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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The primary issue in this appeal is the scope of the easements granted to the railroad in 1901. The CFC erred when it incorrectly ruled that easements granted to the railroad in 1901, which were "voluntary grants" to the railroad pursuant to Missouri's governing statute, were "unrestricted conveyances that are broad enough to encompass trail use." *See Behrens v. United States,* 154 Fed. Cl. 227, 232-33 (Fed. Cl. 2021) ("*Behrens III*"). The CFC's Opinion is contrary to Missouri's "voluntary grant" statute, numerous cases from Missouri courts interpreting that statute, and basic property law (*see* discussion in Section I *infra*).

The CFC also abused its discretion by not allowing Plaintiffs to rebrief the issue of state law abandonment, an alternative path to establish liability under prong 3 of *Preseault II,*[1] after the issue had already been fully briefed and the CFC failed to rule. The prejudice to the Plaintiffs because of the CFC's abuse of discretion is obvious and substantial, particularly because the test to establish state law abandonment in Missouri is nonuse coupled with an intent to abandon, and the evidence in this case easily satisfies the test (*see* discussion in Section II *infra*).

SUMMARY OF ARGUMENT

The three-prong test for liability in a rails-to-trails takings case depends on meeting two prongs—a taking occurs if the railroad only held an easement (prong

[1] *See Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*").

1) and if one of the other two prongs are met, either a hiking and biking trail is beyond the scope of the railroad's easement (prong 2) or the railroad abandoned the right-of-way under state law prior to the issuance of the NITU (prong 3).[2] Here, even though all the deeds conveyed easements (prong 1), the CFC held that the easements were not limited in scope to railroad purposes (prong 2) but were, instead, broad enough in scope to allow railbanking and the construction of a hiking and biking trail. The CFC's ruling is contrary to Missouri law in several respects and must be reversed.

The government repeatedly asserts the irrelevant statement that the terms of the deeds would otherwise be interpreted to convey the fee "but for" Missouri's statutory scheme. The government's argument is flatly contrary to Missouri's "voluntary grant" statute, and numerous Missouri cases interpreting the statute, that conclude that any conveyance to a railroad for nominal consideration conveys an easement to the railroad that is limited in scope to railroad purposes only as a matter of law.

The government then exacerbates its improper argument that the deeds look like fee deeds instead of easements to advance an illogical inference that the grantors intended to grant unlimited easements broad enough to allow a change in use from

[2] *See Preseault II,* 100 F.3d at 1533; *see also Ellamae Phillips v. United States,* 564 F.3d 1367 (Fed. Cir. 2009).

railroad purposes to a hiking and biking trail use. That argument is contrary to Missouri's voluntary grant statute, which settles the issue, but is also contrary to all the surrounding circumstances of the deeds, which demonstrate that the grants were to a railroad, for the construction of the railroad in accordance with the statute, and limited to railroad purposes for decades until the railroad decided to abandon their use.

Even if the statute did not say what it says, the deeds were also limited to railroad purposes as a matter of basic property law. Under Missouri law, by definition, an easement must exist for a particular purpose. Even though neither the CFC or the government attempts to define the purpose if not limited to railroad purposes, numerous cases from Missouri and this Court confirm that the scope of a deed to a railroad for the construction of the railroad is limited to railroad purposes. The easement cannot be changed to a completely different use, like a hiking and biking trail, because converting the railroad's easement creates a new easement and extinguishes the railroad's easement, which amounts to a taking.

After arguing that Missouri's voluntary grant statute does not limit the scope of the easements, the government totally reverses field and argues that railbanking and hiking and biking trail use are within the scope of Missouri's voluntary grant statute because it is an "accommodation" to the railroad. That railbanking may preserve a railroad corridor is irrelevant. The only relevant inquiry under prong 2 of

Preseault II is whether recreational trail use fits within railroad use and Missouri law plainly states that it does not. Pursuant to STB regulations, the railroad filed a petition to abandon their easement as a necessary precursor to a NITU. The use of the Trails Act is not an accommodation to the railroad's existing private easement, but rather the creation of a new, public easement that allows use of the corridor for a recreational trail. That new easement constitutes a taking of the Plaintiffs' reversionary interests.

The CFC also erred and abused its discretion in not allowing Plaintiffs to brief the issue of state law abandonment prior to the issuance of the NITU (prong 3), after the issue had already been fully briefed and the CFC failed to rule. Here, the CFC abused its discretion because Plaintiffs diligently filed motions for partial summary judgment on state law abandonment on two occasions before the CFC denied Plaintiffs' second motion on the subject as moot. The CFC's refusal to allow Plaintiffs to argue government liability under prong 3 is extremely prejudicial and far outweighs the government's presumed counterbalancing argument that Plaintiffs did not provide a reasonable explanation and did not act in a diligent manner. Moreover, the CFC's abuse of discretion is not harmless or inconsequential error under these facts as the unrefuted evidence in the record shows that Plaintiffs should prevail under Missouri's test to establish state law abandonment.

ARGUMENT

I. THE DEEDS AT ISSUE ALL CONVEYED EASEMENTS, THE GRANTORS WOULD NEVER HAVE INTENDED TO GRANT PERMISSION FOR THE RAILROAD TO USE THE RIGHT-OF-WAY FOR A HIKING AND BIKING TRAIL, AND THE PURPOSE OF THE EASEMENTS WAS LIMITED TO RAILROAD PURPOSES AS A MATTER OF FACT AND A MATTER OF LAW

A. The Deeds at Issue Conveyed Easements Despite the Government's Protestations to the Contrary

The government starts their illogical and circular journey related to the scope of the easements at issue by repeatedly stating that the deeds would convey fee "but for" Missouri's voluntary grant statute and case law.[3] In doing so, the government attempts to plant a "false flag." The government argues that the deeds should be interpreted as conveying the fee because they have all the trappings of fee conveyances (the false flag), yet admits that the deeds convey easements (which must be limited to a particular purpose), but then argues that the deeds are unlimited and allow any use, including recreational trail use (which means the deeds convey the fee).

Missouri first enacted its statutory limitation on "voluntary grants" to railroads in 1853, as part of legislation for the specific authorization and regulation

[3] *See* Govt's Br. at 21 ("under Missouri law, these grants would convey estates in fee simple, but for a longstanding Missouri statute, first enacted in 1853 governing 'voluntary grants'"); *Id.* at 25 ("but for the 1853 statute, Missouri courts would construe the deeds as conveying estates in fee").

of railroads,[4] and has always provided, including at the time the deeds at issue in this case were granted, that railroad companies shall have enunciated power:

> To take and hold such voluntary grants of real estate and other properties 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.

See 1889 Mo. Rev. Stat. § 2543; *see also* Mo. Ann. Stat. § 388.210(2) (2021); *Quinn v. St. Louis-San Francisco Railway Co.*, 439 S.W.2d 533, 534 (Mo. 1969).

Missouri law on voluntary grants to railroads is well-settled. Based on Missouri's voluntary grant statute, the Missouri Supreme Court noted that the grant of land to a railroad company "must be read with the limitations and conditions which the law puts into it and in the light of the public policy of this State." *See Brown v. Weare*, 152 S.W.2d 649, 653 (Mo. 1941).

The government argues that "but for" the voluntary grant statute, the deeds would convey the fee simple, but that is immaterial. Indeed, *Brown* specifically rejected this concept by explaining that "the legislature intended positively to interfere in the dealings of a railroad company with the landowners and to protect the latter if the railroad was never constructed, and also if the railroad company abandoned land acquired for its use." *Id.* at 654. Missouri passed and implemented a statutory scheme that has been in place for 170 years, and it requires a finding that

[4] *See* 1853 Mo. Laws at 121-144; *see also* Govt's Br. at 32-33.

a voluntary grant to a railroad is an easement that is limited to railroad purposes as a matter of law, no matter whether the grant otherwise might be construed as granting the fee.

Missouri courts have always held that any voluntary grant to a railroad conveys an easement no matter what interest the deed purported to convey. *See Boyles v. Missouri Friends of Wabash Trace Nature Trail, Inc.*, 981 S.W.2d 644, 648 (Mo. App. 1984); *Moore v. Missouri Friends of the Trace Nature Trail, Inc.*, 991 S.W.2d 681, 685 (Mo. App. 1999). Any deed to a railroad is a voluntary grant under Missouri's statutory scheme whenever the conveyance is without valuable consideration. *See Brown,* 152 S.W.2d at 653; *Boyles,* 981 S.W. 2d at 648; *Moore,* 991 S.W.2d at 685.

The government's argument is disjointed, internally inconsistent, and directly contrary to Missouri law. First, the government states that "nominal consideration doesn't limit the grant" (*see* Govt's Br. at 28), yet states that "because the relevant grants in this case were 'one dollar' deeds subject to the 1853 statute as interpreted by Missouri courts, there is no dispute that the interest conveyed in these grants are treated as easements" (*Id.* at 33).

Second, the government states that nominal consideration of one dollar "is not an indication of the grantor's intent" (*Id.* at 28), yet cites *Fuchs v. Reorganized School Dist. No. 2, Gasconade County*, 251 S.W.2d 677 (Mo. 1952) for the

proposition that a payment of nominal consideration is "an important aid" in finding an intent to limit a conveyance (*Id.* at 29). Third, that *Fuchs* is the only authority the government cites is fatally critical to its argument. *Fuchs* does not pertain to a railroad deed subject to Missouri's voluntary grant statute, statutory scheme, or case law, and is therefore irrelevant.

The government's argument, ostensibly to support the CFC's ultimate conclusion, is a complete subterfuge. The government admitted that the deeds conveyed easements and the CFC concluded the same, yet the government repeatedly says that the deeds look like fee deeds instead of easement deeds. The government merely attempts to ignore Missouri's statutory scheme, purportedly based on the wording of the deeds, to avoid the voluntary grant statute's applicability when it comes to ascertaining the scope of the railroad's easements. Foundationally, the deeds conveyed easements to the railroad. As such, they were limited in scope to railroad purposes pursuant to direct statutory authority and furthermore as a matter of law based on Missouri law concerning the scope of the easements.[5]

[5] *See Maasen v. Shaw,* 133 S.W.3d 514, 518-19 (Mo. App. 2004) (deed did not provide any limitation on use but court determined intent and scope based on historical use of the easement).

B. The Grantors in 1901 Did Not Intend to Grant Permission For the Railroad to Convert the Right-of-Way to a New Hiking and Biking Trail Easement

The government doubles down on its irrelevant argument that Missouri courts would construe the deeds as conveying estates in fee but for Missouri's voluntary grant statute by trying to infer that "the relevant source deeds plainly demonstrate an intent to grant estates in fee simple." *See* Govt's Br. at 26. The government argues that, because the deeds look like fee deeds, the wording of the deeds, not the voluntary grant statute, must determine the grantors' intent, and therefore the grantors intended an unlimited easement for any purpose, which includes the conversion of the easement from railroad purposes to a hiking and biking trail easement. The government's argument is ludicrous.

Simply put, the government's inference concerning the grantors' intent is directly and unquestionably contrary to Missouri's voluntary grant statute and case law. The grantors in 1901, 82 years before the Trails Act was even adopted, did not and could not intend to grant permission to a railroad to convert the railroad purposes easement to a hiking and biking trail easement.

First, the government's arguments are completely based on the false notion that the easements the railroad received in 1901 were not limited to railroad purposes. The government's argument is false given Missouri's voluntary grant statute, which specifically says that the voluntary grants shall be held and used for

the purpose of such grant only, false given Missouri's case law that specifically says that a hiking and biking trail easement is not a railroad purpose, and particularly false given the circumstances when the deeds were executed in 1901.

Second, any easement in Missouri, let alone a railroad easement, is the right to use the land for a particular purpose. *See Marvin M. Brandt Revocable Trust v. United States,* 572 U.S. 93, 104-05 (2014); *Barfield v. Show-Me-Power Elec. Coop.,* 852 F.3d 795, 799 (8th Cir. 2017). In Missouri, like every state, because the railroad's charter was limited to its railroad purposes, because the deeds to the railroad were granted shortly after the railroad received its charter, because the railroad was immediately constructed thereafter, and because the only purpose for the railroad was to carry freight, the easements granted to the railroad are easements *for* the railroad.

Third, the reason an easement is a non-possessory right to use another's land is because the land will revert to the owner when the particular use ends. *See Brandt,* 572 U.S. at 104-05. That is why, in addition to Missouri's statutory scheme, basic property law recognizes that a grant to a railroad is an easement limited to railroad purposes, as that is all that is necessary to serve the particular purpose of the easement:

> The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only. The narrowness of the parcel, the consideration paid, and the frequency with which railroad uses have been abandoned often lead to the

> conclusion that the grantor, as a reasonable person dealing with a railroad, intended to grant no more than an easement for the right-of-way, retaining ownership of the land.

See Restatement (Third of Property): Servitudes § 2.2, Comment g.

Here, just as the Restatement provides, the grantors not only followed Missouri's statutory scheme, which provides that the voluntary grants shall be held and used for the purpose of such grant only, but they also granted a narrow strip of ground, for nominal consideration, that was only used as a railroad for decades. It was only when the railroad sought authority to abandon the easement, well over 100 years later, that the notion of a hiking and biking trail was injected into the mix (simply and solely because the Trails Act authorized it).

Based on this Court's well-established precedent, the grantors in 1901 did not intend to grant unlimited easements to the railroad so that the railroad could use the grantors' land for any purpose under the sun. Instead, the railroad did not change the nature of the use, the government did, because the government intervened and changed the nature of the railroad's use, and that change is an unauthorized conversion to a new easement beyond the scope of the railroad's easement under Missouri law.

That a voluntary grant to a railroad must be treated as an easement limited to railroad purposes is nothing more than an application of common sense. Missouri follows the common-sense approach that a right-of-way a railroad acquires "may be

used for any legitimate, incidental purpose that is reasonably necessary or convenient to the construction, maintenance, and operation of the railroad." *See Ball v. Gross,* 565 S.W.2d 685, 689 (Mo. App. 1978); *Rombauer v. St. Louis-San Francisco Ry. Co.,* 34 S.W.2d 155, 156 (Mo. App. 1391); *Glosemeyer v. United States,* 45 Fed. Cl. 771, 778 (Fed. Cl. 2000).[6] Although a railroad may use the right-of-way for a legitimate purpose that is reasonably related to railroad purposes, it cannot change the use entirely and convert the railroad purposes easement to a new hiking and biking trail easement.

Whenever a hiking and biking trail is created under the Trails Act, the railroad must first petition the STB for authority to abandon the right-of-way and the STB must find that abandoning the railway line is in the public interest. That occurred here. However, instead of allowing the railroad to abandon the right-of-way, the trail user asked the STB to invoke the Trails Act, and the STB did when the NITU was issued. Although the right-of-way easement could be used for the operation of a railway, or could even be transferred to a different railroad or entity to use it for

[6] *See also Barfield,* 852 F.3d at 799 (quoting *St. Charles County v. LaClede Gas Co.*, 356 S.W.3d 137, 139 (Mo. 2011); *Farmers Drainage Dist. of Ray County v. Sinclair Ref. Co.,* 255 S.W.2d 745, 748 (Mo. 1953); *Hinshaw v. M-C-M Props., LLC,* 450 S.W.3d 823, 828 (Mo. App. 2014).

railroad purposes, the railroad transferred the right-of-way easement to a non-railroad for a new and different use.[7]

The implementation of the Trails Act effectively "destroys" the Plaintiffs' state law reversionary property interests and encumbers the right-of-way with "a new easement for the new use."[8] As a result, it is the federal government that railbanked the right-of-way under the Trails Act and converted it to a new easement for a hiking and biking trail, not the railroad.

The determination that the scope of the railroad's easements are limited to railroad purposes is nothing more than basic common sense using basic property law. The facts demonstrate that these easements were granted and intended for the operation of a railway line across a narrow strip of land, that is what the actual text of the deeds state, that is the context in which the deeds were established, that is what Missouri's statutory scheme and case law require, and that is how the railroad used the strip of land for decades and decades before the Trails Act intervened to convert the railroad purposes easement to a new hiking and biking trail easement.

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[7] *See East Alabama Ry. Co. v. Doe,* 114 U.S. 340, 354 (1885) (the railroad cannot extend the easement to anyone "except one who should be the assignee of its franchise to establish and run a railroad").

[8] *See Trevarton v. South Dakota,* 817 F.3d 1081, 1087 (8th Cir. 2016).

C. The Scope of Each Easement Granted to the Railroad is Limited to Railroad Purposes as a Matter of Fact and as a Matter of Law

Easements, definitionally and as a matter of law, are limited rights of use that must have a limited purpose. *See Barfield,* 852 F.3d at 799 ("an easement is right to use the land for particular purposes"); *St. Charles County,* 356 S.W.3d at 139; *Hinshaw,* 450 S.W.3d at 828; *Restatement (Third) of Property: Servitudes* § 1.1. The CFC's ruling, and the government's argument that the deeds are unlimited in scope, is simply contrary to basic property law.

The CFC made no attempt to define the purpose of the railroad's easements and, instead, merely stated that the deeds were broad enough in scope to include a hiking and biking trail. The grantors in 1901 did not have to exclude all prohibited uses but it was incumbent on the CFC, and the government, to define the purpose and scope of the easement under basic property law. The government attempts to define the easement as a fee conveyance, even though it is indisputably not, and then compounds their error to say there is no limitation to the easement. There must be a limitation or purpose, as that is the definition of an easement, and without a limitation, the grant would be in fee.

The purpose of each deed at issue was to construct the railroad. In Missouri, an easement granted to a railroad can only be used for purposes that are reasonably necessary or convenient to the construction, maintenance and operation of the railroad. *See Rombauer,* 34 S.W.2d at 156; *Glosemeyer,* 45 Fed. Cl. at 778; *Ball,*

565 S.W.2d at 689. The CFC simply missed the obvious—the grant of an easement to a railroad for the construction of the railroad means that the railroad can only use the easement for railroad purposes. That is exactly what Missouri's voluntary grant statute says.

Although the government correctly notes that many of the deeds at issue contain secondary grants to provide right of entry and access for the construction of the railroad (*see* Govt's Br. at 30-32), the government's interpretation that the secondary grants have no impact on the scope of the primary grants is wrong. The secondary grants clearly delineate that the purpose of each deed as a whole was "for the proper construction and security of [t]he railroad" and "for purposes of construction of said railroad." *Id.* at 30. Each deed demonstrates, just like each deed with a secondary grant demonstrates, that the purpose of each deed was for the construction of the railroad, and that purpose falls directly within the statute.

The CFC reaches an impossible conclusion that the absence of restrictions within the deeds' terms means that the deeds at issue are unlimited in scope. If the grants to the railroad are not limited to railroad purposes, what then is the purpose of each grant? Notably, neither the CFC or the government makes any effort to set forth or define a purpose. Then, doubling down further, the government makes the absurd statements that "no Missouri Court has held that interim trail use is beyond the scope of a railroad easement that has been properly preserved, under the Trails

Act, for potential future railroad use" (*see* Govt's Br. at 47) and that this Court has never held that either (*Id.).* Under both Missouri law and numerous decisions by this Court, trail use is a completely different use than railroad uses and a hiking and biking trail is beyond the scope of a railroad purposes easement as a matter of law.[9]

Missouri courts have always held that 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 encumber the easement for other than railroad purposes"). A change in use from railroad purposes to a hiking and biking trail purpose is beyond the scope of the railroad's easement as a matter of law.

This Court's opinions in *Preseault II* and all subsequent cases also support the obvious and necessary conclusion that a conversion of a railroad purposes easement to a new hiking and biking trail easement is beyond the scope of a railroad's easement. *See Preseault II,* 100 F.3d at 1542-43 ("although a public recreational trail could be described as a roadway for the transportation of persons, the nature of

[9] *See Preseault II,* 100 F.3d at 1542-43; *Toews v. United States,* 376 F.3d 1371, 1376-77 (Fed. Cir. 2004); *Boyles,* 981 S.W.2d at 649.

the usage is clearly different"); *Toews*, 376 F.3d at 1376-77 ("And it appears beyond cavil that use of these easements for a recreational trail, for walking, hiking, biking, picnicking, frisbee playing…--is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens….").

After denying that the deeds at issue are limited to railroad purposes, and after making no attempt to establish what the limited purpose of each easement was, the government makes the obtuse argument that "Missouri's 'voluntary grant' statute does not preclude interim trail use and railbanking" (*see* Govt's Br. at 32). Although Missouri's voluntary grant statute specifically limits the scope of the easement to "the purpose of such grant only," the issue is not whether each grantor specifically excluded the use of their land for a hiking and biking trail, which they had no obligation to do, the legal question is whether a change in use from railroad purposes to a hiking and biking trail is a change in use that is permitted under Missouri law. That question is precisely why prong 2 of *Preseault II* was established—if the easement is limited to railroad purposes, or even if the purpose is ultimately determined and defined and a hiking and biking trail is beyond the scope of that purpose, then a taking occurs based on this Court's precedent ever since *Preseault II* was decided in 1996.

The legal issue is whether a hiking and biking trail is beyond the scope of the railroad's easement. Here, the change in use from a railroad purposes easement to a hiking and biking trail easement is beyond the scope of the railroad's easement because Missouri's voluntary grant statute limits the use to the original purpose of the grant. The government's argument is contrary to Missouri law and well-established law from this Court, and the grantors would never have intended to allow the railroad to convert the easement to such a drastically different use.

Despite overwhelming precedent from Missouri courts and this Court, the government makes the incredible statement that "there is no basis for construing the statute narrowly as limiting voluntary grants to railroads to railroad purposes only" (*see* Govt's Br. at 36). Simply put, Missouri's voluntary grant statute, as interpreted by Missouri courts since *Brown* was decided in 1941, narrowly limits grants to railroads to railroad purposes only as a matter of law. Missouri courts have always concluded that deeds to railroads that are voluntary grants are limited to railroad purposes only because that is the purpose of the voluntary grant and the purpose of the statute. That is the law of Missouri, and that law has been in place since 1853.

The CFC's conclusion that the easements granted to the railroad were unlimited in their scope cannot stand. The easements were granted for railroad purposes and trail use is a completely different use than railroad uses. The CFC's opinion is contrary to Missouri's "voluntary grant" statute, decades of precedent

from Missouri courts as set forth in *Brown, Boyles,* and *Moore,* basic property law concepts as set forth in *Barfield, Glosemeyer,* and *Cape Girardeau Bell,*[10] and over 25 years of precedent from this Court as set forth in *Preseault II* and *Toews.*

D. A Hiking and Biking Trail is Not an "Accommodation" to the Railroad

According to the government, not only is the scope of the deeds unlimited, and not limited to railroad purposes, but a hiking and biking trail is also within the scope of the voluntary grants because it is an "accommodation" to the railroad. In fact, after repeatedly stating that Missouri's voluntary grant statute does not limit the voluntary grants, the government repeatedly argues that a hiking and biking trail is actually within the scope of the statute because it is an "accommodation" to the railroad. *See* Govt's Br. at 21 ("rather, the statute broadly allows railroads to take and hold any real estate voluntarily granted to them to 'aid in the… accommodation… of railroads'"); *Id.* at 34 ("the 1853 statute authorizes railroads to receive and hold any real estate granted for the purpose of 'aid[ing] in the construction, maintenance, and accommodation' of railroads"); *Id.* at 36 ("although interim trail use under the Trails Act is for purposes in addition to railbanking, the interim use plainly 'aid[s] in the… accommodation' of railroads under the ordinary meaning of these terms, by preserving corridors for future railroad use").

[10] *See also Eureka Real Estate & Investment Co. v. S. Real Estate & Fin. Co.,* 200 S.W.2d 328, 332 (Mo. 1947); *Maasen,* 133 S.W.3d at 517-18.

Although the statute does say that the voluntary grants "shall be made to it to aid in the construction, maintenance and accommodation" of the railroad, the purpose of the voluntary grant is still limited to railroad purposes. So, after denying the statute's applicability, the government now attempts to fit within the statute by advancing the incredible argument that a hiking and biking trail is a railroad purpose. The government's argument is an illogical extension of the argument they always made and lost, that railbanking is a railroad purpose.[11]

In Missouri, the scope of an easement is limited to its specific use because an easement, by definition, is "a right to use the land for particular purposes." *See Barfield,* 852 F.3d at 799 (quoting *St. Charles County,* 356 S.W.3d at 139). *Barfield,* in essence, considered and rejected the exact argument the government makes here, that an easement without any limitations as to its use is purportedly one of unlimited reasonable use. *See Barfield,* 852 F.3d at 802. The Eighth Circuit held that the electric cooperative user could make "unlimited reasonable use of the easements, so long as each 'easement's use is limited to the purposes for which it was created.'" *Id.* (quoting *Maasen,* 133 S.W.3d at 519). In *Barfield,* because the underlying easement was limited to "electric transmission," the use for fiber-optic cables was beyond the scope of the easement. *Id.*

[11] *See* Plaintiffs' Br. at 36-37; *Preseault II,* 100 F.3d at 1554; *Ladd v. United States,* 630 F.3d 1015 (Fed. Cir. 2010) (Judge Moore chastised the government for making that argument during oral argument).

The Eighth Circuit based its ruling, in part, on the earlier Eighth Circuit case of *Illig v. Union Elec. Co.*, 652 F.3d 971, 977-78 (8th Cir. 2011). The easement in *Illig* was granted to a railroad and was limited for "railroad purposes." *See Illig,* 652 F.3d at 974. The railroad subsequently entered into an agreement to install power lines and the Eighth Circuit, interpreting Missouri law, held that the agreement to install power lines was valid only so long as the electrical lines were used "for railroad purposes." *Id.* at 977. As a result, both *Barfield* and *Illig* stand for the well-settled proposition that "an easement can only be used for the purpose for which it was created." *Id.; see also Barfield,* 852 F.3d at 802.

Even when an easement is very broad in scope, whether it is granted under Missouri's voluntary grant statute or not, the only uses that are permitted are "legitimate, incidental purpose[s] that is reasonably necessary or convenient to the construction, maintenance, and operation of a railroad." *See Rombauer,* 34 S.W.2d at 157. Because the use must be incidental to railroad purposes, and because a hiking and biking trail is a completely different use than a railroad purpose, a hiking and biking trail is simply not a railroad purpose. *See Boyles,* 981 S.W.2d at 649-50 (the Court specifically rejected the argument that a hiking and biking trail fell within an easement for "railroad purposes" by concluding that "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").

Missouri's public policy, as set forth in Missouri's voluntary grant statute, is that a grant of an easement to a railroad "must be read with the limitations and conditions which the law puts into it" as set forth in Missouri's statutory scheme. *See Brown,* 152 S.W.2d at 653. *Brown* clarified the nature and scope of railroad easements by stating that the easement is tantamount to fee ownership only when the railroad is using it for a railroad, but there are no rights associated with the easement beyond railroad purposes:

> It is apparent that the legislature intended positively to interfere in the dealings of a railroad company with the landowners and to protect the latter if the railroad was never constructed, and also if the railroad company abandoned land acquired for its use.

See Brown, 152 S.W.2d at 654.

The voluntary grant statute in Missouri, originally adopted in 1853, and currently recodified under § 388.210(2), specifically states that "voluntary grants shall be held and used for the purpose of such grant only."[12] As noted in *G.M. Morris Boat Co. v. Bishop*, 631 S.W.2d 84 (Mo. App. 1982), the interest acquired by any railway company in Missouri is limited to an easement that ceases to exist when the use is abandoned:

[12] *See* Mo. Rev. Stat. § 388.210(2).

> [S]ection 388.210(2) has been construed to mean that an interest in land acquired by a railway company without valuable consideration is an easement no matter what interest the deed purported to convey, and this easement ceases to exist when the land is no longer used for railroad purposes.

See G.M. Morris, 631 S.W.2d at 87 (citing *Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co.,* 43 S.W.2d 817, 821-22 (Mo. 1937). *See also Ball,* 565 S.W.2d at 689 (holding that an easement in Missouri for a particular purpose "terminates as soon as such purposes cases to exist, is abandoned, or is rendered impossible of accomplishment"). The law in Missouri leaves no doubt whatsoever that a deed to a railroad, when the grant is a voluntary grant, grants an easement and, by operation of law, that easement is for railroad purposes only. *See Boyles,* 981 S.W.2d at 648; *see also Moore,* 991 S.W.2d at 683.

The primary fallacy with the government's argument is that a hiking and biking trail does not amount to an "accommodation" to the railroad at all. Although the government attempts to define "accommodation" to include a "convenience, favor, or benefit" to the railroad (*see* Govt's Br. at 34), the imposition of a hiking and biking trail on the railroad's right-of-way does not confer a benefit on the railroad. