favor of finding a fee. *See Cappelli*, 496 P.2d at 213"). The Government is arguing that there are only two choices — easement or fee simple absolute — but in doing so misses the entire point of the *Cappelli* discussion: "These notes suggest that a railroad 'right of way' is a special kind of interest in land, *not to be classified either* as an easement or as an *absolute* fee." 496 P.2d at 213 n.2 (emphasis added). And the Government ignores that the fee simple determinable gives the granting land owner the same reversionary interest upon cessation of railroad use.

4. There is a "Constructional Preference" in Favor of Easements.

The Government also claims that these appellants have "manufacture[d] a presumption in favor of easements where there is none," Gov't Br. 16, but, in fact, the Oregon Court of Appeals has noted the same "*constructional preference* leaning toward the grant of an easement with respect to railroad deeds …." *State ex rel. Dep't of Transp., Highway Div. v. Tolke,* 586 P.2d 791, 795 (Or. Ct. App. 1978) (emphasis added).

In *Tolke*, the original farming landowners, the Stephenses, had conveyed a strip of land to a railroad by fee simple *determinable*, the reversion-interest functional equivalent of an easement but for the exclusive possession obtained by the railroad during railroad operations (as opposed to the shared possession inherent in an easement). The Stephenses subsequently conveyed their now-bisected farm to the Tolkes, but years later purported heirs of the Stephenses issued a deed to the State for the alleged reversionary interests pertaining to the railroad strip. *Id.* at 794-95. In subsequent litigation between the Highway Division and the Tolkes over who owned the strip of land after cessation of railroad operations, the court noted the "constructional preference" in favor of easements, *id.* at 795, but held it inapplicable in the face of the clear conveyance of the fee simple determinable by use of "the so-called 'magic' words 'so long as'…." *Id*. The *Tolke* court was left then, to decide who owned that reversionary interest, the Tolkes — who had bought the surrounding farm from the Stephenses — or the Highway Division which had taken a deed allegedly conveying the reversion interest from the heirs of the Stephenses. It did so by applying its strong state policy against creation of strips of land in fee simple absolute, discussed next.

C. OREGON'S "HIGHEST PUBLIC POLICY" STRONGLY DISFAVORS CONVEYANCES OF FEE SIMPLE ABSOLUTE INTERESTS IN NARROW STRIPS OF LAND.

In addition to focusing on language of use, which is "controlling," the Oregon Supreme Court interprets deeds in light of the "highest public policy" against creating strips of land in fee that are in separate ownership than the lands from which they were formerly attached. While the question usually arises when conveyances bordering a street or stream are made, the policy underlying the doctrine creates a rule of construction against creating strips of land that are owned independently of the lands on either side of them "in the absence of an express provision" indicating an intent to create such strips. *Hurd v. Byrnes,* 506 P.2d 686, 690 (Or. 1973). The rule is sometimes known as the "strips and gores" doctrine.

Cross v. Talbot, 254 P. 827 (Or. 1927), is the seminal Oregon case. There, one Jensen conveyed a parcel of land on the east side of a county road to plaintiff's predecessors in title. Later, the road was relocated more westerly. The heirs of Jensen subsequently — like the heirs of the Stephenses in *Tolke*, *supra* — granted a deed to the defendant, purporting to convey the strip of land (where the original road had been) between west side of the original conveyance and the relocated road. The Oregon Supreme Court held that

> where … land … actually abuts upon the highway, the grantee, in the absence of some clear intention of the part of the grantor to otherwise limit the description, will take to the center of the highway….

254 P. at 828. Explaining its rationale, the Court stated:

> "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American courts especially have regarded as attended with very serious consequences, when not rigidly adhered to, and *its chief object is to prevent the existence of innumerable strips and gores of land*, along the margins of streams and highways, to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who in good faith had supposed themselves secure from such embarrassment."
>
> The case is a very instructive one and the fact of the location in the present case shows *a reason grounded in the highest public policy* for such a holding.

254 P. 828 (quoting *Buck v. Squiers*, 22 Vt. 484, 494 (1850)) (emphasis added).

The rule was subsequently followed in *Buel v. Mathes,* 205 P.2d 551 (Or. 1949), and *Hurd,* 506 P. 2d 686, and ultimately was the deciding rationale in *Tolke, supra.* In *Buel* the Court followed the rule of *Cross v. Talbot* and stated:

> The reason for the general rule raising a presumption of title to the center line of a highway is based upon the view that the seller of land could ordinarily have no object in retaining [reversion interests in] a narrow strip of land which is subject to the rights of others and which would be of no value to him when separated from adjoining property.

