2022-1277

United States Court of Appeals for the Federal Circuit

DAVID H. BEHRENS, ARLINE M. BEHRENS, *et al.*,

Plaintiffs,

MARK W. HEINTZ, HELEN M. HEINTZ, *et al.*,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in No. 1:15-cv-00421-PEC, Honorable Patricia E. Campbell-Smith, Judge

BRIEF FOR PLAINTIFFS-APPELLANTS

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FEBRUARY 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	2022-1277
Short Case Caption	Behrens v. United States
Filing Party/Entity	Plaintiffs/Appellants

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/15/2022

Signature: /s/ Thomas S. Stewart

Name: Thomas S. Stewart

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Mark W. & Helen M. Heinz		
Gordon S. Gehlert		
Tommy Kixmueller		
Sherri L. Crider		
Michael Sean Wiles & Sonya M. Durbin		
Von & Toni Beuhrlen		
Gary Seba		
Rainey & Casey Schalk		
Wendell L. & Kristine G. Keeney		
Linda S. Taggart & Sandra Kay Rader		
Duane R. & Reatha M. Siegler		
Jane K. Trinble		

☑ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. None/Not Applicable
Greg & Maxine Thomas	N/A	N/A
Roger Bax	N/A	N/A
Irene & B. Lyle Brown	N/A	N/A
Mariann M. & Regina A. Murphy	N/A	N/A
Michael D. & Mary E. Reed	N/A	N/A
CJ Welding & Fabrication, LLC	N/A	N/A
Rodney & Brenda Thompson	N/A	N/A
Fred A., Virginia L. & Theodore A. Bethmann	N/A	N/A
Mark D. & Tina M. Lammert	N/A	N/A
Kenneth Ray Butler & Sheila Elaine Hamm	N/A	N/A
Macey G. & Debra Jett, Terry L. & Thomas P. Jett	N/A	N/A
Edward H. Giesler Trust & Kathryn H. Giesler Trust	N/A	N/A
Nicholas, Patrick, and Bernard Hilkemeyer	N/A	N/A
Robert E. & Mary Rodeman	N/A	N/A
James R. & Dorothy M. Summers	N/A	N/A
Sharon A. Vinci	N/A	N/A
Rodger & Ronda Purl	N/A	N/A
Callaghan Warehouse LLC	N/A	N/A

Kenneth & Dora Gerber	N/A	N/A
Roger & Brenda Lenhoff	N/A	N/A

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Other Statutes and Authorities

STATEMENT OF RELATED CASES

Counsel is unaware of other related cases within the meaning of Circuit Rule 47.5(a) that will directly affect or be directly affected by the Court's decision in this appeal. Counsel is aware of another related case within the meaning of Circuit Rule 47.5(b), *Abbott v. United States*, Case No. 15-cv-00211, pending in the CFC, that involves the same abandoned rail line and legal issues involved in this case, that could be directly affected by this Court's decision in this appeal.

INTRODUCTION

Plaintiffs filed their Fourth Amended Complaint on September 8, 2016 (Appx218-238). Plaintiffs alleged that the federal government is liable under the Fifth Amendment for a taking of their property rights when their land was authorized for use as a public use easement through the operation of the National Trails System Act, 16 U.S.C. § 1247 ("Trails Act").[1] There are 32 Plaintiffs who filed this appeal who collectively own 35 parcels of land.

Whether a Plaintiff is entitled to compensation under the Tucker Act in a Rails-to-Trails case depends on meeting two prongs of a three-prong test—a taking

[1] It is well-established that the Tucker Act constitutes the federal government's implied promise to pay just compensation for valid claims founded on the United States Constitution when private land is converted to a public easement for a hiking and biking trail under the Trails Act. *See Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 2 (1990) ("*Preseault I*"); *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"); *Toews v. United States,* 376 F.3d 1371 (Fed. Cir. 2004); *Ellamae Phillips v. United States,* 564 F.3d 1367 (Fed. Cir. 2009).

occurs if the railroad only held an easement (prong 1), and if one of the other two prongs are met, as set out by this Court in *Preseault II:*

> 1) Who owned the strips of land involved, specifically did the Railroad… acquire only easements, or did it obtain fee simple estates;
>
> 2) If the Railroad acquired only easements, if the terms of the easement were limited to use for railroad purposes, then the authorization for future use as public recreational trails constituted a taking [*i.e.*, exceeds scope of the easement]; or
>
> 3) Even if the grants of the railroad's easements were broad enough to encompass recreational trails, if the easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements then a taking occurred [*i.e.*, abandonment of the easement].

See Preseault II, 100 F.3d at 1533.

There is no dispute in this appeal pertaining to prong 1, fee versus easement, because the government and the CFC agreed that easements were conveyed by all of the applicable original source conveyance deeds.[2] Under Missouri's statutory scheme, the source conveyance deeds conveyed easements to the railroad because the consideration for each deed was one dollar, which made them "voluntary grants" under Missouri law. It has been the law of Missouri, at least since 1866, that a "voluntary grant" to a railroad, deemed to be a grant without valuable consideration

[2] A chart of all 35 parcels with a designation of each applicable deed is located at Appx1437-1441. Each of the applicable 19 deeds, marked as A(1)-A(19), are located at Appx1442-1470.

to aid in the construction of the railroad, conveys an easement to the railroad that is limited to the purposes of the grant.[3]

The first issue in this appeal relates to the scope of the voluntary grant easements (prong 2 of *Preseault II*). The CFC concluded that the scope was broad enough to encompass railbanking and the construction of a hiking and biking trail even though Missouri's voluntary grant statute states that the "*voluntary grant shall be held and used for the purpose of such grant only*."[4] The CFC's ruling on scope was error because it is contrary to Missouri's voluntary grant statute, numerous precedents from several Missouri courts and the Eighth Circuit interpreting Missouri law, and basic property law that an easement, by definition, has to be for a particular purpose.

The second legal issue in this appeal pertains to state law abandonment (prong 3 of *Preseault II*). The issue of state law abandonment, which provides an alternative path to proving the government's liability, was presented to the CFC on two separate occasions, but the CFC declined to rule. The CFC then abused its discretion by striking Plaintiffs' third and fourth attempts to present the issue for determination.

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[3] *See Mo. Laws 1866,* at 27, § 2, currently R.S. Mo. § 388.2102 (1994); *see also Brown v. Weare,* 152 S.W.2d 649 (Mo. 1941); *Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc.,* 981 S.W.2d 644 (Mo. App. 1998); *Moore v. Missouri Friends of the Trace Nature Trail, Inc.,* 991 S.W.2d 681 (Mo. App. 1999).

[4] *See Moore,* 991 S.W.2d at 685 (emphasis in original) (citing Mo. Laws 1866, at 27, § 2, currently R.S. Mo. § 388.2102 (1994).

STATEMENT OF JURISDICTION

The CFC had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and entered Judgment pursuant to Rule 54(b) of the Rules of the Court of Federal Claims ("RCFC") on December 9, 2021. *See* Appx42-45. The Appellants filed their Notice of Appeal on December 16, 2021 (Appx2574-2575) and this Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Were the railroad purpose easements obtained by the railroad as "voluntary grants" broad enough to permit railbanking and the construction of a hiking and biking trail under the Trails Act?

2. Did the CFC abuse its discretion by striking Plaintiffs' third and fourth motions for summary judgment pertaining to the alternative path to liability based on state law abandonment (prong 3 of *Preseault II*) after the issue had already been presented to the CFC on two prior occasions and the CFC never ruled?

STATEMENT OF THE CASE

The Missouri Central Railroad Company ("MCRR") operated its railroad on the right-of-way extending from MP 263.5 to MP 262.906, near Pleasant Hill, Cass County, Missouri, and from MP 215.325 near Windsor, Pettis County, Missouri, to MP 71.6, near Beaufort, Franklin County, Missouri. The MCRR formerly possessed

the right-of-way for a distance of 144.3 miles in Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Missouri.

On November 18, 2014, MCRR filed an Abandonment Exemption with the STB seeking to abandon 144.3 miles of its right-of-way. Appx1614-1663. On December 17, 2014, the Missouri Department of Natural Resources ("MDNR") filed a trail use request and a statement of willingness to assume financial responsibility with the STB. On February 26, 2015, the STB issued a Notice of Interim Trail Use ("NITU") relating to the right-of-way. Appx1673-1679. MCRR ultimately relinquished all interest in the railroad corridor and transferred its interests in the right-of-way to the MDNR for use as a public recreational trail under the Trails Act.[5]

Appellants filed the present action on April 27, 2015. Appx57-64. Appellants alleged ownership of land adjacent to the right-of-way on the date of the NITU, which included the fee title to all that property to the centerline of the right-of-way that is now subject to an easement for interim trail use pursuant to the NITU. Appx218-238. Appellants further alleged that upon abandonment of the easement and/or authorization of use beyond the scope of the easement, Appellants' property

[5] MCRR and the MDNR first announced that they had signed a trail use agreement in December of 2019. *See* Appx1898-1901. The government initially took the position that the trail use agreement was either not an actual trail use agreement or that it was not final because the MDNR was still obtaining funding for the ultimate construction of the trail. In any event, that "contingency" was removed in December of 2021 when the Governor of Missouri announced that the acquisition of the trail had been finalized.

would have been unburdened by any easement and that, but for operation of the Trails Act, Appellants would have the exclusive right to physical ownership, possession, and use of their property free of any easement for recreational trail use or future railroad use. Appx237. Thus, Appellants alleged, by operation of the Trails Act, the United States took Appellants' property and is Constitutionally obligated to pay just compensation.

Plaintiffs filed their original Motion for Summary Judgment pertaining to prongs 1 and 2 of *Preseault II* on November 18, 2016.[6] Appx272-276, Appx277-380. Plaintiffs argued the original source conveyance deeds conveyed easements to the railroad (prong 1) and that the railroad's easements were limited in scope to railroad purposes (prong) and, thus, a taking had occurred. In response, the government argued that many Plaintiffs did not own an interest in the former railroad corridor because the railroad owned the corridor in fee (prong 1) and that trail use was within the scope of the railroad deeds that conveyed easements (prong 2). Appx381-953. Plaintiffs filed their reply on January 19, 2017 (Appx954-1035) and the government's reply was filed on February 22, 2017 (Appx1036-1051).

[6] Plaintiffs' original motion for summary judgment addressed prongs 1 and 2 of *Preseault II*. *See* Appx289, fn. 10. Prong 3 was identified as the alternative path to liability, with Plaintiffs noting that "[t]he Court does not need to reach prong 3 of the *Preseault II* test, abandonment of the easement prior to the issuance of the NITU, in order to conclude that a takings has occurred under prong 1 (easement) and prong 2 (scope of the easement)." *Id*.

The CFC issued its first Opinion and Order on June 23, 2017, which denied Plaintiffs' motion and granted the government's cross-motion.[7] Appx1-16. Although the CFC found that the deeds conveyed easements to the railroad (prong 1), the CFC agreed with the government's argument that the deeds contained "unrestricted granting clauses" that allowed for any use whatsoever (prong 2), such that the scope of the easements was broad enough to allow railbanking.[8]

Plaintiffs filed a Motion for Reconsideration on July 25, 2017. Appx1064-1097. Plaintiffs argued the CFC erred because it (1) misinterpreted Missouri law on the scope of the easements at issue; (2) misapplied precedent from the United States Supreme Court as set forth in *Preseault I* and from this Court as set forth in *Preseault II;* and (3) new authority existed on the scope of the easements in Missouri as ruled upon by the Eighth Circuit Court of Appeals in *Barfield v. Show-Me Power Electric Coop.,* 852 F.3d 795 (8th Cir. 2017) ("*Barfield*").

Plaintiffs' first motion for partial summary judgment based on state law abandonment (prong 3) was filed on July 25, 2017. Appx1098-1211. The CFC's Scheduling Order on July 28, 2017 suspended further briefing on prong 3 (Appx17-18). The CFC then issued an Opinion and Order on October 17, 2017,[9] which both denied in part and granted in part Plaintiffs' motion for reconsideration, and

[7] *See Behrens v. United States,* 132 Fed. Cl. 663 (Fed. Cl. 2017) ("*Behrens I"*).
[8] *Id*. at 676.
[9] *See Behrens v. United States,* 135 Fed. Cl. 66 (Fed. Cl. 2017) ("*Behrens II*").

withdrew the decision to grant the government's cross-motion for summary judgment as it related to prong 2 (Appx19-25).

The CFC stated that, since the deeds granted easements, by definition, they required a definable scope as opposed to an unlimited scope.[10] The CFC directed the parties to focus on extrinsic evidence to ascertain the scope of the railroad's easements consistent with the requirement to construe the deeds to give effect to the intention of the grantors.[11] The CFC stated that "relevant [extrinsic] evidence may include the circumstances surrounding creation of the easement, its location, and its prior use."[12] The parties then engaged in discovery to ascertain relevant extrinsic evidence on the scope of the easement issue (prong 2). Appx1333-1334, Appx1337, Appx1343-1344.

Plaintiffs ultimately filed a supplemental motion for summary judgment on liability pertaining to the scope of the easements (prong 2) and state law abandonment (prong 3) on February 5, 2019 (Appx1402-1683). The government's cross-motion on both scope of the easements and state law abandonment was filed on March 12, 2019 (Appx1687-1754), Plaintiffs' response and reply was filed on April 9, 2019 (Appx1782-1810), and the government's reply was filed on April 23,

[10] *Id*. at 69.
[11] *Id*.
[12] *Id.* at 69-70 (citing *Hoelscher v. Simmerock,* 921 S.W.2d 676, 679 (Mo. App. 1996)).

2019 (Appx1828-1866). The CFC issued an Order on September 27, 2019 which denied both Plaintiffs' supplemental motion for summary judgment and the government's cross-motion as "moot." Appx26-30.[13]

The CFC issued a Scheduling Order on October 28, 2019, which set January 10, 2020 as the deadline for Plaintiffs' further motion for summary judgment (Appx1896-1897). Plaintiffs then filed another supplemental motion for summary judgment pertaining to the scope of the easements (prong 2) for the 35 remaining parcels on January 10, 2020 (Appx1909-2019), the government filed their cross-motion and response on February 10, 2020 (Appx2020-2055), and response and reply briefs were filed on March 6, 2020 (Appx2056-2100) and March 27, 2020 (Appx2104-2118).

While Plaintiffs' supplemental motion for summary judgment based on the scope of the easements (prong 2) was still pending, Plaintiffs also filed their third motion for partial summary judgment on liability pertaining to state law abandonment (prong 3) on October 16, 2020 (Appx2165-2315). The government filed a motion to strike Plaintiffs' supplemental motion for summary judgment based on state law abandonment on October 29, 2020 (Appx2439-2441) and, after further

[13] The CFC ruled that Professor Ely's expert report was impermissible expert testimony and, since the testimony was "so intertwined" with Plaintiffs' motion for summary judgment on the scope of the easements, denied the motion as moot, even though Professor Ely's report has no bearing on the state law abandonment issue. *See* Appx28-29.

briefing, the CFC entered its Order striking Plaintiffs' supplemental motion for summary judgment based on state law abandonment on November 12, 2020 (Appx31-32).

The CFC issued its Opinion pertaining to Plaintiffs' motion for summary judgment on the scope of the easements on June 16, 2021.[14] Appx33-41. The CFC denied Plaintiffs' motion for partial summary judgment on prong 2, granted the government's cross-motion for partial summary judgment on prong 2, and concluded the railroad purpose easements were broad enough to encompass trail use under the Trails Act because "it would violate the primacy of the grantor's intent to find that the deeds—which otherwise appear to convey a fee interest—should be artificially limited to plaintiffs' definition of railroad purposes simply because Missouri law construes conveyances for nominal consideration to be easements."[15]

Plaintiffs then filed a motion for leave to file an alternative motion for summary judgment on state law abandonment (prong 3) on July 16, 2021 (Appx2492-2501).[16] The CFC denied Plaintiffs' motion on October 12, 2021 (Appx2543-2547). The parties then jointly filed a motion for entry of judgment under Rule 54(b) (Appx2555-2559) on December 8, 2021, the CFC entered an Order

[14] *See Behrens v. United States,* 154 Fed. Cl. 227 (Fed. Cl. 2021) ("*Behrens III*").
[15] *Id.* at 233.
[16] This would mark the fourth time Plaintiffs sought a liability determination on prong 3 of *Preseault II*.

granting the parties' motion for entry of judgment on December 9, 2021 (Appx2560-2563), and Judgment pursuant to Rule 54(b) was also entered on December 9, 2021 (Appx42-45). Plaintiffs filed their timely Notice of Appeal on December 16, 2021 (Appx2574-2575).

SUMMARY OF THE ARGUMENT

It is undisputed that the 19 deeds at issue conveyed easements to the railroad because they were "voluntary grants" under Missouri's statutory scheme. The deeds were "voluntary grants" because all of the deeds granted a 100-foot strip of land without valuable consideration so that the railroad could construct their right-of-way. Since at least the 1860's, Missouri courts have consistently held that voluntary grants to a railroad for the construction of the railroad convey mere easements.[17]

After acknowledging that all of the deeds conveyed easements to the railroad, the CFC concluded that the scope of the easements was broad enough to encompass trail use and railbanking. The CFC's decision on the scope of the easements is a clear error of law because it ignores settled Missouri law in several respects and violates several fundamental tenets of basic property law. In Missouri, voluntary grants to railroads for the construction of the railroad are limited to railroad purposes as a matter of law. The relevant deeds are also limited in scope as a matter of fact

[17] *See* Mo. Laws 1866, at 27, § 2, currently R.S.Mo. § 388.2102; *see also Boyles,* 981 S.W.2d at 648; *Moore*, 991 S.W.2d at 685.

because: (1) they state that the purpose of each voluntary grant was for the construction of the railroad as set forth in the statute; and (2) the described land was used for constructing a railroad and railroad operations.

Missouri's voluntary grant statute specifically states that a railroad has the power to receive voluntary grants of real estate "to aid in the construction… of its railroads; but the real estate received by voluntary grant **shall be held and used for the purpose of such grant only**."[18] The "purpose" as described by the statute "**includes all railroad purposes**."[19] The CFC's decision was error because all of the easements granted to the railroad were "for the construction of the railroad" as set forth in Missouri's statute, which meant that the scope of the voluntary grants was limited to railroad purposes as a matter of law under overwhelming precedent from the Missouri courts.

Perplexingly, while the CFC acknowledged that any easement, by definition, has to be limited to a particular purpose, the CFC failed to delineate the purpose of these voluntary grants if not for railroad purposes. After stating that any easement, let alone an easement granted to a railroad for the construction of the railroad, could not be open-ended or non-specific in nature, the CFC failed to identify the specific purpose of these easements. In essence, the CFC concluded that the easements at

[18] *See* Mo. Stat. Ann. § 5128, R.S.Mo. 1939, Mo. Stat. Ann. § 4655, p. 2072 (emphasis added); *see also Brown,* 152 S.W.2d at 653.
[19] *See Brown,* 152 S.W.2d at 653 (emphasis added).

issue were broad enough in scope to change the use from railroad purposes to a hiking and biking trail purpose, so that the purpose of the easements granted to the railroad were to provide some form of a broad transportation purpose; this is not only directly contrary to Missouri law, but this same transportation purpose argument was rejected in *Preseault II*.

