Case Nos. 2019-2078 (L.), -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

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.

REPLY BRIEF FOR BELLISARIO PLAINTIFFS-APPELLANTS[1]

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PERRY LOVERIDGE, et al.,
Plaintiffs

NEAL ABRAHAMSON, ET AL.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

GARY E. ALBRIGHT, ET AL.,
Plaintiffs

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

v.

UNITED STATES,
Defendant-Appellee

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

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

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

Case No. 19-2078

CERTIFICATE OF INTEREST

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

Petitioner/Appellants

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
Carole J. Bellisario	None	None
Martha Bush	None	None
George W. DeGeer and Tracy J. Keegan	None	None
David L. Hubbell	None	None
Gregory K. Hulbert Trust	None	None
Jamieson Land and Timber, LLC	None	None
Gail M. Kessinger	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:

Arent Fox LLP, James H. Hulme, Mark F. Hearne II, Stephen S. Davis, Debra Albin-Riley, Abram J. Pafford.

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).

Loveridge, et al., v. United States 16-912L

7/9/2019
Date

/s/ Meghan S. Largent
Signature of counsel

Please Note: All questions must be answered

Meghan S. Largent
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:
James A. and Susan M. Kliewer	None	None
Little Family Trust	None	None
James C. Miller, Diane Foeller Miller, Daniel Mathias Foeller, and Thomas Charles Foeller;	None	None
Thomas J. Rinck and Sandra Gift Trust	None	None
Switzer Family Trust	None	None
Steven Michael and Linda Ann Van Doren and Willa Worley	None	None
Richard John Vidler, Jr.	None	None
Arlene Frances Wolever Trust	None	None

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INTRODUCTION

The landowners appeal the Court of Federal Claims' ("CFC") grant of summary judgment in favor of the government, holding that, as a matter of Oregon law, thirteen deeds to the Pacific Railway & Navigation Company in the very early 1900s were granted as a fee estate in the land to the railroad as opposed to a perpetual easement for railroad purposes only.

On review, the issue before this Court is the intent of the parties which can be gleaned from reading the language of these thirteen deeds. Under Oregon law, if there is any indication that the railroad's estate was "directly *or indirectly*" limited to railroad purposes, the estate conveyed is an easement. There have been a handful of cases in the Oregon Supreme Court and the Oregon Appellate Court confronting specific deeds and what estate they conveyed to a railroad corporation. In all but one, *Bouche v. Wagner*, 293 P.2d 203, 209 (Or. 1956), Oregon courts held the estate conveyed to be an easement. And, in that single case, the Oregon Supreme Court noted that a study of Oregon's prior case law made clear that Oregon courts have "little difficulty" holding that a

deed conveyed an easement when a railroad corporation was involved. *Id.*

This Court has also cited to Oregon law, holding that when a railroad uses the state's eminent domain authority to stake out and survey its right-of-way over private landowners' property, the resulting conveyance between the landowner and the railroad corporation retains its "eminent domain flavor." *Preseault v. United States*, 100 F.3d. 1526, 1537 (Fed. Cir. 1996).

In its response, the government puts forth a description of Oregon law that is incorrect. There is no presumption that a deed to a railroad conveys the fee estate in the land. There is no rule of construction to construe the deed in favor of the railroad corporation as grantee. Oregon law is specifically contrary to the government's contentions. The government cites almost exclusively to *Bouche*, the one and only Oregon Supreme Court case to hold a deed to a railroad to be a conveyance of the fee estate, while ignoring every other case and every applicable statute from the time these thirteen deeds were created. The government even ignores the key passages in the *Bouche* case that undermine its argument in favor of finding a fee estate.

The government claims the issue on appeal "do[es] not present a close question." U.S. Br. at 9. This statement is most obviously undermined by the CFC's own preliminary findings.[2]

These thirteen deeds are easements under the parameters set forth by Oregon law. In some, it is explicit that they are for the purpose of a railroad, while in the others it is clearly implied. They all possess several indicia of easements. The Court of Federal Claims erred in finding they conveyed the fee estate. This Court should reverse that decision, find that the railroad was granted easements for railroad purposes only, and remand this case for further proceedings consistent with that finding.