205 P.2d at 558. The *Buel* Court continued:

> It has also been held that the presumptive rule was adopted to guard again the bootless and almost objectless litigation that might spring up to vex and harass the owners of land adjacent to public highways if title to the [reversionary interests in] land in the highway … should remain in the original owner of the land.

Id. at 559 (internal quotations marks and citation omitted). *Accord Hurd, supra,* 506 P.2d at 690.

Which brings us back to *Tolke*, *supra,* where the court had to decide who owned the railroad strip of land after the cessation of railroad operations, the Tolkes, who were the purchasers of the surrounding farm from the Stephenses, or the State Highway Division, which had purchased the potential reversionary interests in the strip from the heirs of the Stephenses. Following *Hurd v. Byrnes, supra*, the court found that it was aided by a "constructional preference" against creation of strips of land independent of the adjacent properties:

> "Where narrow strips of land have been the subject of dispute in construing various conveyances, we have held that there should be a constructional preference in favor of the grantee [and thus against the creation of such independent strips]. We have pointed to a number of considerations which warrant this preference. We have taken the view that where the conveyance or reservation of title to narrow strips of land is in question, the probable intent of the grantor is not to retain title if he does not own abutting land. Our previous cases recognizing this principle have involved conveyances bordering on a street or stream. We have assumed that in the absence of an express provision to the contrary the grantor, in conveying land described as bordering a street or stream, ordinarily intends to also convey his title to the street portion of the lot or to the bed of the stream. This rule of construction is also *founded on policy considerations, including the prevention of vexatious litigation and the prevention of the existence of strips of land* the title to which would otherwise remain in abeyance for long periods of time."

Tolke, 586 P.2d at 797 (quoting *Hurd v. Byrnes,* 506 P.2d at 690) (emphasis added). As the court noted, while the usual context in which the rule against creating narrow strips of land arose involved streets and streams, it was also applicable to railroads.

And while the usual litigation context is between acquirers of the surrounding land and heirs of the grantors contesting right to the reversion of the street or stream or railroad, the strong "public policy" involved applies equally to interpretation of deeds creating railroad rights of way. *It is against the public policy of Oregon to construe deeds conveying long and narrow strips of land for railroad purposes as fee simple absolute deeds, in light of the expressed desirability of having such lands returned to the adjacent parcels at the end of railroad use*.[15] In the absence of explicit language to the contrary and the absence of any words of use, the rule of construction is that railroad deeds should be interpreted not to create independently owned fee simple absolute strips of land divorced from the surrounding properties out of which or along which they were created.

[15] Numerous states have the same policy. *E.g., Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964) ("Public 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. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved.").

D. THE RAILROAD'S EXERCISE OF ITS EMINENT DOMAIN AUTHORITY IS STRONG EVIDENCE THAT IT ONLY RECEIVED AN EASEMENT.

The Government openly urges this Court to ignore the controlling *en banc* precedent in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*), and asks this Court to ignore the facts that (i) Oregon law during the relevant time period gave railroads power to enter upon private citizens' land and survey it and condemn it and (ii) the fact that *all twelve* deeds to the Arent Fox appellants show explicit evidence that the railroad had in fact exercised those powers by surveying and staking out its right of way; indeed, in at least one case the deed[16] explicitly recites that the railroad had *actually started constructing the railroad* before receiving the purportedly "voluntary" deed, and the historical record strongly suggests construction had begun in the others as well.[17]

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[16] *See* Appx1281, DuBois 24/40 deed ("on each side of the center line of grantee's railway *as the same is last located, staked out, surveyed* ***and being constructed*** through").

[17] Almost all of the Arent Fox appellants' deeds were granted in 1909 and 1910. Historical records indicate that construction began on the railroad in November of 1905 and was *completed* in June of 1911, so there is a very high probability that construction was occurring — indeed, almost finished — when all of these landowners signed the supposedly "voluntary" deeds. *See* Guy Dunscomb, A CENTURY OF SOUTHERN PACIFIC STEAM LOCOMOTIVES, 1862-1962 (Modesto, CA: 1967), p. 401. *See also* https://oac.cdlib.org/findaid/ark:/13030/c8tt4svg/ (citing Dunscomb, and stating that the railroad was incorporated October 13, 1905, built 91.20 miles from Hillsboro to Tillamook, and that "Construction was started in November, 1905 and completed June 30, 1911").

In *Preseault*, this Court recognized the importance of the eminent domain powers of the railroads. Because of their eminent domain power, "even in the … case [of a voluntary deed] the proceeding is, in some sense, compulsory." 100 F.3d at 1536 (internal quotations marks and citation omitted). As this Court characterized it, because railroads possess the ability to acquire a right-of-way by use of eminent domain, even a facially voluntary transfer from a landowner "retained its eminent domain flavor." 100 F.3d. at 1537. As a consequence of this power of eminent domain, this Court recognized that when "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.* (emphasis added).[18]

Even in the face of *Preseault* the Government claims "there is no support in Oregon law for the proposition that an easement is presumptively sufficient for railroad purposes," Gov't Br. 15, but the Government ignores both the relevant statute and the Oregon Supreme Court caselaw. The statute itself, Lord's Oregon Laws (1910), § 6839, provided that a railway might "appropriate so much of said land *as may be necessary* for the line of said railway," thus imposing a *necessity* limitation. In the vast majority of situations involving only the construction of track,

[18] This result would also be the result *preferred by the railroads themselves* because the railroads would not wish to pay for a greater estate than necessary for their purpose of laying track and running trains. This fact is also consistent with the nominal consideration reflected in almost all of the deeds.

as in these cases, an easement was all that was "necessary." And the Supreme Court, in *Oregon Ry. & Nav. Co. v. Oregon Real Estate Co*., 10 Or. 444, 1882 WL 1466 (1882), explicitly held that a railroad engaged in condemnation obtains only an easement, and reversed the trial court's entry of a fee simple absolute judgment:

> The entry of judgment for the land, absolutely, was error.… 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.

Id. at 445, 1882 WL 1466, at *2 (emphasis added).[19] Indeed, in some states the very existence of the condemnation statute is explicitly recognized *as an interpretational factor* that creates a presumption that only an easement was conveyed. *E.g., Hinman v. Barnes*, 66 N.E.2d 911, 916 (Ohio 1946) ("Where … the statute authorizes only an easement or interest in land, and not a fee to be taken by condemnation

[19] The federal courts in Oregon have also recognized this rule. *See Pac. Postal Tel.-Cable Co. v. Oregon & Cal. R.R.*, 163 F. 967, 969 (D. Or. 1908):

> Condemnatory proceedings by a railroad or telegraph company for the purpose of appropriating land to its use result ordinarily in an appropriation of an easement only; for, when the use lapses, the easement reverts to the original holder of the land.… So that, in legal contemplation, the railway or telegraph company by an appropriation under the statute does not obtain a title to the land as land, but an easement only in the land, and whenever the use ceases the easement reverts.

proceedings, a deed will not be construed to convey a fee in the absence of a clearly apparent intention to that effect") (citation omitted).

In this case, *all twelve* of the deeds to the Arent Fox appellants explicitly state that the grantors' property had *already* been entered and surveyed, demonstrating that the railroad was in the process of exercising its eminent domain powers and that the parties were not bargaining at arms' length.[20]

CONCLUSION

The Government's brief ignores salient and controlling Oregon law, engages in an improper "highly technical" analysis, is directly contrary to Oregon's "highest public policy" against creating strips of land, and fails to respect this Court's admonitions that purportedly voluntary deeds given in the face of condemnation normally convey only an easement. A proper application of Oregon law to these deeds demonstrates that both the Court of Federal Claims and the Government are

[20] *See*, *e.g.*, Appx1219, Beals 18/40 ("as the same is *surveyed and located* through"); Appx1238, Burgholzer 83/99 ("as the same is *surveyed and located* through"); Appx1281, Dubois 24/40 ("as the same is last *located, staked out, surveyed and being constructed* through"); Appx1296, Friday 72/526 ("as now *surveyed and located* on said lands"); Appx1410, Goodwin 81/147 ("as the same *is surveyed and located* through"); Appx1446, Rupp 13/245 ("as the same is *surveyed and located* through"); Appx1462, Slattery 94/161 ("as the same is *surveyed, staked out and located* through"); Appx1478, Thayer 11/355 ("as the same is now *surveyed and located* through"); Appx1502, Watt 12/344 ("as the same in [sic] *surveyed and located* through"); Appx1504, Watt 12/345 ("as the same in [sic] surveyed and located through"); Appx1524, Wilson 75/244 ("as the same is *surveyed and located* through"); and Appx2133, Wheeler Lumber Co. 16/3 ("as the same is *located, staked out and surveyed* through").

wrong — the plaintiffs hold reversionary interests that vested upon cessation of railroad use. Accordingly, this Court should reverse the judgments on appeal.

Respectfully submitted,

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