The CFC also abused its discretion by declining (multiple times) to rule on Plaintiffs' alternative liability argument based on state law abandonment. State law abandonment prior to the NITU, which is prong 3 of *Preseault II,* provides an alternative path to liability. Plaintiffs filed their initial motion for partial summary judgment pertaining to prong 3 of *Preseault II* in 2017. After the CFC stayed further briefing in order to address Plaintiffs' motion for reconsideration based on the scope of the easements, Plaintiffs filed their second motion for state law abandonment prior to the NITU in 2019. Even though the issue was fully briefed, the CFC denied Plaintiffs' motion as moot. The CFC also rejected Plaintiffs' third and fourth attempts to have the court rule. The CFC's failure to rule on the merits of state law abandonment under Missouri law is an abuse of discretion that results in extreme prejudice to the Plaintiffs.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO* FOR SCOPE (PRONG 2) AND ABUSE OF DISCRETION FOR STATE LAW ABANDONMENT (PRONG 3)

The CFC's decision that the scope of the easements was broad enough to encompass railbanking and a hiking and biking trail is reviewed on appeal *de novo. See Casitas Municipal Water Dist. v. United States,* 708 F.3d 1340, 1351 (Fed. Cir. 2013). The CFC's decision to avoid ruling on state law abandonment under prong 3 of *Preseault II,* which is an exercise of the CFC's inherent powers, is reviewed on appeal for abuse of discretion. *See Haggart v. United States,* 943 F.3d 943, 947 (Fed. Cir. 2019) (citing *Pickholz v. Rainbow Techs., Inc.,* 284 F.3d 1365 (Fed. Cir. 2002)); *L.E.A. Dynatech, Inc. v. Allina,* 49 F.3d 1527, 1530 (Fed. Cir. 1995).

II. THE EASEMENTS GRANTED TO THE RAILROAD AS "VOLUNTARY GRANTS" UNDER MISSOURI'S STATUTORY SCHEME WERE RAILROAD PURPOSE EASEMENTS LIMITED IN SCOPE AS A MATTER OF FACT AND AS A MATTER OF LAW

The deeds at issue in this case must be analyzed under Missouri law.[20] Missouri, like most states, promoted the construction of railroads after the Civil War by adopting legislation that granted all railroads the ability to condemn land for its right-of-way, and the Missouri Constitution provides that property taken for railroad

[20] Property rights are defined by state law. *See Preseault I,* 494 U.S. at 20; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984).

purposes by condemnation is an easement limited to railroad purposes.[21] In conjunction with the railroad's ability to condemn land, the Missouri legislature allowed railroads to acquire "voluntary grants" from private citizens, defined as "a conveyance without valuable consideration."[22] The Missouri legislature further provided that all such voluntary grants "shall be held and used for the purpose of such grant only."[23]

The CFC framed the issue on scope by stating that it was the CFC's task to evaluate "the scope of the primary conveyance included in the deeds … to determine whether the conveyances are broad enough to encompass trail use or railbanking."[24] The CFC concluded that "the broad granting language and habendum clauses in the deeds at issue are convincing evidence that the grantors intended **unrestricted conveyances**."[25] In doing so, the CFC effectively ruled that the railroad purpose easements were not only broad enough to permit recreational use, but any use—which is effectively the same thing as holding the deeds were fee simple grants.

The CFC's decision is directly contrary to Missouri law, which provides that a voluntary grant to a railroad shall only be held and used for the purpose of the

[21] *See* Mo. Const., Art. I, § 26; *see also Boyles,* 981 S.W.2d at 648.
[22] *See Moore*, 991 S.W.2d at 685.
[23] *See* Mo. Laws 1866, 27, § 2, currently R.S. Mo. § 388.2102 (1994); *see also Moore,* 991 S.W.2d at 685.
[24] *See Behrens I,* 132 Fed. Cl. at 675.
[25] *See Behrens III,* 154 Fed. Cl. at 232 (emphasis added).

grant.[26] All of these conveyances were for the railroad to construct and operate a railroad line.[27] The grantee of each deed is a railroad, the thing granted was a strip of land of a width typical for railroading operations of the era and, furthermore, a railroad line was actually built on the land identified in the deeds. Accordingly, the purpose of the grant was to allow for railroad purposes on the strip of land. Thus, the railroad easement was limited to railroad purposes.

Nevertheless, the CFC held that these were not railroad purpose easements. The CFC's rationale was that because the deeds do not specifically include the limiting words "for railroad purposes," the deeds were "unrestricted" and thus broad enough to include any use, like a hiking and biking trail. This holding directly contradicts Missouri's "voluntary grant" statute. It also fails to take into account basic Missouri law on the subject of easements, which incorporates the obvious fact that the voluntary grants were conveyed to the railroad for the construction of the railroad. The scope of the voluntary grants was limited to railroad purposes as a matter of law, and it was error for the CFC to conclude otherwise.

The CFC acknowledged that it is axiomatic that an easement has to be limited to a particular purpose. However, the CFC made no attempt to delineate what that

[26] *See Moore,* 991 S.W.2d at 685.

[27] *See* chart of all 19 deeds that are applicable to all 35 parcels, Appx1437-1441, and the 19 original source conveyance deeds, Exhibits A(1)-A(19), located at Appx1442-1470.

purpose was, if not railroad purposes. In doing so, the CFC dismissed all pertinent Missouri law on the issue of scope of the easements. The CFC also failed to acknowledge overwhelming precedent from this Court that has consistently held that recreational trail use is not a railroad purpose and that has consistently rejected the government's "broad transportation purpose" argument. Finally, although the CFC ostensibly meant to ascertain the grantor's purpose, it is beyond imagination that any grantor 120 years ago intended to allow a railroad to use the right-of-way for a hiking and biking trail.

A. Missouri Law is Well-Settled on Easements to Railroads and the Scope of Those Easements

One of the leading Missouri cases on the scope of the railroad easements is *Boyles*. In *Boyles*, landowners attempted to quiet title in various sections of a former railroad right-of-way after the railroad had completed formal abandonment before the I.C.C.[28] The Missouri Court of Appeals held:

> Where the acquisition is for right-of-way only, however, whether by condemnation, **voluntary grant**, or conveyance in fee upon valuable consideration, the railroad takes only an easement over the land and not the fee.

See Boyles, 981 S.W.2d at 648 (citations omitted) (emphasis added). The Missouri Court of Appeals then added that "[w]hen a railroad ceases to use the property for

[28] *See Boyles,* 981 S.W.2d at 647.

railroad purposes, the original owner or his grantees hold the property free from the burden of the easement."[29]

Confronted with this law, the trail operator in *Boyles* argued the railroad easement was not actually abandoned "because the proposed use of the railroad corridor as a public trail for alternative transportation such as hiking and biking constitutes a 'use for which [the easement was] taken' within the meaning of Article I, section 26, of the Missouri Constitution."[30] The Missouri Court of Appeals rejected this argument. The court explained that the Missouri Constitution limited railroad easements obtained via condemnation to "railroad purposes," and further that the term "does not encompass other forms of transportation such as walking or bicycling, and the recreational purposes for which [the trail user] proposes to use."[31]

Indeed, the court could not have been more clear with respect to whether a recreational trail is related to a railroad purpose:

> The proposed development of a hiking, biking, cross-country skiing, and nature trail **is completely unrelated** to the operation of a railway and consistent **only with an intent to wholly and permanently cease railway operations**.

[29] *Id*.
[30] *Id*. at 649.
[31] *Id*.

See Boyles, 981 S.W.2d at 650 (emphasis added). Accordingly, the court upheld the trial court's holding quieting title in favor of the landowners in possession of the land adjacent to the former railroad right-of-way.[32]

Another leading case in Missouri is *Moore*. *Moore* involved the same hiking and biking trail as *Boyles* but specifically addressed the "voluntary grant" issue in Missouri law in the context of three specific deeds. In *Moore*, the court first evaluated whether the deeds under consideration conveyed easements. One of the deeds at issue, the Rogers' deed, conveyed a 100-foot strip of property to the railroad in consideration of one dollar and restricted the use of the property to railroad purposes by providing that the railroad possessed the strip only "so long as it is used for railroad purposes."[33] The other two deeds, the Bullock deeds, also granted an interest in the 100-foot strips of land for five dollars consideration and both deeds expressly provided that the conveyance was for purposes of a railroad and, if the railroad ever abandoned the land, the land would revert to the grantors.[34]

The court first reviewed the language of the deeds in the context of Missouri's longstanding statute that railroads receive easements limited to railroad purposes if the grants to the railroad were "voluntary grants":

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[32] *Id*. at 651.
[33] *See Moore,* 991 S.W.2d at 683.
[34] *Id.* at 683-684.

> This analysis begins with an examination of the relevant statutes, which, both at the time of the deeds and now, provide that a railroad has the power:
>
> > To take and hold such **voluntary grants** of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by **voluntary grant shall be held and used for the purpose of such grant only**.
>
> The term "voluntary" grant has been construed to mean a conveyance without valuable consideration. *Brown v. Weare*, 348 Mo. 135, 152 S.W.2d 649, 653 (Mo.1941). If the conveyance was a voluntary grant, the effect of the statute was that the railroad acquired only an easement, **no matter what interest the deed purported to convey**.

See Moore, 991 S.W. 2d at 685 (footnote excluded) (emphasis added).

The Missouri Court of Appeals examined the three deeds at issue in relation to three factors. The Court concluded that the first factor, whether the deeds granted only a "right-of-way," was not applicable since none of the three deeds referred to a right-of-way.[35] The second factor, concerning "voluntary grants" to the railroad, was easily addressed because the term "voluntary grant" meant that the railroad had to give valuable consideration rather than mere nominal consideration in order to acquire a fee simple interest.[36] The third factor considered in *Moore*, whether the deed contains language that restricts the railroad's use of the land, was easily

[35] *Id*. at 686.

[36] *See Moore,* 991 S.W.2d at 686-687 (the consideration of one dollar in one deed and five dollars in the other two deeds constituted nominal consideration such that a voluntary grant easement was transferred to the railroad rather than the fee).

satisfied by the wording of the deeds at issue because the deeds were "for purposes of a railroad" and "for construction of the railroad."[37]

The Court in *Moore* concluded that "the three deeds at issue here restricted the quantum of interest conveyed to the railroad, and did not convey that interest for valuable consideration, and thus were *voluntary grants* as contemplated by the statute."[38] Accordingly, the railroad only held easements and those easements were abandoned after the railroad consummated abandonment through the I.C.C.[39]

B. The Voluntary Grants to the Railroad in this Case are Limited to Railroad Purposes Because the Stated Purpose Was For the Construction of the Railroad as Delineated in the Statute

All of the deeds at issue granted a strip of land 100 feet wide for the railroad's construction of the right-of-way with consideration of one dollar.[40] This means that, as in *Brown, Boyles,* and *Moore,* all of the deeds are voluntary grants under Missouri law[41] and only convey easements.[42]

To determine whether the scope of the railroad purpose easements includes recreational trail use under prong 2 of *Preseault II*, the scope of the voluntary grants must be construed in light of Missouri's statutory scheme. Here, most importantly,

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[37] *Id.*
[38] *Id*. at 688 (emphasis added).
[39] *Id*.
[40] *See* Appx1437-1441, Appx1442-1470.
[41] A "voluntary" grant means a conveyance without valuable consideration. *See Brown*, 152 S.W.2d at 653.
[42] *See Moore*, 991 S.W.2d at 685.

all of the deeds at issue were executed in the early 1900's before the railroad was constructed and all grant a strip of land "for the construction of the railroad"[43]—that is the "purpose." The grants are for a 100-foot strip for the railroad's right-of-way (because what other purpose could it possibly serve), and each voluntary grant is for the "construction of the railroad."[44]

For example, the Backues deed provides:

Isaac C. Backues & wife	}	Warranty Deed
To} Warranty Deed	}	~~~~~
St, Louis, Kansas City	}	This Deed made and entered
& Colorado Railroad Co.	}	into this 20th day of March 1901

by and between Isaac C. Bacues (sic) and Susan Backues, his wife of Maries County, Missouri, of the first part, and the St. Louis, Kansas City & Colorado Railroad Company, a corporation, party of the second part. Witnesseth, That the said parties of the first part, **for and in consideration of One Dollars [$1.00] to them paid** by said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant, bargain and sell, convey and confirm unto the said party of the second part, the following described real estate situated in the County of Maries, State of Missouri, to wit: The North East quarter of the North West quarter of section twenty one; The South half of the North West quarter of the North West quarter of section twenty one; the South half of the North East quarter of Section twenty; The West half of the South East quarter of section twenty; The North half of the South West quarter of section twenty, all in Township forty-one and Range seven west. Also the North East quarter of section twenty one, Township forty one & Range 8 west. **And for the purpose of cuttings and embankments necessary for the proper construction and security of said railroad across the tracts of land described aforesaid**. The additional strips or parcels of land described as follow, to wit: and one hundred feet wide across the North East 1/4 of Sec. 21, T. 41, R. 8 W. **And also the right of entry across adjacent land of the undersigned for purposes of construction of said railroad** with free and undisturbed ingress and egress to said railroad. To have and to hold the same, together with all the rights,

[43] *See* Appx1442-1470.
[44] *Id*.

immunities, privileges and appurtenances to the same belonging unto the said party of the second part, and to its successors and assigns forever; the said parties of the first part hereby covenanting that they, their heirs, executors and administrators, shall and will warrant and defend the title to the premises unto the said party of the second part, and unto its successors and assigns forever, against the lawful claims of all persons whomsoever.

In Witness Whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

Witness: *s*/ Isaac C. Backues {seal}
John W. Terrill *s*/ Susan [her mark] Backues {seal}

State of Missouri } ss
County of Maries } On this 20th day of March 1901 before me personally appeared Issac C. Backues and Susan Backues, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set {seal} my hand and affixed my official seal at Vienna, Mo. the day and year first above written.

s/ Louis N. Hawkins, Circuit Clerk

Filed for Record this June
3rd 1901 at 7 o'clock A.M.

s/ L.N. Hawkins, Recorder

See Backues deed, Appx1443-1444 (emphasis added).

A second deed from Mr. and Mrs. Backues, issued on the same day, March 20, 1901, for an additional 75 feet on each side of the original 100 feet for the right-of-way, elaborates on the purpose of the voluntary grant:

Isaac C. Backues & wife } Warranty Deed
To } Warranty Deed ~~ } ~~~~~~
St. Louis, Kansas City and } This deed made and entered
Colorado Railroad Company} into this 20th day of March

1901 by and between Isaac C. Backues and Susan Backues his wife of Maries County, Missouri of the first part, and the St. Louis, Kansas City & Colorado Railroad Company a corporation, party of the second part. Witnesseth: that the said parties of the first part, **for in consideration of One Dollar [$1.00]** to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents grant, bargain and sell convey and confirm unto the said party of the second part the following described real estate situated in the County of Maries State of Missouri, to wit: **A strip of land seventy five [75] feet wide on each side of and adjacent to and in addition to the right of way already conveyed to the said Railroad Company; said right of way being a strip of land fifty [50] feet wide on each side of the center line, of said Railroad**; said additional strips of land to extend along said Railroad line for a distance of one thousand (1000) feet each side of the intersection of the center line of the said Railroad, with the north and south section line, dividing sections twenty and twenty one in township forty one and Range seven west. **Said additional strips of land are conveyed to said Railroad company for the purpose of side tracks, station house, ware houses, stock yards and for such uses as are necessary in the operation of said Railroad**, to have and to hold the same together with all the rights, immunities, privileges and appurtenances to the same belonging unto the said party of the second part, and to it successors and assigns forever. The said parties of the first part hereby covenanting that they their heirs executors and administrators, shall and will warrant and defend the title to the premises so far as covered by the ownership of said party of the first part, unto the said party of the second part and unto its successors and assigns forever, against the lawful claims of all persons whomsoever.

In witness whereof, the said parties of the first part have hereunto set their hand[s] and seals the day and year first above written.

Witness:	*s*/ Isaac C. Backues	{Seal}
John A. Terrill	*s*/ Susan Backues	{Seal}

State of Missouri }
County of Maries } On this 20th day of March 1901

before me personally appeared Isaac C. Backues and Susan Backues, his wife, to me know to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof I have hereunto set my hand and affixed my official seal at Vienna, M., the day and year first above written.

s/ Louis N. Hawkins, Circuit Clerk

Filed for Record this June 3rd, 1901 at 7 o'clock A.M.

s/ L.N. Hawkins, Recorder

See Backues deed, Appx1442-1443 (emphasis added).

This purpose, for the construction of the railroad, falls directly in line with Missouri's statute that says that such voluntary grants "shall be made to it to aid in the **construction**, maintenance and accommodation of its railroads" and "**shall be held and used for the purpose of such grant only**."[45] Thus, the grants to the railroad in this case are limited to railroad purposes as a matter of fact within each deed and as a matter of law based on Missouri's voluntary grant statute.[46]

In addition, many of the deeds grant an additional width beyond the original 100-foot strip for side tracks, cuts, or embankments, ingress and egress, or other railroad purposes. In each instance, the additional width for other railroad purposes reiterates the fact that the initial 100-foot strip was granted for the railroad's "right-of-way."[47]

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[45] *See Moore,* 991 S.W.2d at 685 (emphasis in original) (citing 1866, 27, § 2, currently R.S. Mo. § 388.2102 (1994).

[46] *See Brown,* 152 S.W.2d at 652; *Boyles,* 981 S.W.2d at 648; and *Moore,* 991 S.W. 2d at 685.

[47] For example, the Backues deed conveys "a strip of land 75-feet wide on each side of and adjacent to and in addition to the right-of-way already conveyed to said Railroad Company, said right-of-way being a strip of land 50 feet wide on each side of the centerline of said Railroad…." *See* Appx1443-1444.

Missouri's controlling statute notwithstanding, there can be no doubt the grantors intended the strips of land were to be used for the railroad's right-of-way, and not some other purpose. The reality is that a railroad was constructed and operated on the strips of land and there is also no evidence of any prior use of the strips of land that might be consistent with use of the strips for recreational use. The purpose of the railroad's easements was for the construction and operation of a railroad and it is that simple.

C. An Easement, by Definition and as Matter of Law, Must Be for a Particular Purpose and, Under Missouri Law, an Easement Granted to a Railroad as a Voluntary Grant is for Railroad Purposes or Uses Only and Does Not Allow Other Purposes or Uses Unless it Specifically Says So

The basic property law concept, that easements must be granted for a particular purpose, is firmly entrenched in Missouri law. Under Missouri law, an easement granted to a railroad for the construction and operation of a railroad cannot be used for a recreational trail. *See Boyles*, 981 S.W.2d at 649 (a railroad purpose "does not encompass other forms of transportation such as walking or bicycling"); *see also St. Louis, I.M. & S. Ry. Co. v. Cape Girardeau Bell Tel. Co.,* 114 S.W. 586, 589 (Mo. 1908) ("the consensus of opinion is to the effect that the railroad company is not permitted to use, sell, or incumber the easement for other than railroad purposes"); *Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co.,* 200 S.W.2d 328, 332 (Mo. 1947) ("It is true that the owner of an easement may, in some

circumstances, license or authorize third persons to use its right-of-way for purposes not inconsistent with the principal use granted....").

Even if Missouri's railroad statute did not say what it says, the deeds at issue here would nonetheless be limited to railroad purposes. Like the deeds in this case, the deed in *Maasen v. Shaw*, 133 S.W.3d 514, 517 (Mo. App. 2004), which did not involve a railroad, did not specify the purpose for the easement granted. *Maasen* concerned interpretation of an easement on which was constructed a road used for travel over the easement. *Id*. The easement was granted in 1994 and not used for any other purpose besides ingress and egress until portions of it were mowed, shrubs and trees were stored on the easement, and users drove all-terrain vehicles on the easement. *Id*.

The court began its analysis by explaining that "[w]hen an easement is granted in general terms without restrictions on use, the easement is one of unlimited reasonable use." *See Maasen*, 133 S.W.3d at 518.[48] The court further explained that "[a]n easement is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but, instead, **is a right that extends only to one or more particular uses**." *Id.* at 518-19 (internal citations

[48] Such was consistent with the basic law of easements, to wit: "Under the doctrine of unlimited reasonable use, the scope of an easement unspecified in a grant is regarded as unlimited insofar as it is reasonable in relation to the object of the easement." *See* 28A C.J.S. *Easements* Section 160 (1996).

omitted) (emphasis added). In evaluating the scope of the easement at issue, the court stated it was important to "consider its location, and how it was previously used." *Id*. at 519 (*citing Hoelscher,* 921 S.W.2d at 679). Of further importance was whether any additional use "represents only a change in the degree of use, or whether it represents a change in the quality of the use." *Id*.

In this case, the Missouri statute already sets forth that the voluntary grant easements are to be used "**for the purpose of such grant only**." *See Moore,* 991 S.W.2d at 685 (emphasis in original) (citing 1866, 27, § 2, currently R.S. Mo. § 388.2102 (1994). Since it is obvious that the grants were given for railroad purposes, and that *Boyles* states that recreational trail use is not a railroad use, this should settle the issue completely. *See Boyles*, 981 S.W.2d at 649. But, even considering the voluntary grants in a different context—by applying the law concerning interpretations of easements as set forth in *Maasen*—the result of the analysis is the same.

In *Maasen*, the deed did not precisely express how the easement was to be used (arguably like the deeds in this case). *See Maasen*, 133 S.W.3d at 517 (deed conveyed "[a] non-exclusive easement 50 feet wide"). The easement could only be used to the extent the use was "unlimited reasonable use related to the purpose of the easement." *Id*. at 518. Here, the easements were only used for railroad purposes from the time they were granted to the near present. They were never used for

recreational trail purposes, let alone established for such purpose. As in *Maasen*, the manner of how the easement is historically used drives the analysis of the easement's intended scope.

The CFC's ruling on scope is further at odds with respect to Missouri's law that an easement granted to a railroad cannot be converted to a public easement, such as a hiking and biking trail easement, because a broad public easement was not contemplated at the time the easement was granted. In *Cape Girardeau Bell,* the Supreme Court of Missouri stated that any additional servitude placed on a railroad easement is not a "legitimate development for railroad purposes" and therefore is beyond the scope of a railroad easement:

> Nevertheless, in so far as the telegraph or telephone company vests rightfully occupying the right-of-way serves the general public as a commercial enterprise, distinct from the avocation of the railroad, **it constitutes a use of the right-of-way easement other than for railroad purposes**, and it is therefore a servitude not contemplated in the original grant and a burden upon the fee of which the adjacent owner may rightfully complain.

See Cape Girardeau Bell, 114 S.W. at 588 (emphasis added).

Similarly, in *Eureka,* an easement granted to the railroad did not allow the railroad's successor to permit the construction of an additional power line that had no connection with the electric lines or purposes of the street railway. *See Eureka,* 200 S.W.2d at 332. Since the purpose of the easement was a railway, the scope of

the easement was limited and the construction of an additional power line was not permitted.

In *Barfield*, Sho-Me (an electric cooperative) held easements to construct and operate an electric transmission line. *See Barfield*, 852 F.3d at 797-98. Sho-Me attempted to use the easements for the installation of fiber-optic cables for commercial-telecommunications purposes. *Id*. at 798. The transmission line easements were broken into several categories but generally allowed electric transmission lines or electric transmission lines with unspecified appurtenances or specifically referenced communications equipment. *Id*.

The Eighth Circuit, after an extensive analysis of Missouri law with respect to easements, affirmed the trial court's conclusion that the easements did not allow for fiber-optic cables providing service for commercial telecommunications. *Id*. at 802. Like the government does in this case, Sho-Me asserted that the fiber-optics use was authorized by its easements because the easements were granted in general terms without any limitations to their use. *Id*. The Eighth Circuit correctly rejected this argument, explaining that pursuant to *Maasen*, Sho-Me was limited to using the easements for the purposes for which they were granted and used, for electrical transmission. *Id.* at 802-803.

Cape Girardeau Bell, *Eureka*, and *Barfield* are examples of Missouri law that stand for the proposition that additional uses of an easement that are not strictly

derivative of the original purpose are not permitted. As set forth in *Maasen*, Missouri would not consider a recreational trail "a change in the degree of use," but rather "a change in the quality of the use." *See Maasen*, 133 S.W.3d at 519.

Thus, not only did the CFC commit error by ignoring the Missouri statute, which explicitly states that the voluntary grants were for railroad purposes, it also improperly analyzed the deeds generally under Missouri law. The CFC also considered evidence regarding "the circumstances surrounding creation of the easements, its location and its prior use." *See Behrens III*, 154 Fed. Cl. at 229 (*citing Maasen*, 133 S.W.3d at 519). But, there is no evidence of any recreational trail use in the record. The only evidence the government came up with is use of the easements for fiber optic cable rights decades later in 1991, and use of the right-of-way by trucks and 4-wheelers, which took place after the NITU and thus after the taking occurred.[49]

The CFC stated that a failure to allow these uses and use as a recreational trail "would violate the primacy of the grantor's intent." *See Behrens III*, 154 Fed. Cl. at 229. In Missouri, "[t]he cardinal rule regarding an interpretation of a deed is to

[49] *See* Govt's Cross-Motion, Appx2039; *see also* Pls.' Supp. Mot. For Summ. Judg. and Interrogatory Answers, Appx1402-1683, Appx1579 ("In 2016 they came through clearing the brush…. In 2018 they finished taking up the rails and ties. The right-of-way was like a highway for trucks and 4-wheelers were running up and down it").

ascertain the intention of the parties and to give that intention effect." *See Hinshaw v. M-C-M Props., LLC*, 450 S.W.3d 823, 827 (Mo. App. 2014) (*citing Dean Machinery Co. v. Union Bank*, 106 S.W.3d 510, 520 (Mo. App. 2003)). There is no way the parties in the early 1900's ever dreamed the strips of land might be used for bicycling, ATV excursions, jogging, or any other recreational purpose. These were railroad purpose easements and the parties intended for them to be nothing more. The CFC was clearly wrong to rule they did.

Indeed, the CFC should have halted its examination once it confirmed the deeds did not specify some other purpose other than a railroad purpose, because a review of the language of the deeds provides the only avenue from which to derive the concept that recreational use was contemplated by the parties to the voluntary grant (and, of course, the deeds say nothing about recreational use). *See Henley v. Continental Cablevision*, 692 S.W.2d 825, 829 (Mo. App. 1985); *see also Maasen* 133 S.W.3d at 518. The CFC then unjustifiably criticized Plaintiffs' argument:

> Indeed, while plaintiffs correctly argue that the source deeds do not contain any language that specifically mentions trail use or railbanking, plaintiffs fail to explain why it is necessary for the deeds to contain such language in order to convey an easement to the railroad that is broad enough to encompass public recreational trail use. Because the plain language in the source deeds makes clear that the parties intended to convey a broad easement to the railroad—and not to limit this easement to use for railroad purposes—the Court concludes that the source deeds relevant to plaintiffs' remaining claims convey easements that can encompass public recreational trail use.

See Behrens III, 154 Fed. Cl. at 222-23. As a matter of fact and law, there is absolutely no language in the deeds that could be said to make it "clear that the parties intended to convey a broad easement to the railroad." The deeds granted a strip of land, to a railroad, for the purpose of constructing and operating a railroad. There is no topic in the deeds besides railroading, so characterizing the deeds as "broad" was incorrect.

The CFC's ruling also contradicts the basic property law concept that an easement, by definition, must be for a particular purpose. Relying on a long line of precedent from the Missouri Supreme Court, including *Maasen*, *Eureka*, and *Cape Girardeau Bell*, the Eighth Circuit in *Barfield* set forth a litany of basic property law concepts applicable to this case, including:

> (1) An easement is "**a right to use the land for particular purposes**" and "an easement is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but it is a right only to one or more particular uses;"[50]
>
> (2) Where a railroad possesses an easement only and a telegraph is constructed upon the easement with the permission of the railroad for the purpose of not only serving the railroad but also the general public as a commercial enterprise, the easement to the telegraph company "**constitutes a use of the right-of-way easement other than for railroad purposes, and it is therefore a servitude not contemplated in the original grant** and a burden upon the fee of which the adjacent owner may rightfully complain;"[51]

[50] *See Barfield*, 852 F.3d at 799 (emphasis added).
[51] *Id.* at 801 (emphasis added).

(3) Show-Me's easements for fiber-optic cable to serve the general public were distinct from Show-Me's electricity business, and the fiber-optic cable cannot lawfully serve the general public for purposes not authorized by the original easement;[52] and

(4) Easement holders can utilize easements so long as the use is limited to the purposes for which it was created.[53]

Since an easement, by definition and under Missouri law, must be granted for a particular purpose and cannot be unlimited, open-ended, or non-specific, the obvious question for the CFC's determination was what was the particular purpose or use granted to the railroad by the grantors over 100 years ago? The deeds at issue were "voluntary grants" to the railroad, for the construction and operation of its railroad, and the grants accomplished their purpose—to allow for the construction and operation of a railroad.

The CFC, however, ignored the obvious, and concluded that "the broad granting language and habendum clauses in the deeds at issue are convincing evidence that the grantors intended unrestricted conveyances." *See Behrens III*, 154 Fed. Cl. at 231. According to the CFC, because the grantors did not specifically say that the easements were limited to railroad purposes, they must have intended unlimited, open-ended, and non-specific uses. That is fallacious reasoning because it ignores and is directly contrary to the definition of an easement. "An 'easement'

[52] *Id.* at 801-802.
[53] *Id.* at 802 (citing *Illig v. Union Elec. Co.*, 652 F.3d 971, 977-78 (8th Cir. 2011)).

is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but it is a right only to one or more particular uses...." *See Farmers Drainage Dist. of Ray Cty. v. Sinclair Ref. Co.*, 255 S.W.2d 745, 748 (Mo. 1953). If this were not the case, then there would be no such thing as easements.

In effect, the CFC's holding is tantamount to a conclusion that the deeds were fee simple grants, which is not the case. The CFC noted that, because there was not a specific limitation in the deeds, they "otherwise appear to convey a fee interest," and held they could be used for any purpose whatsoever. *See Behrens III*, 154 Fed. Cl. at 223. But these conveyances *are* easements, *not* fee grants. The decision in *Moore* is directly instructive because it illuminates the incorrect reasoning of the CFC's decision by explaining that "the conveyance was a voluntary grant" and the result is that the railroad acquired an easement "**no matter what interest the deed purported to convey**." *See Moore*, 991 S.W.2d. at 685 (emphasis added).

If the grantors in the early 1900's intended to allow some other uses or purposes beyond railroad purposes then they would have said so. *See Eureka*, *Cape Girardeau Bell*, and *Barfield*. They did not. Accordingly, the easements at issue cannot be used for any other purpose other than a railroad purpose or railroad use.

D. Any Attempt to Change an Easement Granted to a Railroad to a Broad "Transportation" Easement Has Already Been Rejected by this Court and the Missouri Courts

The argument advanced by the government, and apparently accepted by the CFC, is that an easement granted to a railroad for their purposes encompasses the right to "a permanent right of passage, which would include any form of transportation, including on foot…." (Appx1709). This argument has always been rejected by this Court and by Missouri courts. The reason the concept is not allowed as a matter of law stems from the basic property law concept that an easement to a railroad is for its "use" and the nature of the "use" cannot be changed to include trail use.

In *Preseault I,* the government argued that federal regulatory law through the Trails Act had redefined easements granted to railroads to now include trail uses. The Supreme Court held that the federal government cannot re-define existing property law by changing the scope of the railroad's easement without violating the Fifth Amendment's obligation to pay just compensation for the taking of property. When the government attempted to argue that an easement granted to a railroad can be converted to a trail use easement or general transportation easement by and through the Trails Act, Chief Justice Rehnquist commented "That is like saying if

my aunt were a man she would be my uncle."[54] Although the courtroom broke into laughter, the basic property law point is serious because the federal government by and through the Trails Act cannot change the nature or scope of the easement granted to the railroad to a different use, like a transportation use, because an easement must be for a particular purpose and a hiking and biking trail is a completely different use.

This basic point of property law has been affirmed by this Court and the Missouri courts on several occasions—no Federal Circuit case or CFC case has ever accepted the government's argument that public recreational use of land by a non-railroad is within an easement granted to the railroad. In *Preseault II*, this Court found that the terms of the easements at issue did not contemplate the use of land as public trails:

> **When the easements here were granted to the Preseaults' predecessors in the title at the turn of the century specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not. Although a public recreational tail could be described as a roadway for the transportations of persons, the nature of the usage is clearly different**. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in the exercise or recreation on foot or on bicycles. It is

[54] Oral Argument, *Preseault I*, 494 U.S. 1 (No. 88-1076) (statements of Chief Justice Rehnquist), available at http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/argument.

> difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.

See Preseault II, 100 F.3d at 1542-43 (emphasis added).

This Court in *Toews* reaffirmed the opinions of Justices Rehnquist and Scalia in *Preseault I* and its decision in *Preseault II*, and once again recognized that recreational activities are very different than railroad purposes:

> **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**.

See Toews, 376 F.3d at 1376 (emphasis added).

The government argued in *Preseault II* that both recreational trail use and "railbanking" were railroad purposes within the scope of the easement (Vermont law). This Court rejected the argument and held that it could find no support for the proposition "that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails." *See Preseault II,* 100 F.3d at 1530. The concurring opinion by Judge Rader explained:

> **Realistically, nature trails are for recreation, not transportation. Thus, when the state sought to convert the easement into a recreational trail, it exceeded the scope of the original easement** and caused a reversion… [T]he State's transparent attempt to retain property condemned for a narrow transportation use crumbled when it converted that property to a recreational use. [T]he United States and Vermont, have converted a right to use the landowners' land for a

> railroad into a right to hold the land in perpetuity. The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.

See Preseault II, 100 F.3d at 1554 (emphasis added).

Missouri courts have already spoken on the scope of railroad purposes easements, too. In *Boyles*, after referring to the "commonly understood" meaning of "railroad purposes," the Missouri Court of Appeals confirmed that other forms of transportation, such as a walking or bicycling trail, is beyond the scope of a railroad purposes easement. *See Boyles,* 981 S.W.2d at 649-650. In fact, the Court of Appeals stated that a hiking and biking trail is "completely unrelated" to a railroad purposes easement because the nature of the use is completely different, the grantors did not contemplate any future use as a hiking and biking trail, and an easement granted to a railroad cannot be converted to a general "transportation" easement. *Id.*

The CFC, interpreting Missouri law and relying on *Boyles*, reached the same conclusion in *Glosemeyer v. United States*, 45 Fed. Cl. 771 (Fed. Cl. 2000). The government set forth the same argument that recreational trail use and railbanking were railroad purposes, but the CFC rejected the argument again, holding that trail use does not constitute a railroad purpose:

> **The term "railroad purposes"… does not encompass other forms of transportation, such as walking or bicycling… the proposed development of a hiking, biking, cross-country skiing, and nature trail is completely unrelated to the operation of a railway** and

> consistent only with an intent to wholly and permanently cease railway operations.

See Glosemeyer, 45 Fed. Cl. at 779 (emphasis added) (quoting *Boyles*, 981 S.W.2d at 649-50).

It is undeniable that no Missouri court has ever found a railroad's easement legally permits non-railroad purposes. The CFC's holding in this case did what no Missouri court has ever done: find that an easement granted to a railroad and used as a railroad for a century also authorized other non-railroad uses such as a recreational trail. That is not the law in Missouri or as applied by this Court in virtually similar circumstances in *Preseault II* and its progeny. Accordingly, this Court should reverse the CFC's erroneous decision.

E. All of the Relevant Extrinsic Evidence Pertaining to the Creation of the Easements, the Location of the Easements, and the Prior Use of the Easements, Establishes that the Easements Were Limited to Railroad Purposes

Basic property law requires that easements must be granted for a particular purpose. Since an easement requires a definable scope and these easements do not specifically say that they are "for railroad purposes" only, the CFC wished to consider and analyze extrinsic evidence on the subject.[55] *See Behrens III*, 154 Fed. Cl. at 229 (quoting *Maasen*, 133 S.W.3d at 519) ("Under Missouri law, when an

[55] As explained *supra*, this was actually an unnecessary exercise since *Moore* holds that voluntary grant easements are for railroad purposes only and recreational trail use is not a railroad purpose.

easement does not include an expressly stated purpose, it is 'incomplete or ambiguous,' and the court may consider extrinsic evidence 'to determine the parties' intention.'"). Despite the government's repeated protestations that the deeds were unambiguous and extrinsic evidence was not even necessary,[56] the relevant extrinsic evidence establishes that the easements at issue were limited to railroad purposes.

The CFC stated that "relevant [extrinsic] evidence may include the circumstances surrounding creation of the easement, its location, and its prior use."[57] In this case, all of the circumstances surrounding the creation of the easements in the early 1900's, the location and nature of the property interest granted, and all of the railroad's prior usage of the right-of-way for their railroad purposes over eight decades establishes that the parties to the deeds intended for the railroad to receive an easement limited to railroad purposes.

The most critical evidence concerning the circumstances surrounding the creation of the easements are actually the deeds themselves. It is inescapable and obvious that the deeds were granted to the railroad to accomplish the construction of the railroad. Although the deeds generally contain two granting clauses, one for the specific right-of-way for the railroad's use and another for the purpose of cuttings and embankments during construction, both granting clauses refer to the

[56] *See* Govt's Resp. Br. and Cross-Motion for Summ. Judg., Appx1694, Appx1705, Appx1708.
[57] *Id.* at 69-70.

construction of the railroad line itself. The temporary construction easement, which was limited to the railroad's purpose of construction, is additional proof that the "permanent" easement was limited to railroad purposes. A grant to a railroad for the construction of the railroad's right-of-way, particularly during the early 1900's, obviously means that the grantors granted a right of passage to the railroad so it could construct a railroad line and conduct its railroad business.

The "prior usage" of the right-of-way easement should also have been considered by the CFC in its analysis concerning the scope of the railroad's easement. *See Behrens III*, 154 Fed Cl. at 239 (*citing Maasen*, 133 S.W.3d at 519). The railroad used the corridor for its railroad purposes, and for no other purposes, for approximately eight decades from the turn of the century to the early 1980's. There is no evidence of use other than railroad purposes for eight decades. Indeed, the railroad had no need to use the right-of-way for any other purpose because the railroad was in the business of running a railroad, not operating recreational trails. The easement corridor was used exclusively as a railroad's right-of-way for at least eight decades, it was never used as a recreational trail open to the public.[58]

[58] As part of the discovery process after the CFC directed the parties to develop and consider extrinsic evidence, the Plaintiffs responded to the government's interrogatories and addressed the issue of prior usage by repeatedly stating that the corridor was never used for any purpose other than railroad purposes. *See* Appx1420-1421; 1508-1542.

The government repeatedly advanced the argument that the easements were not limited to railroad purposes because the corridor was used for "other uses," like fiber-optic cables, and that the grantors intended a broad "transportation easement" rather than a railroad purposes easement because some trespassers occasionally used the corridor for ATV's.[59] The government's "other uses" argument beyond railroad uses is without any merit. In the context of fiber-optic cable, burying fiber-optic cable on the corridor is basically an illegal act that is obviously not a railroad purpose in the first place.[60]

Similarly, the government's argument concerning other forms of transportation on the right-of-way, ostensibly after the early 1980's when trains ceased to run, is wrong. Prior to the early 1980's, while the railroad was actually using the right-of-way for railroad purposes, there is no evidence that the railroad ever allowed motorized vehicles or other non-railroad use on its right-of-way. After the early 1980's when trains ceased to run, the railroad basically failed to maintain the right-of-way, and failed to police the presence of ATVs on the right-of-way, but the presence of trespassers using ATVs does not mean that the grantors and the railroad contemplated these "other uses." The fact that ATVs utilized the corridor for their own amusement does not diminish the fact that anyone who utilizes the

[59] *See* Govt's Resp. Br. and Cross-Motion for Summ. Judg., Appx1694, Appx1705, Appx1713.
[60] *See Barfield,* 852 F.3d at 801-802.

right-of-way for their amusement is nothing more than an illegal trespasser. This argument would not pass former Justice Scalia's laugh test.[61]

Taking the circumstances surrounding the creation of the easement together or independently—the location and configuration of the corridor and the railroad's prior use of its easement—the extrinsic evidence makes an overwhelming case that these easements were intended to be confined to railroad usage. This Court must apply the same precedent it has for years and rule that "it appears beyond cavil that use of these easements for a recreational trail… is not the same use made by a railroad, involving tracks, depots, and the running of trains."[62]

III. STATE LAW ABANDONMENT PRIOR TO THE NITU PROVIDES AN ALTERNATIVE PATH TO LIABLITY AND THE CFC ABUSED ITS DISCRETION BY FAILING TO RULE ON THIS ISSUE

The standard to determine liability in a Trails Act takings case was first decided by this Court in *Preseault II* in 1996. Nine years later, in *Hash v. United States,* 403 F.3d 1308 (Fed. Cir. 2005), this Court confirmed that there are two alternative ways a taking could occur under the Trails Act upon issuance of a NITU: (1) the railroad only held an easement and recreational trail use exceeds the scope of the railroad's easement (prongs 1 and 2 of *Preseault II*); or (2) the railroad's

[61] Oral Argument, *Preseault I*, 494 U.S. 1 (No. 88-1076) (statements of Chief Justice Rehnquist), available at http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/argument.

[62] *See Toews,* 376 F.3d at 1376.

easement is abandoned or expires under state law prior to the issuance of a NITU such that the landowner's land is disencumbered by the railroad's easement under state law (prongs 1 and 3 of *Preseault II*).[63]

In this case, Plaintiffs filed a motion for partial summary judgment pertaining to prong 3 in 2017.[64] The CFC stayed further briefing. The issue was fully briefed again in 2019 and the CFC denied Plaintiffs' motion as moot. The CFC struck Plaintiffs' third attempt to file a motion on the issue. Finally, the CFC denied Plaintiffs' fourth attempt to file a motion on the issue.

After Plaintiffs' first motion for summary judgment on liability pertaining to state law abandonment under prong 3 of *Preseault II* was filed on July 25, 2017 (Appx1098-1211), the CFC entered a Scheduling Order that directed the parties to suspend briefing on Plaintiffs' motion while the parties briefed Plaintiffs' motion for reconsideration pertaining to scope (Appx17-18). After granting in part and denying in part Plaintiffs' motion for reconsideration pertaining to prong 2 of *Preseault II* (Appx19-25), the CFC then issued a stay (Appx1286-1287), lifted the stay (Appx1333-1334), and entered a Discovery Scheduling Order on April 13, 2018 (Appx1337).

[63] *See Ellamae Phillips,* 564 F.3d at 1373.
[64] *See* Appx1098-1211.

After discovery, Plaintiffs filed their second and supplemental motion for summary judgment on liability pertaining to both the scope of the easements and state law abandonment on February 5, 2019 (Appx1402-1683). The CFC then entered an Order that denied all pending motions, including Plaintiffs' motion for summary judgment and the government's cross-motion for summary judgment, on September 27, 2019 (Appx26-30). The CFC denied all of the pending motions as "moot" and then entered a Scheduling Order on October 28, 2019 that directed Plaintiffs to file any further motions for summary judgment for which title and standing remained a disputed issue by January 10, 2020 (Appx1896-1897).

Plaintiffs filed their supplemental motion for summary judgment on the scope of the easements on January 10, 2020 (Appx1909-2019) and, while Plaintiffs' motion for summary judgment pertaining to the scope of the easements was still pending, Plaintiffs filed their third motion for summary judgment on liability pertaining to state law abandonment under prong 3 of *Preseault II* on October 16, 2020 (Appx2165-2315). The government filed a motion to strike Plaintiffs' third motion for summary judgment on liability pertaining to state law abandonment under prong 3 of *Preseault II* (Appx2439-2441) and the CFC granted the government's motion to strike Plaintiffs' third motion for partial summary judgment pertaining to state law abandonment on November 12, 2020 (Appx31-32). The CFC concluded that Plaintiffs' third motion for partial summary judgment on state law

abandonment violated the CFC's Scheduling Order that was issued on October 28, 2019 and also stated that "if Plaintiffs wish to file a motion for leave to file an additional motion for summary judgment, they may do so, and the Court will consider all properly briefed arguments in that context." *See* Appx32.

Plaintiffs then filed a motion for leave to file an alternative motion for summary judgment on state law abandonment pursuant to prong 3 of *Preseault II* on July 16, 2021 (Appx2492-2501). The government opposed Plaintiffs' motion and the CFC entered an Opinion on October 12, 2021 which denied Plaintiffs' motion for leave to file an alternative motion for summary judgment on state law abandonment for the fourth time (Appx2543-2547). The CFC concluded that Plaintiffs had not offered any adequate explanation as to why Plaintiffs' third and fourth motions for summary judgment on state law abandonment had not been filed earlier in conjunction with the CFC's Scheduling Order entered on October 28, 2019 (Appx1896-1897) which set a deadline of January 10, 2020.

The CFC had significant discretion to allow amended and/or supplemental pleadings under Rules 15 and 16 and to modify the briefing schedule promulgated in October of 2019 which required additional summary judgment briefs be filed by January of 2020. Although no precise definition of what constitutes "good cause" has been established by this Court, the focus should require an analysis of counsel's diligence, counsel's explanation for any delay, and potential prejudice. *See Simio,*

LLC v. FlexSim Software Prod. Inc., 983 F. 3d 1353, 1365-66 (Fed. Cir. 2020); *Advanced Software Design Corp. v. Fiserv, Inc.,* 641 F.3d 1368, 1381 (Fed. Cir. 2011).

The good cause standard ultimately provides the CFC with significant discretion to either allow supplemental pleadings or to modify a briefing schedule. Under the appropriate analysis, the CFC should have at least looked at 4 factors when analyzing Plaintiffs' motion to permit the third and fourth filings of a summary judgment motion on state law abandonment, including (1) Plaintiffs' counsel's explanation for the delayed filing; (2) the importance of the motion for summary judgment; (3) the potential prejudice in allowing the supplemental pleading; and (4) the availability of a continuance or further time delay to secure such prejudice. *See Morpho Trust USA, LLC v. United States,* 132 Fed. Cl. 419, 420-21 (Fed. Cl. 2017); *Sys. Fuels, Inc. v. United States,* 111 Fed. Cl. 381, 383 (Fed. Cl. 2013).

Under these facts, since Plaintiffs' motion for partial summary judgment on state law abandonment had already been submitted on two occasions, once when the CFC stayed briefing and once when the motion was denied as moot, justice requires that Plaintiffs should have been allowed to supplement their two prior motions and good cause also exists because the issue had already been briefed on two prior occasions and the Court never ruled. Simply put, Plaintiffs' counsel did not believe

that the scheduling order pertaining to additional summary judgment briefs applied to prong 3 of *Preseault II*.

All of the CFC's orders relating to discovery and the search for extrinsic evidence pertained to the scope of the easements at issue. The fact is that, even though the CFC denied Plaintiffs' second motion for partial summary judgment pertaining to state law abandonment as moot, none of the difficulties that the CFC had with respect to Professor Ely's report that resulted in the CFC's denial of Plaintiffs' second motion for partial summary judgment on scope as moot had anything to do with Plaintiffs' second motion for partial summary judgment on state law abandonment.

Prong 3 of *Preseault II* is an alternative path to liability that exists separate and distinct from whatever determination the CFC made with respect to scope and now, after the CFC denied Plaintiffs' third and fourth attempts to file on the issue, the importance of the issue is obvious. The third and fourth motions were filed while summary judgment was still pending on prong 2 and, since the CFC ultimately granted the government's cross-motion on scope, the prejudice is open and obvious.

This is simply not a situation where the issue was raised in an untimely manner or Plaintiffs' counsel was not diligent. Plaintiffs had previously filed motions for summary judgment on this exact subject on two prior occasions. It is obviously important for the CFC to rule on state law abandonment since it is an alternative

means by which Plaintiffs are entitled to recover. There is obvious and extreme prejudice against the Plaintiffs if the issue is not decided.

The abandonment of an easement in Missouri under prong 3 of *Preseault II* is proven by evidence of nonuse plus an intention to abandon. *See Hatton v. Kansas City, C&S Ry. Co.,* 162 S.W. 227 (Mo. 1913); *Dalton v. Johnson,* 320 S.W.2d 659, 574 (Mo. 1959); *Schuermann Enterprises, Inc. v. St. Louis County,* 436 S.W.2d 666, 668 (Mo. 1969); *Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc.,* 742 S.W.2d 182 (Mo. App. 1986) ("*KCATA*"). The uncontroverted evidence in this case is that the railroad actually ceased running trains over 40 years ago.[65] In addition to the fact that no trains have run since approximately 1980, the undisputed evidence also conclusively establishes that the rails and ties were removed and that it is impossible to use the right-of-way for railroad purposes.[66]

Under Missouri law, nonuse is easily established under these facts and an intention to abandon is inferred by the discontinuance of rail service with no prospect for resumption of service. *See KCATA,* 742 S.W.2d at 191. The nonuse of the right-of-way for almost 40 years is also strong evidence of the railroad's intent to abandon which, along with their application to abandon filed with the STB and the subsequent

[65] Sixteen Plaintiffs filed interrogatory answers which established that the trains stopped running around 1980, and that evidence is unrefuted. *See* Appx1578-1613.

[66] *See* Appx1578-1613.

removal of rails and ties, confirms the railroad's intention to abandon (the removal of the rails and ties was an obvious act that puts the railroad's intent to abandon into effect). Not only is the fact of nonuse for almost 40 years strong evidence of the railroad's intent to abandon, but the railroad also specifically and directly stated their intent to abandon when they filed their verified Notice of Exemption before the STB.

The CFC previously addressed abandonment law in Missouri in detail in *Glosemeyer*. In addition to reviewing Missouri law on abandonment as set forth in *KCATA,* the CFC specifically stated that the railroad's application to the STB for authority to abandon was clear evidence of intent to abandon their easement and the fact that no trains had been run over those easements for years, such as here, is strong evidence of abandonment. *See Glosemeyer*, 45 Fed. Cl. at 777.

The facts pertaining to abandonment in this case are much more substantial than the facts that resulted in an abandonment determination in either *KCATA* or *Glosemeyer*. Under Missouri law, since the standard requires an intent to abandon and an act which puts the intent into effect, state law abandonment occurred under prong 3 of *Preseault II* prior to the issuance of the NITU and all of these Plaintiffs had their land taken when the NITU was issued whether or not the scope of the easements was broad enough to encompass railbanking and a hiking and biking trail.

IV. CONCLUSION

The CFC's ruling that the voluntary grants to the railroad were broad enough to encompass railbanking and the construction of a hiking and biking trail should be reversed as a matter of law and the CFC's decision to strike Plaintiffs' alternative motion for summary judgment on state law abandonment should be reversed, if necessary, as an abuse of discretion.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS/APPELLEES

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Case Number: 2022-1277

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Addendum

In the United States Court of Federal Claims

No. 15-421L

(E-Filed June 23, 2017)

DAVID H. & ARLINE M. BEHRENS, et al.,	)	
Plaintiffs,	)	Motion for Summary Judgment; RCFC 56; Rails-to-Trails; Trails Act; Fifth Amendment Takings; Railbanking
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

Thomas S. Stewart, Kansas City, MO, for plaintiffs.

Edward C. Thomas, Trial Attorney, with whom were John C. Cruden, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, for defendant. Evelyn Kitay, Associate General Counsel, United States Surface Transportation Board, Washington, DC, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge

Plaintiffs are landowners along a 144.3-mile rail corridor owned by the Missouri Central Railroad Company (MCRR). See ECF No. 24 at 4 (fourth amended complaint). The rail corridor stretches through the center of Missouri, from Pettis County to Franklin County. See id. Plaintiffs claim they have suffered a Fifth Amendment taking of their property interests as a result of MCRR's efforts to discontinue use of the rail corridor, and allow use of the property as a recreational trail. See id. at 20. This is one of four lawsuits brought by plaintiffs in this court alleging a takings claim along this same rail corridor. See Abbott, et al. v. United States, Case No. 15-211; Burnett, et al. v. United States, Case No. 16-995; and Axmark, et al. v. United States, Case No. 16-1138.

Before the court are the parties' cross-motions for summary judgment, pursuant to Rule 56 of the Rules for the United States Court of Federal Claims (RCFC). See ECF

Nos. 34 and 36. For the reasons set forth below, plaintiffs' motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**.

I. Background

In 1983, Congress enacted the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, to the National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. § 1241 et seq.) (2012) (the Trails Act). The Trails Act provides railroads an alternative to abandoning their use of a rail line by preserving the rail corridor for future rail use, a practice known as "railbanking." See 16 U.S.C. § 1247(d) (2012); Preseault v. I.C.C. (Preseault I), 494 U.S. 1, 6-7 (1990). A railbanked corridor can be used for other public purposes in the interim, such as a public trail. Preseault I, 494 U.S. at 6-7.

Once an abandonment application or request for an exemption is filed with the Surface Transportation Board (STB), a party interested in interim trail use of the railroad corridor may request the issuance of a certificate of interim trail use (CITU)—for an abandonment application proceeding—or a notice of interim trail use (NITU)—for an abandonment exemption proceeding. See 49 C.F.R. § 1152.29(c)-(d). If the railroad indicates that it is willing to negotiate a railbanking and interim trail use agreement, the STB issues a NITU. See Preseault I, 494 U.S. at 7 n.5.

Upon the issuance of a NITU, the railroad's initial abandonment proceedings are suspended and a 180-day period begins for the rail operator and third party to negotiate a railbanking and interim trail use agreement. See id. If an agreement is reached, the abandonment proceedings are suspended and rail service is discontinued. See id. Under the terms of the Trails Act, interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (2012); see also 49 C.F.R. § 1152.29 (implementing regulations). If no agreement is reached, the rail operator may continue to pursue abandonment proceedings. See 49 C.F.R. § 1152.29(d)(1).

The Fifth Amendment states that private property is not to "be taken for public use, without just compensation." U.S. CONST. amend. V. Here, plaintiffs claim they have suffered a Fifth Amendment taking of their property interests as result of the NITU issued by the STB after MCRR sought permission to abandon the rail corridor at issue. See ECF No. 24 at 19-20. The expiration date of the NITU at issue is February 21, 2018. See Missouri Central Railroad Co.—Abandonment Exemption—In Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, MO., STB Docket No. AB-1068 (Sub-NO. 3X), Dec. ID No. 45595 (served Dec. 23, 2016). To date, MCRR has not entered into a railbanking and interim trail use agreement, and continues to hold all of its property rights in the subject rail corridor by either fee title or easement. See ECF No. 36 at 21.

Plaintiffs now seek summary judgment on liability for claims related to 71 parcels of land.[1] Plaintiffs argue that they are entitled to such judgment for three reasons:

> (1) Plaintiffs owned fee simple title to the property adjacent to the railroad corridor;
>
> (2) The railroad originally acquired mere easements, pursuant to Missouri law, by and through nine condemnations, adverse possession, and 33 deeds; and
>
> (3) The railroad's easement was limited to railroad purposes, and the conversion of the easement for a public recreational trail is beyond the scope of the easement, and thus constituted a taking that requires just compensation.

See ECF No. 34 at 3-4.

In opposition, and by way of cross-motion for summary judgment, defendant asserts that many of plaintiffs' claims are improper because either: (1) plaintiffs do not have a valid property interest in the segments of the rail corridor allegedly adjacent to their land, or (2) the deeds relating to certain parcels convey easements broad enough to permit interim trail use. See ECF No. 36 at 1. Defendant also argues that it is premature to determine whether defendant's actions effected a permanent or a temporary taking because the railroad company has not entered into a trail use agreement or consummated abandonment. See id. at 2.

Briefing is complete on the parties' motions for summary judgment. Oral argument was not requested by the parties and was not deemed necessary by the court. The matter is now ripe for a ruling.

II. Legal Standards

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S.

[1] Plaintiffs initially alleged 74 claims, three of which have since been voluntarily dismissed (claims 13B, 27, and 39A). See ECF No. 30.

242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist such that the case should proceed to trial. Id. at 324.

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The court, however, must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment.").

Because the parties have developed an extensive factual record through discovery, the issues presently before the court are primarily legal in nature. Thus, summary judgment is appropriate, and to the extent any factual disagreements remain, the court finds them to be immaterial to the issues at hand.

III. Analysis

To prevail on a Fifth Amendment takings claim arising from the issuance of a NITU, a plaintiff must prove that the conversion of a railroad right-of-way to trail use effectively eliminates any state law reversionary property interest that plaintiff would have otherwise had. See Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004) (citing Preseault v. United States (Preseault II), 100 F.3d 1525, 1543 (Fed. Cir. 1996) (en banc)). The Federal Circuit has set forth a framework for analyzing takings claims under the Trails Act which begins with establishing whether an ownership interest exists in the segment of the rail corridor. See Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009). The court applies state law when evaluating the nature of the property interest at issue. See Preseault I, 494 U.S. at 8, 16.

If a railroad owns the subject property in fee, the United States is not liable for a taking. Preseault II, 100 F.3d at 1533. When the land at issue is subject to a railroad easement, a plaintiff may establish the right to just compensation in one of two ways. First, a plaintiff can show that the proposed trail use falls outside the scope of the

easement. See Ellamae Phillips, 564 F.3d at 1373. See also Romanoff Equities, Inc. v. United States, 815 F.3d 809, 812-13 (Fed. Cir. 2016), cert. denied, 137 S. Ct. 597 (2016) (noting that if the trail use falls within the scope of the easement at issue, the United States has no takings liability). Alternatively, plaintiffs can show that their property rights had already reverted because the railroad easement was abandoned before the STB issued its NITU. See Ellamae Phillips, 564 F.3d at 1373.

A. Missouri law does not support a presumption that easements conveyed to a railroad by voluntary grant are limited in scope to railroad purposes only

As a preliminary matter, the court addresses an argument that runs throughout plaintiffs' briefing. Much of plaintiffs' theory of defendant's liability is premised on their position that any conveyance of an easement to a railroad made by voluntary grant, as opposed to a forced conveyance through condemnation proceedings, is statutorily limited in scope to railroad purposes only. See ECF No. 37 at 21 ("[I]f the original source conveyance deed was a voluntary grant under Missouri's statutory scheme then the scope of it is limited to railroad purposes by statute."). The court does not find that such a presumption exists.

The Missouri statute in question reads:

> Every corporation formed under this [Railroads] chapter shall, in addition to the powers herein conferred, have power. . . (2) To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only.

Mo. Rev. Stat. § 388.210(2). Plaintiffs argue that the only correct interpretation of the term "for the purpose of such grant only" must be that the scope of any easement made by voluntary grant to a railroad is limited, in all cases, to "railroad purposes only." See ECF No. 35 at 19-25. By this interpretation, plaintiffs assert that trail use necessarily falls outside of the scope of any voluntary grant. See id. at 25 (arguing that "all of the deeds at issue in this case, which are voluntary grants to the railroad, are not only easements to the railroad they are also limited to railroad purposes as a matter of law").

While the court understands the logic of plaintiffs' position, it hesitates to apply this interpretation for several reasons. First, the effect of such an interpretation would be to prevent a property owner from conveying its land, outright, with no conditions or reversionary interests, to a railroad. In the court's view, the statutory language does not unambiguously encompass all voluntary conveyances. And absent a clear indication that Missouri lawmakers intended such a result, the court will not impose this significant limitation on a property owner's right to transfer its property. See Hinshaw v. M-C-M

Properties, LLC, 450 S.W.3d 823, 827 (Mo. Ct. App. 2014) ("The cardinal rule regarding an interpretation of a deed is to ascertain the intention of the parties and to give that intention effect.") (citing Dean Machinery Co. v. Union Bank,106 S.W.3d 510, 520 (Mo. App. 2003).

Furthermore, the cases on which plaintiffs rely do not provide support for this inference. See ECF No. 35 at 14-19. In both Brown v. Weare, 152 S.W.2d 649 (Mo. 1941), and Moore v. Missouri Friends of The Wabash Trace Nature Trail, Inc. (Moore v. Missouri Friends), 991 S.W.2d 681 (Mo. App. 1999), the court expressly considered the limiting language of the conveying deeds in determining the scope of the easements and upon determining the grants were voluntary did not presume, as plaintiffs suggest, that the scope of the easements was limited only to railroad purposes. Brown, 152 S.W.2d at 652-54 (deed expressly conveyed a "right of way for said Railroad" and made another grant only "so long as the same shall be used for the construction, use and occupation of said railroad company"); Moore, 991 S.W.2d at 687 (deed included language "for Rail Road purposes"). And the court's decision in Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc., 981 S.W.2d 644 (Mo. App. 1998), provides even less support for plaintiffs' proposed interpretation because it did not involve voluntary grants, but rather involuntary grants by condemnation. See id at 648-50.

The court, therefore, declines to apply the presumption suggested by plaintiffs, and instead looks to the express language of each deed at issue to determine what, if any, limitations exist. Hubbert, et al. v. United States, 58 Fed. Cl. 613, 615-16 (2003); Schuermann Enter., Inc. v. St. Louis Cty., 436 S.W.2d 666, 669 (Mo. 1969) (per curiam).

B. Defendant is not liable for a taking where the rail corridor is owned by MCRR in fee

In order to establish a right to just compensation, plaintiffs must demonstrate a valid ownership interest in the property at issue. Ellamae Phillips, 564 F.3d at 1373. Plaintiffs cannot make such a showing with regard to property owned by MCRR in fee.

1. Claim 9B (Windell and Kristine Kenney), the Tilbe Deed

Defendant claims that, based on the express language of the relevant deed, it owns in fee the portion of the rail corridor at issue in claim 9B. See ECF No. 36 at 24. In the Tilbe Deed, the property owner states: "I hereby grant, sell and quitclaim to the said St. Louis, Kansas City & Colorado Railroad Company and to its successors and assigns forever" the described property. See ECF No. 36-3 at 3. The conveyance was made "for and in consideration of the sum of Ten ($10) Dollars." See id. The deed concludes with the following language:

> To Have and to Hold the same unto the said St. Louis, Kansas City & Colorado Railroad Company and unto its successors and assigns forever, with all appurtenances thereunto belonging.
>
> This grant, and conveyance is conditioned, however that the said Railroad Company shall complete said road across said tract of land within two years from the date of the execution of this deed, otherwise it is to be null and void as a deed or grant and the title to the above described tract of ___ is to revert to and revest in me, the said H. J. Tilbe, Witness my hand and seal on this the 28th day of May 1901.

See id. at 3-4. Plaintiffs contend that the language of the Tilbe Deed effects a voluntary grant and, as such, conveys only an easement limited in scope "to railroad purposes as a matter of law." See ECF No. 37 at 21. For the reasons previously discussed, the court does not credit this assumption.

As an alternative means of demonstrating that the Tilbe Deed involves a voluntary grant, plaintiffs also assert that the ten dollars provided as consideration for the deed is nominal. See ECF No. 37 at 21. This conclusion does not comport with Missouri law. Under relevant precedent, any consideration of more than one dollar is deemed "valuable consideration." See ECF No. 36 at 25-26 (citing Brown, 152 S.W.2d at 653; Allaben v. Shelbourne, 212 S.W.2d 719, 723 (Mo. 1948) ("[A]ny other stated sum of money in excess of one cent, one dime, or one dollar . . . is a valuable consideration within the meaning of the law of conveyancing.").

In response to plaintiffs' arguments, defendant points to several clauses within the source deed language that indicate a conveyance of a fee simple interest. The property was "grant[ed]" and "quitclaimed" to the railroad company "and unto its successors and assigns forever, with all appurtenances thereunto belonging." See ECF No. 36-3 at 3. Each of these words and phrases indicate the owner's intention to part with the property permanently. See Nixon v. Franklin, 289 S.W.2d 82, 88 (Mo. 1956) (holding that the words "grant, bargain, and sell" are evidence of a conveyance in fee); Bayless v. Gonz, 684 S.W.2d 512, 513 (Mo. App. (1984) (holding that "to have and hold" and all "appurtenances" language in a habendum claims indicates a fee conveyance).

This conclusion is buttressed by the one condition that is specifically included in the deed:

> This grant, and conveyance is conditioned, however that the said Railroad Company shall complete said road across said tract of land within two years from the date of the execution of this deed, otherwise it is to be null and void as a deed or grant and the title to the above described tract of ___ is to revert to and revest in me, the said H. J. Tilbe.

See ECF No. 36-3 at 4. The express language of the deed makes clear that the owner intended to convey title to the subject property pursuant to this deed, and that the only condition that could operate to cancel the conveyance, should it go unmet, is the railroad company's promise to complete a nearby road within two years. Plaintiffs have presented no evidence that the railroad company failed to meet this condition.

The court notes that the Tilbe deed contains additional conveyances that are not at issue here—one to allow for cuttings and embankments, and one providing a right of entry for the purpose of railroad construction. See id. at 3. These conveyances are not at issue because they are not part of the rail corridor, and thus, any potentially limiting language contained in these ancillary conveyances will not operate to define the character of what the court has previously held to be a conveyance in fee. See Clevenger v. Chicago, Milwaukee & St. Paul Ry. Co., 210 S.W. 867, 868 (Mo. 1919) (holding that the conveyance for the center 100 feet was in fee and the side tracks were easements); Hinshaw, 450 S.W. 3d at 827-29 (holding that one of the conveyances was in fee and the other adjacent conveyances were easements).

As such, the court finds that MCRR owns in fee the rail corridor that is the subject of claim 9B.

2. Claims 11 (John and Beverly Smith) and 60 (Julie Branson), the Hafner Deed

The property at issue in claims 11 and 60, the subject of the Hafner deed, includes a 100-foot wide right of way flanked by 100-foot strips of land on either side—for the purpose of cuttings and embankments. See ECF No. 36-3 at 8-9. As with the Tilbe deed, defendant argues that the language of the deed conveys a fee interest in the center 100-foot strip, and that the two separate conveyances that are not at issue here. See ECF No. 36 at 27-29. Plaintiffs disagree, arguing that the deed conveys an easement of a 300-foot wide strip of land. See ECF No. 37 at 22.

In relevant part, the deed states that for consideration in the amount of fifty dollars, the Hafners "grant, bargain and sell, convey and confirm" the center 100-foot strip of property to the railroad company. See ECF 36-3 at 8. After reciting a description of that property, the deed also includes the following passage:

> And for the purpose of cuttings and embankments necessary for the proper construction and security of said railroad across the tracts of land described aforesaid, such additional strips or parcels of land as may be necessary for that purpose One hundred feet on each side of and adjacent to above described way across the aforesaid SW[] of NE[] and the said Henry Dupiech [sic] of St. Louis joins in this deed for the express purpose of releasing above

> described strips for right of way & cuttings & embankments from his deed of trust on above described land dated _____ and also the right of entry across adjacent land of the undersigned for purposes of construction of said railroad with free and undisturbed ingress and egress to said railroad.

Id. at 8-9. And in the concluding paragraph, the deed notes that railroad company shall hold the land "together with all the right, immunities, privileges and appurtenances to the same . . . forever." See id. at 9.

Defendant takes the position that the rail corridor, which consists of the center 100-foot strip, is a separate and distinct conveyance from the strips on either side. See ECF No. 36 at 28. According to defendant, MCRR owns the rail corridor in fee, and that "both the cuttings-and-embankments and temporary-access conveyances are irrelevant because they do not grant any land currently at issue." See ECF No. 36 at 28. Defendant reasons that, when appropriately separated from the two temporary conveyances which are already part of plaintiffs' property, the rail corridor conveyance contains no limiting language, and thus, effected a conveyance in fee. See ECF No. 36 at 27.

Plaintiffs insist that the deed addresses an indivisible 300-foot strip of property. See ECF No. 37 at 22. When viewed as a solitary conveyance, plaintiffs argue, inclusion of the phrases "way across the aforesaid" and "above described strips for right of way" sufficiently limit the grant such that the court should conclude that the railroad received only an easement. See ECF No. 37 at 22. Defendant, in its reply, characterizes the phrase "way across the aforesaid" as "merely descriptive," not limiting. ECF No. 38 at 8 (citing Hubbert v. United States, 58 Fed. Cl. 613, 615-16 (2003) and Schuermann Enters., Inc. v. St. Louis Cty., 436 S.W.2d 666, 669 (Mo. 1969)). In addition, defendant asserts that the phrase "above described strips for right of way" appears in "a release from a deed of trust, which has no bearing on deed interpretation." Id. (citing Eurengy v. Equitable Realty Corp., 107 S.W.2d 68, 71 (Mo. 1937) and Libby v. Uptegrove, 988 S.W.2d 131, 132 (Mo. Ct. App. 1999)).

The court agrees with defendant that the Hafner deed makes more than one conveyance, and that each must be treated separately under Missouri law. See Clevenger, 210 S.W. at 867-68 (Mo. 1919); Hinshaw, 450 S.W.3d at 827-29. As such, any limitations that may have been intended to circumscribe the cuttings-and-embankments conveyance or the temporary-access conveyance cannot be read to limit the conveyance of the center 100-foot strip used as part of the rail corridor.

Because the Hafner deed conveyed the center 100-foot wide strip of land to the railroad for valuable consideration without limiting language, the railroad possesses a fee interest in that property.

3. Claim 17 (Joyce Medlock), the Keeney Deed[2]

Like the Hafner and Tilbe deeds, the Keeney deed contains three separate conveyances including a 100-foot wide parcel for the rail corridor, and 100-foot wide parcels on either side of the corridor. See ECF No. 36-3 at 20-21. Defendant concedes that the parcels on either side of the rail corridor are easements, see ECF No. 36 at 30, but argues that the railroad owns a fee interest in the center parcel based on the deed language and valuable consideration of thirty-five dollars, see id. at 30.

The deed states that the grantor "grant[s], bargain[s], and sell[s], convey[s] and confirm[s]" the center strip of property. ECF No. 36-3 at 20. The deed also contains the habendum language: "To [h]ave and to hold the same, together with all the rights, immunities, privileges and appurtenances to the same." Id. at 21. As the court has previously observed, this is the language of fee conveyance under Missouri law. See Nixon v. Franklin, 289 S.W.2d 82, 88 (Mo. 1956) (holding that the words "grant, bargain, and sell" are evidence of a conveyance in fee); Bayless v. Gonz, 684 S.W.2d at 513 (holding that "to have and hold" and all "appurtenances" language in a habendum claims indicates a fee conveyance).

Plaintiffs argue that the deed's description of the rail corridor as a "right of way" sufficiently limits what might otherwise be a fee conveyance, such that the court should find the rail corridor conveyance was only an easement. See ECF No. 37 at 23 (citing ECF No. 36-3 at 21). Such a conclusion, however, is contrary to Missouri law. See Hubbert, 58 Fed. Cl. 613, 615-16 (2003) (holding that the phrase "right of way" is merely descriptive under Missouri law).

For these reasons, the court finds that MCRR owns the center 100-foot conveyance in fee.

C. Plaintiffs have failed to prove that they possess a valid property interest in claims 1A (Mark and Helen Heintz), 29 (Manuel D. Duncan), and 41 (Kurtz Revocable Living Trust)

As noted above, the first step in determining whether a taking has occurred under the Trails Act is to identify whether plaintiff has an actual ownership interest in the property at issue. Ellamae Phillips, 564 F.3d at 1373. Plaintiffs bear the burden of

[2] Plaintiffs have presented two Keeney Deeds—one relating to the north portion of the property, and the second relating to the south portion of the property. This section analyzes only the deed relating to the south portion of property because defendant has stated that it lays no claim to any part of the north section, as it contains no part of the rail corridor. See ECF No. 36 at 31.

proving their property interest as a basis for their takings claim. Caldwell, 391 F.3d at 1228. Here, plaintiffs have failed to establish an ownership interest for several of the claims before the court.

1. Claims 1A (Mark and Helen Heintz) and 29 (Manuel D. Duncan)

The subject parcels of the land in claims 1A and 29 are separated from the railroad's right-of-way by Highway 28 in Maries County and Highway 52 in Morgan County, respectively. See ECF No. 37 at 25. Both highways were constructed long after the Missouri Department of Transportation acquired the railroad's right-of-way. See id. Plaintiffs assert that the two highways are themselves easements and thus, the adjacent landowners have an ownership interest that extends to the centerline of the railroad's right of way. See id.

This argument implicates what is known as the centerline presumption under Missouri law. As the court in Brown v. Weare explained, in cases where a railroad receives only an easement:

> in the absence of evidence to the contrary . . . the title to the fee is presumed to be in the abutting landowners and the title of each extends to the center of the way. This presumption may be rebutted by evidence to show that the entire way has been taken from the land of only one of the abutting owners.

Brown, 152 S.W.2d at 655 (citations omitted). See also St. Louis Cty. v. St. Appalonia Corp., 471 S.W.2d 238, 243 (Mo. 1971).

With regard to claims 1A and 29, defendant argues that plaintiffs lack standing because the properties at issue "are not, and never were, adjacent to the rail corridor." ECF No. 36 at 34. Thus, defendant insists, plaintiffs' cannot claim a centerline presumption across the highways. See id. at 35; ECF No. 38 at 10-11. In support of its position, defendant cites Moore v. United States, which involves an application of Missouri law to Trails Act cases where a public road separates properties from the railroad corridor. 58 Fed. Cl. 134, 138-39 (2003). The court held that plaintiffs owned "fee title up to the county road [but] not across it to the railroad corridor." Moore, 58 Fed. Cl. at 138-39. Here, as in Moore, the property records show that plaintiffs' land was never adjacent to the rail corridor; rather, it was part of a larger tract of subdivided land that was bounded by the southern line of the highway. See ECF No. 36 at 34 (citing ECF No. 36-4 at 1-25).

As defendant observes, contrary to plaintiffs' assertion, there is no presumption that the state highway is an easement under Missouri law. See id. at 35 (citing Ogg v. Mediacom, L.L.C., 142 S.W.3d 801, 811 (Mo. Ct. App. 2004); St. Louis Cty., 471 S.W.2d at 242)). Defendant adds that even if the highway were an easement, plaintiffs'

ownership interest would extend only to the center of the highway, but not to the rail corridor because plaintiffs' historical property boundary is the highway. Id. (citing Brown, 152 S.W.2d at 654-55; St. Louis Cty., 471 S.W. 2d at 243).

Plaintiffs have not pointed to any evidence in the record demonstrating that they own an interest in the land on which Highways 28 and 52 are situated. Nor have plaintiffs provided any legal support for their claim that the two highways are themselves easements that create a presumption of property ownership to the centerline of the railroad's right of way. Therefore, plaintiffs have not established that a genuine issue of material fact exists as to their ownership interest in the property at issue in claim 1A or claim 29.

2. Claim 41 (Kurtz Revocable Living Trust)

Defendant argues that it is entitled to summary judgment because the land in claim 41 lies entirely in section four, and the subject rail corridor lies entirely in section nine. See ECF No. 36 at 33. In support of this assertion, defendant points to a map from Morgan county records of the property produced to it by plaintiffs. See ECF No. 36-3 at 37. The map clearly shows that the property, highlighted in red, is contained in section four, while the rail line is below, contained in section nine. See id. Defendant notes that plaintiffs admitted as much when they acknowledged that "[t]he current parcel boundary actually abuts the section line and is contained within section 4," but that "the railroad's right-of-way . . . is contained within section 9." ECF No. 35 at 36. Thus, defendant asserts, plaintiffs do not have a viable claim.

In response, plaintiffs have altered their original argument to urge instead that there is a factual dispute as to the location of the rail corridor, and proposes that a survey of the area should be taken to resolve it. See ECF No. 37 at 26. Defendant denies that a factual dispute exists and argues that plaintiffs' request for additional discovery should be denied because it is in effect a request under RCFC 56(d), without the required affidavit or declaration. See ECF No. 38 at 9-10.

Plaintiffs bear the burden of showing that the location of the land in claim 41 raises an issue of material fact for trial, Celotex Corp., 477 U.S. at 323, but they have failed to do so. The record before the court is clear. The land involved in plaintiffs' claim 41 is not adjacent to the rail corridor at issue.

D. Claims 21A (Connie Humphrey), 21B (Connie Humphrey), 22 (Tony Humphrey), 23 (Etterville Christian Church), and 24 (Barbara Galloway and Richard Popp) involve property outside the scope of this case

Defendant moves for summary judgment on claims 21A, 21B, 22, 23, and 24 on the basis that these claims involve properties that are not included in the land MCRR

sought to abandon and to which the pertinent NITU applies. See ECF No. 36 at 35 (citing ECF No. 36-2 at 6-13 (NITU)). Defendant presents evidence, in the form of the quitclaim deed, that MCRR's predecessor-in-interest quitclaimed the land involved in these claims in 1999. See id. at 36 (citing ECF No. 36-5 at 96). Defendant argues that because MCRR did not own an interest in the property at issue in claims 21A, 21B, 22, 23, and 24 at the time of issuance of the NITU on which plaintiffs rely, plaintiffs do not have a basis for their claims. Id.

Plaintiffs argue that the original source conveyance to the railroad was an easement because the consideration provided was nominal. See ECF No. 37 at 23. According to plaintiffs, because the railroad received an easement only, it could not later quitclaim more than an easement interest 1999. Id. at 24. Plaintiffs go on to argue that because the interest was quitclaimed to an entity related to MCRR that later dissolved, and the land has since been railbanked, defendant cannot successfully question whether claims 21A, 21B, 22, 23, and 24 involve land adjacent to the rail corridor at issue. Id.

MCRR initiated the STB abandonment proceedings on which the relevant NITU is based. See ECF No. 36-2 at 6-13 (NITU)). To succeed on their takings claims here, plaintiffs must prove that conversion of the railroad's right-of-way to trail use through the NITU would effectively eliminate any state law reversionary property interest they otherwise would have had in that right-of-way. Caldwell, 391 F.3d at 1228 (citing Preseault II, 100 F.3d at 1543). See also ECF No. 24 (plaintiffs' fourth amended complaint alleging that plaintiffs' claims arise out of easements owned by MCRR). Plaintiffs have failed to demonstrate that any interest in the property at issue in claims 21A, 21B, 22, 23, and 24 was held by MCRR at the time the NITU was issued. Because plaintiffs' complaint alleges that operation of the Trails Act effected a taking, see ECF No. 24 at 20, any property not covered by the NITU, which was issued pursuant to the Trails Act, cannot be part of plaintiffs' case as alleged.

As such, the court finds that claims 21A, 21B, 22, 23, and 24 relate to property outside the scope of this litigation.

E. Defendant is not liable for a taking where the conveyed easements are broad enough to encompass trail use and railbanking

The United States has no takings liability where trail use falls within the scope of the easements at issue. See Romanoff Equities, Inc., 815 F.3d at 812-13; Ellamae Phillips, 564 F.3d at 1373. Plaintiffs bear the burden of establishing that trail use falls outside the scope of those easements. Preseault II, 100 F.3d at 1533.

Defendant asserts that several of the easements conveyed by voluntary grant to the railroad are broad enough to encompass both trail use and railbanking. See ECF No. 36 at 38-41. In its cross-motion, defendant includes a table in which it lists the deeds that

convey voluntary grants and identifies the 36 corresponding claims. See id. at 41-43. The table includes the following claims: 1A (Mark and Helen Heintz), 2 (Gordon and Judith Gehlert), 3 (Tom Kixmueller), 4 (Sherry Crider), 5 (Sonya Durbin-Wiles and Gary Wiles), 6 (Von Buehrlen), 7 (Gary Seba), 8 (Casey & Rainey Schalk), 9A (Wendell and Christine Keeney), 9C (Wendall and Christine Keeney), 10 (Linda Taggart), 14 (Duane Siegler), 15 (Jane Trimble), 16 (Greg Thomas), 25 (Rodger Bax), 26 (Iris Brown), 34A (Mariann Murphy), 39C (Michael & Mary Reed), 39D (Michael & Mary Reed), 40 (CJ Welding & Fabrication), 45 (Rodney and Brenda Thompson), 47A (Frederick and Virginia Bethmann and Theodore Bethman), 47B (Frederick and Virginia Bethmann and Theodore Bethman), 48 (Mark Lammert), 49B (Kenneth Butler and Sheila Hamm), 50 (Macy and Debra Jett, Terry Lyndon Jett and Thomas Parker Jett), 51 (Kathryn Giesler c/o Merry Drewel), 52 (Nicholas Hilkemeyer, Patrick Hilkemeyer and Bernard Hilkemeyer), 53 (Robert E. and Mary Rodeman Trust), 54 (James and Dorothy Summers), 55 (Sharon Vinci), 56 (Roger and Rhonda Purl), 57 (Callaghan Wharehouse LLC), 58 (Kenneth P. and Dora Gerber), and 59 (Roger Lenhoff).[3] See id.

Defendant concedes that each identified deed likely conveys an easement as opposed to a fee interest because each deed involves nominal consideration. See id. at 39. All of the deeds include what defendant calls a "primary conveyance" that "conveys the center 100-foot portion of the rail corridor." Id. at 40. A subset of the deeds "also include secondary conveyances referred to as 'cutting-and-embankment' and 'temporary-access' conveyances." Id. Defendant asks the court to draw two conclusions: (1) "that the primary conveyances in the one-dollar deeds convey unrestricted easements that encompass trail use of railbanking," and (2) "that the secondary conveyances do not limit the scope of the primary conveyances." Id. at 41.

Taking the second issue first, the court notes that, as it has already found, each conveyance in a deed must be individually evaluated—limits on one conveyance should not, as a matter of course, be interpreted as a limit on all conveyances. See Clevenger, 210 S.W. at 868 (holding that the conveyance for the center 100 feet was in fee, and that the conveyances for the side tracks were easements); Hinshaw, 450 S.W. 3d at 827-29 (holding that one of the conveyance was in fee and the other adjacent conveyances were easements). Thus, to the extent that any of the deeds included in defendant's table involve secondary conveyances, limits thereon will not be read to apply to the primary conveyance absent evidence of the grantors' intent to do so in a specific document.

The court is left, then, with the task of evaluating the scope of the primary conveyances included in the deeds listed in defendant's table to determine whether the conveyances are broad enough to encompass trail use or railbanking. In its motion,

[3] Plaintiffs' names are recited as set forth in the caption of the fourth amended complaint. See ECF 24.

defendant states that "no court interpreting Missouri law has ever found that a conveyance to a railroad without any limiting language prohibits trail use or railbanking." ECF No. 36 at 40. Here, "[t]he primary conveyances have unrestricted granting clauses, property descriptions and habendum clauses that allow for any used desired by the railroad." Id. at 43-44. As such, defendant insists, the broad and unlimited language of these conveyances allow the railroad to railbank its interest or convert its easement into a trail without implicating plaintiffs' reversionary interests. Id. at 44-46.

In response, plaintiffs reiterate their position that voluntary grants to the railroad are easements, and are statutorily limited to use for railroad purposes under Missouri law. Trail use and railbanking, the argument goes, necessarily exceed the scope of the railroad's easement interest. See ECF No. 37 at 13-17. As the court discussed above, the court does not read Missouri law to create such a presumption.

Plaintiffs have not identified any disputed material fact, or any fact in the record that contravenes defendant's assertion that the primary conveyances in these source deeds are broad enough to enough to encompass trail use and railbanking. Celotex Corp., 477 U.S. at 322.

Because the primary conveyances do not contain language limiting their scope, the court finds that the easements involved in the following claims are broad enough to encompass trail use and railbanking: 1A, 2, 3, 4, 5, 6, 7, 8, 9A, 9C, 10, 14, 15, 16, 25, 26, 34A, 39C, 39D, 40, 45, 47A, 47B, 48, 49B, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59.

IV. Conclusion

For the reasons set forth above, plaintiffs' motion for summary judgment, ECF No. 34, is **DENIED**, and defendant's cross-motion for summary judgment, ECF No. 36, is **GRANTED**.

The parties are directed to confer regarding the effect of the legal conclusions in this opinion and to file a joint stipulation as to the claims that remain viable in this case. As part of the stipulations, the parties shall identify for the court the number and nature of the conveyances involved in each claim. The parties shall file the joint stipulations on or before **July 28, 2017**.

The court reserves its determination as to any liability on the remaining claims until it has had the opportunity to consider the import of the Federal Circuit's decision in Caquelin v. United States, No. 16-1663, which was issued on June 21, 2017. The court would like to hear from the parties on this matter. To that end, also on or before **July 28, 2017**, the parties shall file a joint proposed scheduling order to govern future proceedings in this case. That schedule shall specifically account for submissions from the parties addressing the effect of the Caquelin decision on the issues in this case.

IT IS SO ORDERED.

s/ Patricia Campbell-Smith
PATRICIA CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-421L
(E-Filed: July 28, 2017)

DAVID H. & ARLINE M. BEHRENS, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

ORDER

Before the court in this matter are: (1) plaintiffs' motion for reconsideration of the court's June 23, 2017 opinion, ECF. No. 44; (2) plaintiffs' motion for summary judgment on liability pertaining to abandonment under prong 3 of Preseault II, ECF No. 45; (3) the parties' joint status report and proposed scheduling order, ECF No. 46; and (4) the parties' joint stipulations as to the remaining viable claims, ECF No. 47.

It is the court's position that plaintiffs' motion for reconsideration of the court's June 23, 2017 opinion requires a ruling before proceeding on the remaining three filings before the court. Accordingly, the court shall suspend the briefing of plaintiffs' motion for summary judgment on liability and shall postpone addressing the parties' positions outlined in their joint status report and their joint stipulations until after the court has ruled on plaintiffs' motion for reconsideration.

Pursuant to Rule 59(f) of the Rules of the United States Court of Federal Claims (RCFC), the court hereby directs defendant to file a **response** to plaintiffs' motion for reconsideration, on or before **August 25, 2017**. The clerk's office is directed to suspend defendant's deadline to respond to plaintiffs' motion for summary judgment, ECF No. 45, until further order of the court.

IT IS SO ORDERED.

s/ Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-421L

(E-Filed October 17, 2017)

DAVID H. & ARLINE M. BEHRENS, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion for Reconsideration; RCFC 59(a); Motion for Summary Judgment; RCFC 56; Rails-to-Trails; Trails Act; Fifth Amendment Takings; Railbanking; Motion for Leave to File Amicus Curiae Brief.

Thomas S. Stewart, Kansas City, MO, for plaintiffs.

Edward C. Thomas, Trial Attorney, with whom were John C. Cruden, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, for defendant. Evelyn Kitay, Associate General Counsel, United States Surface Transportation Board, Washington, DC, of counsel.

OPINION

CAMPBELL-SMITH, Judge.

Plaintiffs in this case allege that they have suffered a Fifth Amendment taking of their property. See Pls.' Fourth Am. Compl., ECF No. 24. The parties previously filed cross-motions for summary judgment, which the court resolved in defendant's favor. See Opinion, ECF No. 43. Currently before the court are plaintiffs' motion for reconsideration of the court's June 23, 2017 opinion, ECF No. 44; plaintiffs' new motion for summary judgment, ECF No. 45; and, a motion for leave to file an amicus curiae brief, ECF No. 49, filed by two property law professors, Dale A. Whitman and James W. Ely, Jr., and the National Association of Reversionary Property Owners.

For the reasons that follow, plaintiffs' motion for reconsideration is **DENIED in part**, as to plaintiffs' motion for summary judgment, and **GRANTED in part** as to defendant's cross-motion for summary judgment, plaintiffs' new motion for summary

judgment is **DENIED** as premature, and the motion for leave to file an amicus curiae brief is **DENIED**.

I. Background

In ruling on the parties' cross-motions for summary judgment, the court drew five conclusions: (1) "Missouri law does not support a presumption that easements conveyed to a railroad by voluntary grant are limited in scope to railroad purposes only," see ECF No. 43 at 5; (2) "Defendant is not liable for a taking where the rail corridor is owned by [the railroad] in fee," see id. at 6; (3) "Plaintiffs have failed to prove that they possess a valid property interest in [several specific claims]," see id. at 10; (4) "[Several specific claims] involve property outside the scope of this case," see id. at 12; and (5) "Defendant is not liable for a taking where the conveyed easements are broad enough to encompass trail use and railbanking," see id. at 13.

Plaintiffs now ask the court to reconsider its decision with regard to the final conclusion, on which it denied plaintiffs' motion for summary judgment, ECF No. 34, and granted defendant's cross-motion for summary judgment, ECF No. 36. See ECF No. 44. According to plaintiffs, the court erred in finding that certain conveyances were sufficiently broad to allow trail use and railbanking. See id. at 17 (arguing that "the easement deeds at issue are limited to railroad purposes only despite the fact that they do not specifically say 'for railroad purposes' within the body of the deeds"). They ask the court to reverse its previous decision and enter judgment in their favor. See id. at 28.

As an alternative basis for asking the court to reconsider its decision, plaintiffs have filed a new motion for summary judgment, ECF No. 45, which asserts an argument that they chose not to make in the previous round of dispositive briefing. See ECF No. 44, at 27 n.24 (admitting that plaintiffs have not previously raised the argument made in the new motion for summary judgment on the assumption that the arguments they did make would be sufficient to ensure judgment in their favor).

In addition to the foregoing, property law professors Dale A. Whitman of the University of Missouri, and James W. Ely, Jr., of Vanderbilt University, along with the National Association of Reversionary Property Owners, seek leave to file an amicus curiae brief in support of plaintiffs' motion for reconsideration.

II. Legal Standards

A. Motion for Reconsideration

Plaintiffs make their motion for reconsideration pursuant to Rule 59(a) of the Rules of the United States Court of Federal Claims (RCFC). See ECF No. 44 at 8. RCFC 59(a)(1) provides that rehearing or reconsideration may be granted: "(A) for any

of reason for which a new trial has heretofore been granted in an action at law in federal court; (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States." RCFC 59(a)(1).

The court, "in its discretion, 'may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.'" Biery v. United States, 818 F.3d 704, 711 (Fed. Cir.), cert. denied, 137 S. Ct. 389 (2016). Motions for reconsideration must be supported "by a showing of extraordinary circumstances which justify relief." Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999), aff'd, 250 F.3d 762 (2000)). Such a motion, however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). In addition, "a motion for reconsideration is not intended . . . to give an 'unhappy litigant an additional chance to sway' the court." Matthews v. United States, 73 Fed. Cl. 524, 525 (2006) (quoting Froudi v. United States, 22 Cl. Ct. 290, 300 (1991)).

B. Motion for Leave to File Amicus Curiae Brief

"There is no right to file an amicus brief in this court; the decision whether to allow participation by amici curiae is left entirely to the discretion of the court." Fluor Corp. v. United States, 35 Fed. Cl. 284, 285-86 (1996) (citing Am. Satellite Co. v. United States, 22 Cl. Ct. 547, 549 (1991)). In ruling on a motion for leave to file an amicus brief, the court considers the following factors: objections from the opposing party, interest of the moving party, partisanship on the part of the amici, adequacy of the movant's representation, and timeliness. See id. The court may also consider whether the additional argument is useful to the court's analysis, and whether participation of the amici would cause unnecessary delay. See Health Republic Ins. Co. v. United States, 129 Fed. Cl. 115, 117 (2016).

III. Analysis

A. Motion for Reconsideration

Plaintiffs characterize this court's previous opinion as "completely backwards." See ECF No. 44 at 18. Having considered the plaintiffs' arguments closely and having again reviewed the challenged opinion, the court affirms its central conclusion that Missouri law does not support a presumption that easements conveyed to a railroad by voluntary grant are necessarily limited in scope to plaintiffs' definition of "railroad

purposes." See ECF No. 43 at 5-6. Plaintiffs have presented no change in controlling law, no newly discovered evidence and no clear legal error on this point. Rather, plaintiffs take issue with the court's earlier determination.

In one respect, however, the court finds that plaintiffs' motion for reconsideration is well-founded. It is true that an easement, by its nature, must have a definable scope. Maasen v. Shaw, 133 S.W.3d 514, 518 (Mo. Ct. App. 2004) ("By definition, an easement is 'the mere right of a person to use for a definite purpose another [person]'s land in connection with his [or her] own land.'" (quoting Mahnken v. Gillespie, 43 S.W.2d 797, 800-01 (Mo. 1931))). The court's June 23, 2017 opinion stated that "[b]ecause the primary conveyances do not contain language limiting their scope, the court finds that the easements involved in the following claims are broad enough to encompass trail use and railbanking." See ECF No. 43 at 15. The court's imprecise language implies that the easements are "unlimited." For this reason, the court clarifies this language by finding that a more accurate characterization would be that the easements are "not expressly limited." After considering the parties' arguments currently before the court and the import of the court's June 23, 2017 opinion, the court concludes that, before determining liability with regard to the deeds at issue in plaintiffs' motion for reconsideration, it must first more carefully define the scope of the subject easements.

Under Missouri law, when an easement does not include an expressly stated purpose, it is "incomplete or ambiguous," and the court may consider extrinsic evidence "to determine the parties' intention." See Maasen, 133 S.W.3d. at 519 (citing Fisher v. Miceli, 291 S.W.2d 845, 848 (Mo. 1956)). Relevant evidence may include the circumstances surrounding creation of the easement, its location, and its prior use. See id. (citing Hoelscher v. Simmerock, 921 S.W.2d 676, 679 (Mo. Ct. App. 1996)).

Neither party has successfully established the facts necessary to determine the precise scope of the easement with respect to the grants that do not include explicitly stated purposes. As the court has previously discussed, plaintiffs' argument in the motion for summary judgment relies primarily on a presumption that the court declines to credit. See ECF No. 43 at 5-6, 15. For its part, defendant emphasizes the lack of explicit limitation but fails to define the scope of the easements. See ECF No. 36 at 38-53.

Plaintiffs assert, as an alternative basis for their motion for reconsideration, that the court should grant summary judgment in their favor on the basis of an argument under "prong 3 of the Preseault II test," an argument they admittedly chose not to make as part of their original motion. See ECF No. 44 at 27. After incorporating this new argument into their motion for reconsideration, plaintiffs filed a new motion for summary

judgment.[1] See ECF No 45. A motion for reconsideration, however, "may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." Exxon, 554 U.S. at 485 n.5 (2008) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). Plaintiffs, by their own admission, could have presented the argument under "prong 3 of the Preseault II test" in support of their initial motion for summary judgment, but instead argued that "the Court did not have to reach" that portion of the Preseault II analysis. Plaintiffs are not entitled to reconsideration of the issue because of a strategic decision to exclude a previously available argument. See ECF No. 44 at 27 n.24.

As such, the court **AFFIRMS** its decision to deny plaintiffs' motion for summary judgment, ECF No. 34, but **WITHDRAWS** its decision to grant defendant's cross-motion for summary judgment as it relates to this subset of properties, ECF No. 36. See ECF No. 43 at 15 (identifying the relevant claims: 1A, 2, 3, 4, 5, 6, 7, 8, 9A, 9C, 10, 14, 15, 16, 25, 26, 34A, 39C, 39D, 40, 45, 47A, 47B, 48, 49B, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59).

B. Motion for Leave to File Amicus Curiae Brief

Also before the court is a motion made by property law professors Dale A. Whitman and James W. Ely, Jr., along with National Association of Reversionary Property Owners, seeking leave to file an amicus brief in support of plaintiffs' motion for reconsideration. See ECF No. 49. Defendant strenuously objects to this motion, arguing that the request is unnecessary, untimely, and inappropriately partisan. See ECF No. 51. The court has considered and given substantial weight to defendant's objections. See Fluor, 35 Fed. Cl. at 285-86 ("While parties to an action cannot bar the filing of an amicus brief by their unanimous opposition, such opposition should be given great weight by a court.") (citing United States v. Winkler-Koch Engineering Co., 209 F.2d 758, 760 (C.C.P.A. 1953); Am. Satellite, 22 Cl. Ct. at 549).

While the timeliness and necessity of the briefing give the court pause, the lack of candor with the court on the part of amici's counsel is notably troubling. The motion reads, in part: "The amici have no financial interest in the outcome of this litigation, and neither the amici nor their counsel represent the landowners in this litigation." See ECF No. 49 at 4. Defendant, however, informs the court that, although this statement may be technically true, counsel for amici "represent[] landowners with 673 claims along the exact same corridor at issue in Behrens, and that some of those claims involve similar or

[1] On July 28, 2017, the court issued an order suspending defendant's deadline to respond to plaintiffs' motion for summary judgment, ECF No. 45, pending the resolution of plaintiffs' motion for reconsideration. Order, ECF No. 48.

identical deeds to those at issue in Behrens." ECF No. 51 at 3-4. And to date, neither plaintiffs nor counsel for amici have sought to dispute or defend this claim.

After careful consideration of both the deficiencies of the application, and the contribution the amicus curiae brief might make to the court's analysis, the motion for leave is **DENIED**. In the court's view, the scope of the easements at issue will ultimately be determined as a matter of fact, and the amici are not in a position to provide such evidence.

IV. Conclusion

For the reasons set forth above,

(1) Plaintiffs' motion for reconsideration, ECF No. 44, filed July 25, 2017, is hereby **DENIED in part**, as to any reconsideration of plaintiff's motion for summary judgment; and **GRANTED in part**, as to defendant's cross-motion for summary judgment.

(2) Accordingly, the court hereby **AFFIRMS** its June 23, 2017 ruling on plaintiff's motion for summary judgment, ECF No. 34, and **WITHDRAWS** its June 23, 2017 ruling on defendant's cross-motion for summary judgment, ECF No. 36.

(3) Plaintiff's motion for summary judgment, ECF No. 34, filed November 18, 2016, remains **DENIED**.

(4) Defendant's cross-motion for summary judgment, ECF No. 36, filed December 19, 2016, is hereby **DENIED in part**, as it relates to the scope of the 36 conveyances identified in the table that appears in defendant's cross-motion brief, ECF No. 36 at 41-43,[2] and is otherwise **GRANTED**.

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[2] The table includes the following claims: 1A (Mark and Helen Heintz), 2 (Gordon and Judith Gehlert), 3 (Tom Kixmueller), 4 (Sherry Crider), 5 (Sonya Durbin-Wiles and Gary Wiles), 6 (Von Buehrlen), 7 (Gary Seba), 8 (Casey & Rainey Schalk), 9A (Wendell and Christine Keeney), 9C (Wendall and Christine Keeney), 10 (Linda Taggart), 14 (Duane Siegler), 15 (Jane Trimble), 16 (Greg Thomas), 25 (Rodger Bax), 26 (Iris Brown), 34A (Mariann Murphy), 39C (Michael & Mary Reed), 39D (Michael & Mary Reed), 40 (CJ Welding & Fabrication), 45 (Rodney and Brenda Thompson), 47A (Frederick and Virginia Bethmann and Theodore Bethman), 47B (Frederick and Virginia Bethmann and Theodore Bethman), 48 (Mark Lammert), 49B (Kenneth Butler and Sheila Hamm), 50 (Macy and Debra Jett, Terry Lyndon Jett and Thomas Parker Jett), 51 (Kathryn Giesler c/o Merry Drewel), 52 (Nicholas Hilkemeyer, Patrick Hilkemeyer and Bernard Hilkemeyer), 53 (Robert E. and Mary Rodeman Trust), 54 (James and Dorothy

(5) Plaintiffs' motion for summary judgment, ECF No. 45, filed July 25, 2017 is **DENIED** as premature. The rules of this court do not prohibit plaintiffs from filing a renewed Rule 56 motion; however, plaintiffs are directed to incorporate the findings of this opinion before doing so.

(6) The motion for leave to file amici curiae brief in support of the plaintiff-landowners' motion for reconsideration, ECF No. 49, filed August 25, 2017, is **DENIED**.

(7) The court shall issue a separate order this date governing future proceedings in this case.

IT IS SO ORDERED.

s/ Patricia Campbell-Smith
PATRICIA CAMPBELL-SMITH
Judge

Summers), 55 (Sharon Vinci), 56 (Roger and Rhonda Purl), 57 (Callaghan Wharehouse LLC), 58 (Kenneth P. and Dora Gerber), and 59 (Roger Lenhoff). Plaintiffs' names are recited as set forth in the caption of their fourth amended complaint. See ECF 24.

In the United States Court of Federal Claims

No. 15-421L

(E-Filed: September 27, 2019)

DAVID H. & ARLINE M. BEHRENS, et al.,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

Plaintiffs are landowners along a rail corridor owned by the Missouri Central Railroad Company (MCRR). See ECF No. 24 at 4 (fourth amended complaint). Plaintiffs claim they have suffered a Fifth Amendment taking of their property interests as a result of MCRR's efforts to discontinue use of the rail corridor, and allow use of the property as a recreational trail. See id. at 20.

On June 23, 2017, the court ruled on the parties' cross-motions for summary judgment. See ECF No. 43. And on October 17, 2017, the court granted, in part, plaintiffs' motion for reconsideration, and clarified a portion of its initial decision. See ECF No. 52. Following the court's rulings, the parties engaged in discovery. See ECF Nos. 60, 62, and 65 (scheduling orders). Five motions are presently pending before the court: (1) plaintiffs' motion to sever claims related to twenty-six of the sixty-one parcels at issue, ECF No. 74; (2) plaintiffs' supplemental motion for summary judgment on liability pertaining to the scope of the easements and state law abandonment, ECF No. 75; (3) defendant's cross-motion for summary judgment on scope of the easements and state law abandonment, ECF No. 78; (4) defendant's motion to exclude plaintiff's expert report and testimony, ECF No. 79; and (5) plaintiffs' motion for oral argument, ECF No. 89.

The court found sufficient argument in the parties' written submissions to rule on the pending motions, and thus deemed oral argument unnecessary. Accordingly,

plaintiffs' motion for oral argument is **DENIED**. For the following reasons, plaintiffs' motion to sever is **DENIED**; plaintiffs' supplemental motion for summary judgment is **DENIED** as moot; defendant's cross-motion for summary judgment is **DENIED** as moot; and defendant's motion to exclude plaintiffs' expert report and testimony is **GRANTED**.

I. Motion to Sever Claims Related to Twenty-Six of the Sixty-One Parcels At Issue

The Rules of the United States Court of Federal Claims (RCFC) grant the court authority to sever some claims from others brought in the same lawsuit. Rule 21 states:

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the Court may at any time, on just terms, add or drop a party. The Court may also sever any claim against a party.

According to plaintiffs, this final sentence of the rule allows the court to sever the claims relating to twenty-six of the sixty-one parcels of land at issue in this case. See ECF No. 74 at 3. As plaintiffs correctly note, "[t]he decision to sever claims is within the sound discretion of the trial court." Id. at 4. See Goodwyn v. United States, 33 Fed. Cl. 730, 732 (1995) ("Broad discretion is afforded the trial court under RCFC 21.").

Plaintiffs argue that severance is appropriate because "prongs 1 and 2 of Preseault II have already been established" as to twenty-six parcels, but "substantial additional briefing is now required for the 35 'other' parcels." ECF No. 74 at 3. Plaintiffs explain the effect of such severance as follows: "Rule 21 should be utilized in this instance to create two discreet and independent causes of action, one for the 26 parcels where liability has been established and one for the 35 parcels where additional briefing is now required." Id. at 4-5. If the court declines to sever the claims, plaintiffs contend, "[t]here is also a very significant likelihood of significant prejudice to the 26 parcels," due to the delay the relevant plaintiffs would endure while the merits for the remaining parcels are determined. Id. at 6. And finally, plaintiffs claim that "severance of the 26 parcels from the 35 parcels should promote judicial economy for all of the parties." Id.

Defendant objects to plaintiffs' motion for three reasons. First, defendant contests plaintiffs' statement that liability has been established for the first twenty-six parcels, and explains that "only title and standing issues have been stipulated" as to those parcels. ECF No. 80 at 1. Defendant also argues that "[s]everance simply makes no sense because the only meaningful difference between the two groups is the pending cross-motions for summary judgment on title and standing issues for the 35-parcel group." Id. at 2. And finally, according to defendant, "the two groups share other common features making severance inefficient." Id. at 3.

Having considered the parties' arguments, the court declines to sever the two sets of claims in this case. The court will need to engage in the same liability and damages analyses as to both groups, and sees no efficiency in doing so in two different decisions. As such, plaintiffs' motion to sever is **DENIED**.

II. Motion to Exclude Plaintiffs' Expert Report and Testimony

Plaintiffs have filed an expert report, on which they heavily rely, as an exhibit to their supplemental motion for summary judgment. See ECF No. 75-3 (expert report of James W. Ely, Jr.). Plaintiffs' expert, Mr. James W. Ely, Jr., is a law professor who has written a treatise on easements. See id. at 2. The court notes that Professor Ely has previously attempted to offer his opinion in this case as an amicus, but the court denied his motion. See ECF No. 49 (motion for leave to file an amicus brief); ECF No. 52 (opinion denying motion for leave to file an amicus brief); ECF No. 58 (opinion denying motion to amend or correct the court's opinion denying the motion for leave to file an amicus brief).

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, Testimony of Expert Witnesses, which reads as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Defendant has moved to exclude Professor Ely's expert report and testimony on the basis that his opinion offers primarily legal conclusions, which are "'the province of the Court,'" and because "'[e]xpert testimony is an improper mechanism for offering legal arguments to the Court.'" ECF No. 79 at 3 (quoting Sparton Corp. v. United States, 77 Fed. Cl. 1, 9 (2007). See also Stobie Creek Invs., LLC v. United States, 81 Fed. Cl. 358, 360 (2008) ("Expert testimony that testifies about what the law is or directs the finder of fact how to apply law to facts does not 'assist the trier of fact to understand the evidence or to determine a fact in issue' within the contemplation of Fed. R. Evid. 702.")

(citation omitted). In response, plaintiffs argue that they "retained Professor Ely to examine and review [the] extrinsic evidence" that the court suggested may be necessary to determine the scope of the easements at issue. See ECF No. 83 at 2 (citing the court's previous opinion discussing extrinsic evidence, ECF No. 52 at 4).

The court has reviewed Professor Ely's expert report and agrees with defendant. The report is almost entirely Professor Ely's legal conclusions as to the proper interpretation of the deeds at issue in this case. While the court has no reason to doubt Professor Ely's expertise, his opinion is not the extrinsic evidence to which the court will look in order to determine the scope of plaintiffs' easements. As the court previously stated: "Under Missouri law, when an easement does not include an expressly stated purpose, it is 'incomplete or ambiguous,' and the court may consider extrinsic evidence 'to determine the parties' intention.'" See ECF No. 52 at 4 (citations omitted). Plaintiffs have not demonstrated that Professor Ely has factual knowledge of the circumstances surrounding the creation of the deeds at issue here such that he is in a position to supply the evidence that the court must evaluate. And to the extent that plaintiffs believe that the court is in need of Professor Ely's assistance in interpreting the law, they are misinformed. See Burkart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) (noting that "[e]ach courtroom comes equipped with a 'legal expert,' called a judge").

For these reasons, defendant's motion to exclude Professor Ely's expert report and testimony is **GRANTED**.

III. Supplemental Motion and Cross-Motion for Summary Judgment

As noted above, plaintiffs' rely extensively on Professor Ely's expert report and testimony in making their argument for summary judgment. Because the impermissible testimony is so intertwined with plaintiffs' argument, their supplemental motion for summary judgment is **DENIED** as moot. Defendant's cross-motion for summary judgment also serves as a response to plaintiffs' improperly supported argument, and as such, must be **DENIED** as moot for the same reason.

IV. Conclusion

Accordingly,

(1) Plaintiffs' motion to sever claims, ECF No. 74, is **DENIED**;

(2) Plaintiffs' supplemental motion for summary judgment on liability, ECF No. 75, is **DENIED** as moot;

(3) Defendant's cross-motion for summary judgment, ECF No. 78, is **DENIED** as moot;

(4) Defendant's motion to exclude plaintiff's expert report and testimony, ECF No. 79, is **GRANTED**;

(5) Plaintiffs' motion for oral argument, ECF No. 89, is **DENIED**; and

(6) On or before **October 18, 2019**, the parties shall **CONFER** and **FILE** a **joint status report** proposing a schedule to govern this matter going forward.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-421L

(E-Filed: November 12, 2020)

DAVID H. & ARLINE M. BEHRENS, et al.,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

On October 16, 2020, plaintiffs filed a motion for partial summary judgment on liability as "an alternative motion for the 35 parcels that are still being litigated[,] based on prong 3" of the takings analysis in Presault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). ECF No. 110 at 5. On October 29, 2020, defendant filed a motion to strike plaintiffs' motion for partial summary judgment as untimely. See ECF No. 112. Therein, defendant cites to this court's October 28, 2019 order, in which the court directed plaintiffs to file "any further motion for summary judgment on the remaining 35 parcels," by January 10, 2020. Id. at 2 (citing and adding emphasis to ECF No. 93 at 1).

In response to defendant's motion to strike, plaintiffs argue that "[b]ased on the procedural history of all of the summary judgment briefing in this case, [defendant's] motion to strike should be denied but, in the alternative, [p]laintiffs move for leave to file their third motion for state law abandonment under prong 3 of [Presault, 100 F.3d 1525] out of time." ECF No. 113 at 1. Plaintiffs acknowledge that they "should have interpreted the [c]ourt's [s]cheduling [o]rder of October 28, 2019 (ECF No. 93) to pertain to both prong 2 of [Presault, 100 F.3d 1525], and prong 3 of [Presault, 100 F.3d 1525] and should have filed their third motion for partial summary judgment on state law abandonment at the same time that they filed on scope of the easements for the third time." Id. at 4.

Defendant suggests, in reply, that the court rule on the presently pending motions for summary judgment, ECF No. 96 and ECF No. 97, before determining whether an additional motion is appropriate. See ECF No. 114 at 2. Defendant did not respond in

detail to plaintiffs' alternative request, which was included in their response to defendant's motion to strike, for leave to file their motion for partial summary judgment out of time. See id.

The court's October 28, 2019 order clearly and unequivocally stated that on or before January 10, 2020, "[p]laintiffs shall **FILE** any further **motion for summary judgment** on the remaining 35 parcels for which title and standing remain in dispute." ECF No. 93 at 1. Plaintiffs' motion for partial summary judgment, filed on October 16, 2020, ECF No. 110, violated the court's scheduling order, and therefore could not be properly filed absent leave of court.

Accordingly, defendant's motion to strike, ECF No. 112, is **GRANTED**; and plaintiffs' alternative request for leave to file out of time, which was included in their response to defendant's motion to strike, is **DENIED**. The clerk's office is directed to **STRIKE** plaintiffs' motion for partial summary judgment, **ECF No. 110**, as untimely, pursuant to this court's October 28, 2019 order. See ECF No. 93. If plaintiffs wish to file a motion for leave to file an additional motion for summary judgment, they may do so, and the court will consider all properly briefed arguments in that context.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-421L

(E-Filed: June 16, 2021)

DAVID H. & ARLINE M. BEHRENS, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion for Summary Judgment; RCFC 56; Rails-to-Trails; Trails Act; Fifth Amendment Takings; Railbanking.

Thomas S. Stewart, Kansas City, MO, for plaintiffs.

Edward C. Thomas, Trial Attorney, with whom were John C. Cruden, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, for defendant. Evelyn Kitay, Associate General Counsel, United States Surface Transportation Board, Washington, DC, of counsel.

OPINION

CAMPBELL-SMITH, Judge.

Plaintiffs in this case allege that they have suffered takings of their property pursuant to the Fifth Amendment of the United States Constitution. See ECF No. 24 (fourth amended complaint). Plaintiffs' motion for partial summary judgment, ECF No. 96, and defendant's cross-motion for partial summary judgment, ECF No. 97, both brought pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), are currently before the court.

In evaluating these motions, the court considered the following: (1) plaintiffs' fourth amended complaint, ECF No. 24; (2) plaintiffs' motion for partial summary judgment, ECF No. 96; (3) defendant's response and cross-motion for partial summary judgment, ECF No. 97; (4) plaintiffs' response to defendant's cross-motion and reply in support of its motion for partial summary judgment, ECF No. 98; (5) defendant's reply in

support of its cross-motion, ECF No. 101; and (6) the parties' joint supplement attaching legible transcriptions of the deeds at issue, ECF No. 111.

Briefing is now complete and the motions are ripe for decision. The court has considered all of the parties' arguments and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, plaintiffs' motion for partial summary judgment, ECF No. 96, is **DENIED**; and defendant's cross-motion for partial summary judgment, ECF No. 97, is **GRANTED**.

I. Background

Plaintiffs are landowners along a 144.3-mile rail corridor owned by the Missouri Central Railroad Company (MCRR). See ECF No. 24 at 4. The rail corridor stretches through the center of Missouri, from Pettis County to Franklin County. See id. Plaintiffs claim they have suffered a Fifth Amendment taking of their property interests as a result of MCRR's efforts to discontinue use of the rail corridor, and allow use of the property as a recreational trail. See id. at 20.

The parties previously filed cross-motions for summary judgment, which the court resolved in defendant's favor.[1] See ECF No. 43 (reported opinion at Behrens v. United States, 132 Fed. Cl. 663 (2017)). Plaintiffs then moved for reconsideration, which the court granted in part. See ECF No. 52 (reported opinion at Behrens v. United States, 135 Fed. Cl. 66 (2017)). In its opinion ruling on plaintiffs' motion for reconsideration, the court summarized its conclusions in its initial summary judgment opinion as follows:

> In ruling on the parties' cross-motions for summary judgment, the court drew five conclusions: (1) "Missouri law does not support a presumption that easements conveyed to a railroad by voluntary grant are limited in scope to railroad purposes only," see ECF No. 43 at 5; (2) "Defendant is not liable for a taking where the rail corridor is owned by [the railroad] in fee," see id. at 6; (3) "Plaintiffs have failed to prove that they possess a valid property interest in [several specific claims]," see id. at 10; (4) "[Several specific claims] involve property outside the scope of this case," see id. at 12; and (5) "Defendant is not liable for a taking where the conveyed easements are broad enough to encompass trail use and railbanking," see id. at 13.

See id. at 2. The court granted reconsideration only with regard to the last point—the scope of the easements at issue in this case. See id. at 4. The court noted that under

[1] In its opinion ruling on the parties' previous motions for summary judgment, the court explained the background of this case in detail. See ECF No. 43. The court will only reiterate the portions of that background that are directly relevant to the present motions.

Missouri law, easements must have a definable scope, and held that "[n]either party ha[d] successfully established the facts necessary to determine the precise scope of the easement with respect to the grants that do not include explicitly stated purposes." Id. The scope of each easement remains at issue in this case, see id. at 5, and are the subject of the parties' present motions for summary judgment.[2]

Both parties acknowledge that the deeds at issue do not include express restrictions on how MCRR uses the parcels. See ECF No. 96 at 30-31 ("Since an easement requires a definable scope and these easements do not specifically say that they are 'for railroad purposes' only, . . . the [c]ourt recognized the need to consider and analyze extrinsic evidence on the subject upon reconsideration and directed the parties to focus on extrinsic evidence to ascertain the scope of the railroad's easement consistent with the requirement to construe the deeds to give effect to the intention of the parties."); ECF No. 97 at 18 ("The deeds do not contain any language expressly limiting their scope to railroad purposes.").

Under Missouri law, when an easement does not include an expressly stated purpose, it is "incomplete or ambiguous," and the court may consider extrinsic evidence "to determine the parties' intention." See Maasen v. Shaw, 133 S.W.3d. 514, 519 (Mo. Ct. App. 2004) (citing Fisher v. Miceli, 291 S.W.2d 845, 848 (Mo. 1956)). Relevant evidence may include the circumstances surrounding creation of the easement, its location, and its prior use. See id. (citing Hoelscher v. Simmerock, 921 S.W.2d 676, 679 (Mo. Ct. App. 1996)). For this reason, following the court's ruling on plaintiffs' motion for reconsideration, the parties engaged in discovery in an attempt to develop evidence of the intended scope of the easements created by the subject deeds. See ECF No. 97 at 11; see also ECF No. 62, ECF No. 65 (discovery orders).

After "reviewing and evaluating the arguments made by the parties, the court . . . concluded that this case requires the resolution of tension between various precepts of Missouri law," and issued an order staying this case and inviting the parties to consider seeking "guidance from the Supreme Court of Missouri on the interpretations of Missouri law at issue in the case." ECF No. 116 at 1, 4. On June 4, 2021, the parties filed a joint status report in which they state that "[t]he parties have conferred and have researched the issue as delineated by the [c]ourt and do not presently see a practical course" to seek guidance from the Supreme Court of Missouri. ECF No. 118 at 1. As such, the parties

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[2] Plaintiffs maintain their position that under Missouri law, the grants at issue must necessarily be limited to use for "railroad purposes only." See ECF No. 96 at 12-31. Because the court resolved this issue against plaintiffs in its first summary judgment decision, see ECF No. 43 at 5-6, and left its conclusion undisturbed on reconsideration, see ECF No. 52 at 3-4, it will not consider this argument for a third time in this opinion.

requested "that the [c]ourt lift the stay and rule on the pending motions before the [c]ourt." Id.

II. Legal Standards

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist such that the case should proceed to trial. Id. at 324.

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The court, however, must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not [herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment.").

Because the parties have developed an extensive factual record through discovery, the issues presently before the court are primarily legal in nature. Thus, summary judgment is appropriate, and to the extent any factual disagreements remain, the court finds them to be immaterial to the issues at hand.

III. Analysis

A. Evidence Of Grantors' Intent

Under Missouri law, "[t]he cardinal rule regarding an interpretation of a deed is to ascertain the intention of the parties and to give that intention effect." Hinshaw v. M-C-M Props., LLC, 450 S.W.3d 823, 827 (Mo. Ct. App. 2014) (citing Dean Machinery Co. v. Union Bank, 106 S.W.3d 510, 520 (Mo. Ct. App. 2003)). The evidence now before the

court includes the language of the various deeds at issue and evidence of multiple uses of the parcels—as an active rail line, for the placement of fiber optic cables, and for other forms of transportation.[3]

1. Deed Language

With only minor differences in capitalization and punctuation, each of the twenty deeds states that the grantors: "grant, bargain and sell, and convey and confirm unto [the railroad] the following described real estate . . . To have and to hold the same, together with all the rights, immunities, privileges and appurtenances to the same . . . , and to its successors and assigns forever . . . ." ECF No. 111-2 at 2-3 (Schoening deed); see also id. at 5-6 (Bowles deed); id. at 8 (Stuhlmacher deed); id. at 11 (Groff deed); id. at 14 (Dreysse deed); id. at 17 (first Backues deed); id. at 20-21 (second Backues deed); id. at 23, 24-25 (first Thompson deed); id. at 27 (Yarger deed); id. at 30-31 (Lackland deed); id. at 33 (second Thompson deed); id. at 36 (Linke deed); id. at 39 (Vaughn deed); id. at 42-43 (Ridenhour deed); id. at 45 (Wilcoxson deed); id. at 48 (Lacy deed); id. at 51 (Marriott deed); id. at 54 (Yaws deed); id. at 57 (Crewson deed); id. at 60 (Hatler deed).

In addition, seventeen of the deeds are titled "Warranty Deed." Id. at 2, 5, 8, 11, 14, 17, 20, 30, 36, 39, 42, 45, 48, 51, 54, 57, 60. One of the three deeds that are not explicitly described as warranty deeds describes the conveyance as a "quit claim." Id. at 23. And one of the warranty deeds is joined by two mortgagees "for the purpose of releasing the foregoing strip of land from the lien of their [m]ortgages against it." Id. at 48.

2. Extrinsic Evidence

The parties have offered several pieces of extrinsic evidence in support of their positions. Plaintiffs note that the grantee was a railroad, see ECF No. 96 at 32, and the long, narrow shape of the property at issue, see id. at 33. For its part, defendant points to relatively recent uses of the property—including the installation of fiber optic cable and the use of recreational vehicles on the property. See ECF No. 97 at 19-20.

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[3] On October 16, 2020, the parties filed a joint supplement attaching transcribed copies of the deeds at issue, pursuant to the court's September 2, 2020 scheduling order. See ECF No. 111. Therein, they corrected an error in the number of deeds at issue, noting the discovery of a corrected deed during the transcription process, bringing the total number of deeds from nineteen to twenty. See id. at 1 n.1. Despite the previous omission of the corrected deed, the parties reported that no further briefing on the pending motions was warranted. See id. at 2. Accordingly, the court will rule on the motions for summary judgment based on the briefs which were filed prior to the parties' supplement, and which refer to nineteen deeds. For this reason, there may be a discrepancy in the number of deeds referenced in the fact section, and the number of deeds referenced in discussing the parties' briefs.

B. Easements Are Broad Enough to Encompass Trail Use

The evidence before the court presents a complicated question of interpretation in this case. As the court has previously noted, "[d]efendant concedes that each identified deed likely conveys an easement as opposed to a fee interest because each deed involves nominal consideration." See ECF No. 43 at 14 (citing ECF No. 36 at 39). See also Brown v. Weare, 152 S.W.2d 649, 653-54 (Mo. 1941) (holding that a deed exchanged for nominal consideration is a "voluntary grant" under Missouri law); MO. ANN. STAT. § 388.210(2) (West 1969) (stating that a "voluntary grant" to a railroad "shall be held and used for the purpose of such grant only"). And an easement, by its nature, must have a definable scope. See Maasen, 133 S.W.3d at 518 ("By definition, an easement is 'the mere right of a person to use for a definite purpose another [person]'s land in connection with his [or her] own land.'") (quoting Mahnken v. Gillespie, 43 S.W.2d 797, 800-01 (Mo. 1931)).

While the court recognizes the force of these rules under Missouri law, they do not fit comfortably with the language in the deeds that seems to indicate the intention to convey a fee interest in the properties. See Nixon v. Franklin, 289 S.W.2d 82, 88 (Mo. 1956) (holding that the words "grant, bargain, and sell" are evidence of a conveyance in fee); Bayless v. Gonz, 684 S.W.2d 512, 513 (Mo Ct. App. 1984) (holding that language stating "to have and to hold the same together with all singular rights, immunities, privileges and appurtenances to the same" conveys a fee simple interest).

Thus, in order to act in accordance with Missouri law, the court must both consider the broad granting language and habendum clauses that seem to convey a fee interest, but also remain mindful of the legal construction of the grants as easements that must be limited in scope. The tension in this analysis is marked.

As noted above, the court has previously found that the scope of the easements at issue is unclear. See ECF No. 52 at 4. And when the scope of an easement is unclear, Missouri courts will consider extrinsic evidence that may include the circumstances surrounding creation of the easement, its location, and its prior use. See Maasen, 133 S.W.3d at 519 (citing Hoelscher v. Simmerock, 921 S.W.2d 676, 679 (Mo. Ct. App. 1996)). Unfortunately, the evidence submitted by the parties in the briefs now before the court is inconclusive. Plaintiffs point to the fact that the grantee was a railroad, see ECF No. 96 at 32, and the long, narrow shape of the property at issue, see id. at 33, neither of which are facts that compel the conclusion that the conveyance is limited to what plaintiffs define as railroad purposes. For its part, defendant points to relatively recent uses of the property that are quite far removed in time from the execution of the deeds—including the installation of fiber optic cable, and the use of recreational vehicles on the property—raising doubts about how probative of the grantors' intent those activities are. See ECF No. 97 at 19-20.

In light of the parties' request that the court rule on their motions without guidance from the Supreme Court of Missouri, on the record currently before it, the court believes that the best course is to hew closely to the rule articulated in Hinshaw v. M-C-M Properties, LLC, 450 S.W.3d 823 (Mo. Ct. App. 2014). Under Missouri law, "[t]he cardinal rule regarding an interpretation of a deed is to ascertain the intention of the parties and to give that intention effect." Id. at 827 (citing Dean Mach. Co., 106 S.W.3d at 520). In this case, the best evidence available of the grantor's intent remains the language of the deeds themselves, which indicates a broad grant to the railroad. See ECF No. 96 at 32 (plaintiffs arguing that "[t]he most critical evidence concerning the circumstances surrounding the creation of the easements are actually the deeds themselves").

In the court's view, the broad granting language and habendum clauses in the deeds at issue are convincing evidence that the grantors intended unrestricted conveyances. The legal construction of these conveyances as easements does not change that apparent intent. The court does not find, however, that these conveyances are in fee—Missouri law clearly does not allow for such a conclusion given the nominal consideration.

Rather, the court concurs with the reasoning articulated by this court in Burnett v. United States, 139 Fed. Cl. 797 (2018), a case in which the court considered deeds conveying property to the same railroad as the deeds in this case, through strikingly similar language. The court in Burnett concluded that the deeds at issue conveyed easements that were broad enough to encompass trail use and railbanking, and explained its conclusion as follows:

> [T]he granting clauses in these deeds state that: "the parties of the first part . . . do by these presents, grant, bargain and sell, convey and confirm unto said party of the second part . . ." the property conveyed. As discussed above, the inclusion of the phrase "grant, bargain and sell" in a conveyance deed has long been interpreted under Missouri law to convey a fee simple interest. Nixon, 289 S.W.2d at 88. While there is no dispute that a fee simple interest was not conveyed to the railroad here—given that the consideration provided in these deeds is only one dollar—the inclusion of the phrase "grant, bargain and sell," nonetheless, indicates that the parties intended to convey a broad easement to the railroad. This view is reinforced by the fact that the granting clauses for these source deeds do not contain any language to limit the scope of the easements conveyed.
>
> In addition, the habendum clauses for the applicable source deeds similarly indicates that the parties intended to convey a broad easement to MCRR. These clauses state, in relevant part, that property is conveyed to the railroad: "To have and to hold the same, together with all rights, immunities,

> privileges and appurtenances to the same belonging to the [railroad] and to its successors and assigns forever." As discussed above, Missouri courts have interpreted such language to convey a fee simple interest. Bayless, 684 S.W.2d at 513. And so, again, the Court construes the applicable source deeds for the remaining claims in this case to convey a broad easement to the railroad.
>
> Indeed, while plaintiffs correctly argue that the source deeds do not contain any language that specifically mentions trail use or railbanking, plaintiffs fail to explain why it is necessary for the deeds to contain such language in order to convey an easement to the railroad that is broad enough to encompass public recreational trail use. Because the plain language in the source deeds makes clear that the parties intended to convey a broad easement to the railroad—and not to limit this easement to use for railroad purposes—the Court concludes that the source deeds relevant to plaintiffs' remaining claims convey easements that can encompass public recreational trail use.

Burnett v. United States, 139 Fed. Cl. at 811–12 (record citations omitted).

In the court's view, it would violate the primacy of the grantor's intent to find that the deeds—which otherwise appear to convey a fee interest—should be artificially limited to plaintiffs' definition of railroad purposes simply because Missouri law construes conveyances for nominal consideration to be easements. For these reasons, the court concludes that the easements at issue in the parties' motions for summary judgment are broad enough to encompass trail use.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) The clerk's office is directed to **LIFT** the **stay** in this case;

(2) Plaintiff's motion for partial summary judgment, ECF No. 96, is **DENIED**;

(3) Defendant's cross-motion for partial summary judgment, ECF No. 97, is **GRANTED**; and

(4) On or before **July 16, 2021**, the parties are directed to **CONFER** and **FILE**:

  (a) A **joint status report**, indicating what, if any, issues remain for resolution in this case; and

(b) A **joint motion for entry of judgment** on all claims that have been resolved. The parties are directed to specifically identify the resolved claims, unless no issues remain, and the case may be dismissed in its entirety.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Judge

In the United States Court of Federal Claims

No. 15-421 L
Filed: December 9, 2021

DAVID H. & ARLINE M. BEHRENS, et al.

v.

THE UNITED STATES

RULE 54(b) JUDGMENT

Pursuant to the court's Order, filed December 9, 2021, granting the parties' motion for entry of judgment and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

EXHIBIT A

Behrens v. U.S.

Claim No.	Owner Last Name	Owner First Name	Parcel Number
1.A	Heintz	Mark W. & Helen M.	19501500000001401
2	Gehlert	Gordon S.	01-5.0-21-002-01-0002.01
3	Kixmueller	Tommy	01-5.0-21-002-17-0016.01
4	Crider	Sherri L.	01-4.0-20-001-24-0001.01
5	Wiles Durbin	Michael Sean Sonya M.	01-4.0-20-001-24-0004.00
6	Buehrlen	Von & Toni	01-4.0-20-001-21-0012.00
7	Seba	Gary	01-4.0-20-003-01-0001.00
8	Schalk	Rainey & Casey	01-4.0-20-003-05-0002.00
9.A	Keeney	Wendell L. & Kristine G.	01-4.0-20-003-05-0003.00
9.B	Kenney	Wendell L. & Kristine G.	02-7.1-25-000-00-0005.00
9.C	Keeney	Wendell L. & Kristine G.	02-6.0-24-000-00-0006.00
10	Taggart, as Trustee Rader, as Trustee	Linda S. Sandra Kay	01-4 .0-20-004-10-0008.00
11	Smith	John Mark & Beverly	01-9.0-30-000-00-0011.00
14	Siegler	Duane R. & Reatha M.	02-6.0-23-000-00-0009.00
15	Trimble	Jane K.	02-6.0-23-000-00-0005.00
16	Thomas	Greg & Maxine	02-5.0-22-000-00-0002.00
21.A	Humphrey	Connie M.	028028000000022000
21.B	Humphrey	Connie M.	028028000000022002

Behrens v. U.S.

Joint Motion to Issue Rule 54(b) Judgment

Claim No.	Owner Last Name	Owner First Name	Parcel Number
22	Humphrey	Tony	028028000000022001
23	Etterville Christian Church	c/o Robert Jones	028028000000016001
24	Galloway	Barbara & Richard Popp	028028000000016000
25	Bax	Roger	037035000000010005
26	Brown	~~Iris~~ Irene & B. Lyle	138027100007001000
29	Duncan	Manuel Dwain	134018000000005000
34.A	Murphy	Mariann M. & Regina A.	079031300020002000
39.C	Reed	Michael D. & Mary E.	111002000000011000
39.D	Reed	Michael D. & Mary E.	112003000000007000
40	CJ Welding & Fabrication, L.L.C.	c/o John Crabtree	111001400002018001
41	Kurtz Revocable Living Trust	Mervin M. & Bonita F. Kurtz	112004000000004000
45	Thompson	Rodney J. & Brenda	19601400000000401
47.A	Bethmann	Fred A. & Virginia L. & Theodore A.	19501500000000400
47.B	Bethmann	Fred A. & Virginia L. & Theodore A.	19501600000000100
48	Lammert	Mark D. & Tina M.	01-4.0-20-003-02-0008.00
49.B	Butler~~, et al.~~	Kenneth Ray & Sheila Elaine Hamm	02-6.0-23-000-00-0002.00
50	Jett	Macey G. & Debra (h&w), Terry L., Thomas P.	02-5.0-22-000-00-0009.00

Behrens v. U.S.

Joint Motion to Issue Rule 54(b) Judgment

Claim No.	Owner Last Name	Owner First Name	Parcel Number
51	Giesler Trusts	Edward H. Giesler Trust - 1/2 Int. Kathryn H. Giesler Trust- 1/2 Int.	02-5.0-21-000-00-0002.00
52	Hilkemeyer	Nicholas, Patrick & Bernard	21601300000000400
53	Rodeman	Robert E. & Mary as Co-Trustees	082003000000002003
54	Summers	James R. & Dorothy M.	037035002002003000
55	Vinci	Sharon A. Etal.	037035000000010001
56	Purl	Rodger & Ronda	138027100006003000
57	Callaghan Warehouse LLC	c/o Martin & Rebecca Callaghan	111001300002009002
58	Gerber	Kenneth P. & Dora	112003000000008003
59	Lenhoff	Roger & Brenda	01-5.0-21-002-08-0007.00
60	Branson	Donald & Julie	01-9.0-30-000-00-0005.00

Exhibit A