ARGUMENT

I. The standard of review for this appeal is *de novo*.

The government's brief oddly obfuscates the well-established standard of review here by insinuating there was an element of fact-finding in the CFC. On this basis, it posits that this Court may review the CFC's decision by a standard other than *de novo* review. *See* U.S. Br. at 10 ("Whether the United States has taken property is a legal question

[2] Appx2921 (sealed); Appx2926-2927 (sealed); Appx2930 (sealed); and Appx2934-2936 (sealed).

based on underlying facts. []The burden of proof for establishing the required elements of a takings claim lies on the plaintiff.") (citations omitted).

The standard of review in this appeal is *de novo*. The Court of Federal Claims granted the government's motion for summary judgment. Summary judgment is appropriate only where evidence demonstrates "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247 (1986). The moving party bears the burden of establishing the absence of any material facts. *Id*. at 256. Any doubt over factual issues will be resolved in favor of the non-moving party. *Wavetronix LLC v. EIS Elec. Integrated Sys.,* 573 F.3d 1343, 1354 (Fed. Cir. 2009).

An order granting summary judgment is reviewed *de novo* "in all respects." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). This Court owes no deference to the CFC's legal conclusions. *Barclay v. United States*, 443 F.3d 1368, 1372-73 (Fed. Cir. 2006), *cert denied*, 549 U.S. 1209 (2007).

II. The CFC did not properly apply Oregon law in holding that these thirteen conveyances of a strip of land to a railroad conveyed the fee estate.

A. There is no presumption in Oregon that a railroad obtained the fee estate in strips of land acquired for its right-of-way.

In *Bouche v. Wagner*, 293 P.2d 203, 210 (Or. 1956), the Oregon Supreme Court makes it clear that any indication in a deed that the use is for railroad purposes is sufficient to limit the estate conveyed to an easement. In *Bouche*, the Court succinctly held:

> 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). *Bouche* instructed to look for "additional language *relating to* the *use or purpose* to which the land is to be put *or in other way cutting down or limiting, directly or indirectly,* the estate conveyed." *Id.* (emphasis added).

But, the government argues that when ascertaining the parties' intent:

> it is presumed that the parties intended to convey the entire estate, and the intent to pass a lesser estate must be expressly stated or necessarily implied in the terms of the grant.

U.S. Br. at 8. The government cites no authority for this sentence

because there is none.[3] There is no such "presumption" under Oregon law.

If such a presumption in favor of finding a fee estate existed, then one would expect more than one Oregon court to have found as such. Instead, every published decision in Oregon for more than a century has held deeds to a railroad almost always convey an easement. *See, e.g., Wason v. Pilz*; *Bernards v. Link*, 248 P.2d 341, 344 (Or. 1952); *Powers v. Coos Bay Lumber Co.*, 263 P.2d 913, 944 (Or. 1953); *Cappelli v. Justice*, 496 P.2d 209, 213 (Or. 1976); *Egaas v. Columbia Cnty.*, 673 P.2d 1372 (Or. Ct. App. 1983). *Bouche* is the only Oregon appellate court decision to hold a railroad obtained a fee estate by way of a deed.

Most notably, the government wholly ignores and discounts the Oregon Supreme Court's decision in *Bernards v. Link*, 248 P.2d 341 (Or. 1952). The Oregon Supreme Court's decision in *Bouche* was handed down

[3] The government makes another unfounded assertion on page 14 of its brief where it states, "The Court must determine the parties' intent regardless of whether the language is clear or ambiguous; in doing so, it must apply the statutory presumption that they intended to convey the fee unless the intent to convey something less is manifest in the deed's express terms." U.S. Br. at 14. Again, there is no citation for this sentence because there is no Oregon authority to support it.

four years after its decision in *Bernards*. But it is the earlier decision, *Bernards*, which had been cited far more often and bears more authoritative guidance as to Oregon law. It is *Bernards,* and not *Bouche*, that this Court relied on and cited in its seminal Trails Act takings opinion in *Preseault II*, 100 F.3d at 1535, and the Oregon state courts, the United States District Court for the District of Oregon, and the United States Court of Appeals for the Ninth Circuit have cited to *Bernards* a combined twenty-eight times, most recently in 2018. *Eugene Water & Elec. Bd. v. Miller*, 417 P.3d 456 (Or. Ct. App. 2018). *Bouche* has been roundly ignored. In the more than fifty years that have passed since *Bouche*, the decision has been cited only twice in Oregon; neither decision followed its outcome.[4]

Oregon law does not presume deeds to a railroad convey a fee estate in the land. To the contrary, Oregon law is that any direct or indirect limitation on the estate conveyed or language relating to railroad use

[4] In *Egaas*, the appellate court found that the railroad held only an easement, even applying the court's analysis in *Bouche*. 673 P.2d at 1375. In the only other Oregon case to cite *Bouche*, the Oregon Court of Appeals simply cited to it in a footnote observing, "The court looked to a number of factors in determining whether a fee interest was conveyed in that case." *Wiser v. Elliott*, 209 P.3d 337, 341 n.4 (Or. Ct. App. 2009).

should be considered as evidence that the intent of the grantors was to convey an easement.[5] *See Bouche*, 293 P.2d at 210; *Bernards*, 248 P.2d at 351-52.

i. These deeds all possess multiple "factors" the Oregon Supreme Court looked to in *Bouche* and *Bernards* to be indicative of an easement.

Bernards and *Bouche*s set forth several factors courts should look to as indicating a limitation on the estate conveyed. *See Bouche*, 293 P.2d at 209 (relying on six factors); *Bernards*, 248 P.2d at 343 (relying on eight factors). Contrary to the CFC's ruling and the government's arguments, Oregon law does not require *multiple* factors to be present as evidence of intent to limit the railroad's use to an easement. Rather, Oregon law is that *any* direct or indirect limitation on the estate conveyed or language

[5] Easements can be in "fee simple." *Sunset Lake Water Serv. Dist. v. Remington*, 609 P.2d 896, 900 (1980) ("Here, N. W. Bower's estate in the easement was not limited in duration either by his or another's life, and was, therefore, in the nature of an interest in fee. . . . Thus, the easement is in the nature of a fee simple estate, is inheritable[.]") (internal citations removed). *See also Jackson v. United States*, 135 Fed. Cl. 436, 459 (2017), "Even though the deed in Coffee County purported to convey a right of way 'in fee simple' to the railroad, the Supreme Court of Georgia found that the words 'forever in fee simple' were not controlling, since they referred to the duration of enjoyment of the easement."

relating to railroad use should be considered evidence the intent of the grantors was to convey an easement. *Bouche*, 293 P.2d at 210; *Bernards*, 248 P.2d at 351-52.

Here, the thirteen deeds describe a narrow "strip of land" running "across" or "through" the grantor's land. The strip was measured by reference only to existing railroad tracks (that have since been removed) or the presence of survey stakes setting forth where the railroad tracks would soon be built.[6] There can be no doubt for what purpose these deeds served: to allow the railroad to operate over the land so long as there were tracks. The Gattrell Deed (77/37, Appx1300) even goes so far as to explicitly state it is "confirming to the grantee likewise the right to build, maintain and operate a railway line thereover." Such language would satisfy the *Bouche* court's directive to look for *additional language* limiting directly or indirectly the estate conveyed. The *Bouche* court did

[6] (1) Galvani Deed (77/37, Appx1300); (2) Gattrell Deed (13/11, Appx1302-130); (3) Hagen Deed (75/279, Appx1312-1313); (4) Jeffries Deed (85/70, Appx1357-1358); (5) Rinck Deed (77/424, Appx1438); (6) Watt Deed (12/343, Appx1500); (7) Westinghouse Deed (85/39, Appx1510-1511); (8) Woodbury Deed (23/399, Appx1528); (9) Bryden Deed (74/273, Appx1234); (10) Stowell Deed (75/32, Appx1473-1474); (11) Cummings Deed (77/262, Appx1263); (12) Smith, Lloyd Deed (16/515, Appx1468-1469); and (13) Woodbury Deed (16/481, Appx1526).

not specify where that "additional language" should be found – the granting clause vs. the habendum clause. The court simply said to look for any "additional language." 293 P.2d at 209.

The landowners have been unable to find a single Oregon case where a conveyance to a railroad describing a "strip of land" "across" or "through" the grantor's land was held to convey anything other than an easement. *See Contra Wason*, 48 P. at 702; *Bernards*, 248 P.2d at 344; *Powers,* 263 P.2d at 944; *Bouche*, 293 P.2d at 209; *Cappelli*, 496 P.2d at 213; *Egaas,* 673 P.2d at 1375.

Another factor weighing in favor of finding these thirteen deeds convey an easement is that the strip of land over the grantor's land is only described in relation to the railroad tracks. As described above, six of these conveyances only describe the "strip of land" being conveyed as being in relation to the centerline of the tracks or temporary survey stakes that *were already on the land*.[7] Those survey stakes, like the tracks, are long gone. There is no way to know the boundaries of the

[7] Rinck (77/454, Appx88); Woodbury (16/481, Appx123-124); Watt (12/343, Appx112); Smith (16/515, Appx97); Westinghouse (85/39, Appx117-18); Jeffries (85/70, Appx63); and Cummings (77/262, Appx35-36).

"strip of land" without the railroad tracks. The fact that the parties at the time used the tracks as the sole point of reference for describing the boundaries is indicative of the parties' intent that these conveyances be for a railroad and only so long as it was used as a railroad.

Bouche and *Bernards* further note that nominal consideration is indicative of the intent to convey only an easement. *See Bouche*, 293 P.2d at 209 (holding that the fact the consideration was "substantial" was a factor in determining whether a deed conveyed an easement to a railroad or the fee estate in the land); *Bernards*, 248 P.2d at 343 (holding that a deed in which the recited consideration was only one-dollar indicated a conveyance of an easement only). Here, several of the deeds, like the deed in *Bernards,* only had nominal consideration of one-dollar[8] or ten-dollars.[9] The Oregon Supreme Court would, as it did in *Bouche* and *Bernards*, find this fact to be indicative of an intent to convey only an easement.

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[8] Appx45-46 (Galvani); Appx46-47 (Gattrell); Appx51-52 (Hagen); Appx63 (Jeffries); Appx88 (Rinck); Appx112-114 (Watt); and Appx117-118 (Westinghouse).

[9] Appx124-125 (Woodbury).

a. The government's stipulations in the record undermine its arguments in favor of upholding the CFC's determination these thirteen deeds conveyed the fee estate in the land.

The government contends that the Plaintiffs' arguments here are somehow undermined by their own stipulations. U.S. Br. at 24. The government does not cite where in the record the Plaintiffs made such stipulations. The *Bellisario/Albright* plaintiffs made no stipulations to that affect. In fact, the only stipulations in the *Bellisario/Albright* record were the government's own concession in its response to the *Bellisario/Albright* plaintiffs' motion for partial summary judgment that several deeds did, in fact, convey only easements to the railroad. *See* Appx1092-1093 (stipulating twelve deeds to the railroad conveyed only easements). In fact it is the government's stipulations that undermine their arguments to this Court. For example, four of the deeds the government stipulated were easements stated consideration well over one-dollar, ranging from $60.00 to $981.15. Appx1092-1093. Five of the deeds the government agreed were easements do not use the phrase "over and across" the grantor's land. *Id.* Nine deeds contain no reverter clause. *Id.* And five of the deeds describe the strip of land being conveyed with

precision. *Id.* The government provides no explanation why the foregoing deeds convey easements, but the deeds at issue do not.

b. The railroad - as the presumed drafter of the deeds - does not enjoy a presumption in its favor.

The government argues that any ambiguities in the deeds should be construed against the landowners. *See* U.S. Br. at 12. The government's attempt to impose yet another burden of construction against the landowners is misapplied here. While true in other contexts, when the deeds are form deeds to a railroad corporation, such as the deeds at issue here, the presumption runs the other way, and ambiguities are construed against the *grantee* corporation. *See Verzeano v. Carpenter*, 815 P.2d 1275, 1278 (Or. Ct. App. 1991) *rev. denied*, 824 P.2d 417 (Or. 1992) (noting there are exceptions to this rule when construing easements). In *Verzeano*, the Oregon court observed:

> In case of doubt the grant of an easement is construed, as are conveyances generally, in favor of the grantee rather than the grantor, while a reservation of an easement is, it seems, to be construed in favor of the grantee of the land. In such a case a right of way reserved over the granted premises is limited to that expressly reserved.

Id. (citing HERBERT TIFFANY, LAW OF REAL PROPERTY § 802 (1931); RICHARD POWELL, REAL PROPERTY 34–186, ¶ 415(2) (1989). *See also Beres*

v. United States, 97 Fed. Cl. 757, 801 (2011) (citing *Hanson Industries, Inc. v. County of Spokane*, 58 P.3d 910, 916 (Wash. Ct. App. 2002), *review denied*, 78 P.3d 656 (Wash. 2003) (applying the law of Oregon's neighboring state, Washington, and noting that when the deeds to a railroad appeared to pre-printed forms drafted by the grantee, and "[t]herefore, any ambiguity in the language of the deeds should be construed against the railroad.").

In *Tipperman v. Tsiatsos*, the Oregon Supreme Court held ambiguities in deeds should be strongly construed against the drafter of the deeds.

> [W]hen an ambiguity exists in a deed that reserves an easement, a supplemental rule of construction is that the reservation is to be construed most strongly against the grantor [who reserves the easement] and in favor of the grantee.

964 P.2d 1015, 1019 (Or. 1998) (internal quotations removed) (quoting *Oliver v. Johnson*, 113 P.2d 430 (Or. 1941)). The Court in *Tipperman* also explicitly affirmed *Verzeano*, stating:

> *Verzeano* did state, correctly, that any ambiguity in a reservation must be construed in favor of 'the grantee of the *land*,' that is, the owner of the servient estate. That statement is consistent with this court's decision in *Oliver,* discussed above.

964 P.2d at 1019, n.3 (quoting *Verzeano*, 815 P.2d at 1278 (emphasis added)). Construing the deeds in favor of the landowners makes sense when one considers the context in which they were executed. (*See* Section B below). The railroad corporation had entered the owners' land, staked out or built its right-of-way, and threatened eminent domain. All ambiguities in this situation would be construed against the corporation.

Furthermore, the government characterizes the Pacific Railway & Navigation Company's acquisition of these "strips of land" as an acquisition for the public. *See* U.S. Br. at 44. Railroads are for-profit corporations, not public entities. *See* Appx1783-1793, Appx1838-2087 (Pacific Railway & Navigation Company's articles of incorporation). That is one of the fundamental shifts of the use of these owners' land – one that was for private use by a corporation – to public use.

> And it appears beyond cavil that use of these easements for a recreational trail—for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway—is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens.
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> * * *
>
> Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But

> that is not the point. The landowner's grant authorized one set of uses, not the other.

See also Toews v. United States, 376 F.3d 1371, 1376–77 (Fed. Cir. 2004).

B. The Court must consider the deeds in light of the law at the time they were executed, making the Oregon statutes at the time and Pacific Railway & Navigation Company's charter relevant to their interpretation.

The government does not dispute the Oregon Supreme Court's directive that the deeds must be analyzed in light of the law at the time. *Bernards*, 248 P.2d at 352 (stating that in order to rule upon a deed executed in 1910, "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."). Indeed, the CFC rightly acknowledged in its opinion that "the task of the court is to ascertain the intent of the original parties by considering the language of the deed in its entirety and the surrounding circumstances." (Appx11, citing *Bouche*, 293 P.2d at 208).

But the government mischaracterizes the Plaintiffs' argument to be that the Pacific Railway & Navigation Company exceeded its authority under Oregon law. U.S. Br. at 51 ("Plaintiffs are wrong, even if the railroad exceeded its authority . . ."). To the contrary, every indication is

that the Pacific Railway & Navigation Company was acting pursuant to its charter and laws of Oregon to survey and stake its 80-mile long right-of-way and, as required, first approach the landowners to agree on a price for their land before instituting formal condemnation proceedings. The point is that the deeds must be read through the lens of the law at the time. The law at the time created a situation where the landowners' only choice was to agree on a price for the railroad's use of the land or be subject to a condemnation action.

In *Preseault II*, this Court noted that, because railroads possess the ability to acquire a right-of-way by use of eminent domain, even a voluntary transfer 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*.

This Court directly cited the Oregon Supreme Court in *Preseault II* for the proposition that:

> [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, 1535 (citing *Bernards,* 248 P.2d at 351-52). And it is a principle the Oregon Supreme Court has repeatedly acknowledged when it observed that the courts have "little difficulty" in finding that a conveyance to a railroad is only an easement. *Bouche,* 293 P.2d at 209.

This is precisely what occurred in this matter. All thirteen conveyances at issue in this appeal state that *at the time of the conveyance* the railroad was already "surveyed, located, and adopted through the grantor's land,"[10] "constructed through" the grantor's land,[11] or "operated through" the grantor's land.[12] Therefore, the conveyances here are four-square within the rule and analysis of this Court's *Preseault II* decision, consistent with Oregon law at the time; and, therefore, would have been presumed at the time of their creation to convey easements.

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[10] Appx24-25 (Bryden); Appx45-46 (Galvani); Appx51-52 (Hagen); and Appx100-102 (Stowell). The following state they are "surveyed and staked out through" the grantor's land. Appx35-36 (Cummings); Appx46-47 (Gattrell) ("located surveyed and staked out"); Appx63 (Jeffries); Appx97-98 (Smith); Appx112-114 (Watt); and Appx117-118 (Westinghouse).

[11] Appx88 (Rinck).

[12] Appx124-125 (Woodbury) ("located, staked out, and operated").

At the time these thirteen conveyances were executed in 1907, it was well understood that when the railroad invoked its powers to survey and stake its rail line, it was required to attempt to reach an agreement with the owners. *See Bellisario* Op. Br. at 26-29 (setting forth the Pacific Railway & Navigation Company's Articles of Incorporation and Oregon statutes in effect at the time). Only when the railroad's attempt to negotiate a price with the landowner failed could it resort to its condemnation power. (*See* Appx1783-1790). The leading treatise on the topic at the time relied on by the Oregon courts, REDFIELD ON RAILWAYS, found that the railroad in that situation could, *at most*, obtain an easement. *See, e.g., Oregon Ry. & Nav. Co. v. Oregon Real Estate Co.*, 10 Or. 444, 445-46 (1882) (citing 1 REDFIELD ON RAILWAYS 246).[13]

Redfield's treatise presciently foresaw the very dispute these landowners are having with the government today.

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[13] Numerous Oregon Supreme Court decisions have shown reliance on REDFIELD ON RAILWAYS as authority. *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).

> Questions have sometimes arisen in regard to the precise title acquired by a railway company in lands purchased by them, where the conveyance is fee-simple. 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.

1 REDFIELD ON RAILWAYS 221 at §69, p. 255.[14]

When a railroad exercised this power of eminent domain and located its right-of-way across an owner's land, it was not an arms-length transaction between equals. The railroad possessed the extraordinary power of eminent domain. Confronted with this circumstance an owner's only choice was to consent to the railroad's occupation of the owner's land and execute a voluntary conveyance memorializing the railroad's right-of-way or hold-out and await a condemnation decree.

C. The CFC's inconsistent rulings undermine Oregon landowners' settled expectations of their property interests.

In *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979), the Supreme Court held:

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[14] *See also Id.* at §69, ¶3 ("Hence, in some of the cases, it seems to be a just inference from the reasoning of the court, that a railway, by a deed in fee-simple acquires only a right of way, that being all which the corporation is capable of taking.").

> 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.

The Court reaffirmed this principle in *Marvin M. Brandt Rev. Trust v. United States*, 572 U.S. 93, 110 (2014), "We decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'" (quoting *Leo Sheep*, 440 U.S. at 687).

In 2015, the Honorable Nancy B. Firestone of the CFC considered the deeds of thirty-three similar conveyances to a railroad from the early 1900s affecting similarly situated landowners in Benton County, Oregon, who brought claims against the federal government for the uncompensated taking of their property. *Boyer v. United States*, 123 Fed. Cl. 430 (2015). If the thirteen deeds that are subject to the *Bellisario* Plaintiffs' appeal were considered in the *Boyer* case, at least twelve would have clearly been held to be an easement.[15] The *Boyer* court focused

[15] The following eight deeds have stated consideration of one-dollar and describe a "strip of land" either "across" or "through" the grantor's land (as well as other indicia of an easement): (1) Galvani Deed (77/37, Appx1300); (2) Gattrell Deed (13/11, Appx1302-130); (3) Hagen Deed (75/279, Appx1312-1313); Jeffries Deed (85/70, Appx1357-1358); Rinck

correctly on the Oregon Court's direction to look for any language that makes it "clear . . . that they were granted to allow for railroad construction and use." *Boyer*, 123 Fed. Cl. at 439.

The government agreed that the CFC's opinion was inconsistent with *Boyer*. *See* Appx3121. But, despite this admitted inconsistency, the government argued these Oregon landowners have not demonstrated a "manifest injustice" stating:

> [A]lthough Plaintiffs are correct that the Courts' conclusions here differ in certain respects from its rulings three years ago in *Boyer*, this Court has more than once held that '[d]ecisions of the one judge (or the same judge) on the court of Federal Claims do not serve to bind another judge of the court.

Id.

Deed (77/424, Appx1438); Watt Deed (12/343, Appx1500); Westinghouse Deed (85/39, Appx1510-1511); and the Woodbury Deed (23/399, Appx1528). The following deeds all state a "strip of land" "across" the grantor's land and reference the "strip of land" as a "right of way" in the body of the deed: and (9) Bryden Deed (74/273, Appx1234); (10) Stowell Deed (75/32, Appx1473-1474) (referencing the "strip of land" as a "right of way" three times in the body of the deed). The following two deeds state a "strip of land" "through" the grantor's land and reference the "strip of land" as a "right of way" in the body of the deed: (11) Cummings Deed (77/262, Appx1263); and (12) Smith, Lloyd Deed (16/515, Appx1468-1469). Finally, the Woodbury Deed (16/481, Appx1526) references a "strip of land" "through" the grantor's land.

These Oregon landowners disagree. Although the conveyances in *Boyer* were, of course, not the same conveyances at issue in this case, they were substantially similar. The CFC's disparate holdings on how to interpret virtually identical language under the same state's law conflicts with the Supreme Court's tenet that when interpreting property rights there is a "special need for certainty and predictability." *See Leo Sheep Co.*, 440 U.S. at 687-88.

CONCLUSION

The landowners ask this Court to reverse the decision of the CFC, and remand this case with instructions to enter partial summary judgment in favor of these landowners on the issue of whether the railroad held an easement in the right-of-way over these fifteen owners' property pursuant to Oregon law.

Respectfully submitted,

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United States Court of Appeals
for the Federal Circuit
Albright v. US, 2019-2080

CERTIFICATE OF SERVICE

I, Meghan S. Largent, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On **March 30, 2020,** I electronically filed the foregoing **Reply Brief of Plaintiffs-Appellants** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the other parties:

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Six paper copies will be filed with the Court within the time provided in the Court's rules.

March 30, 2020

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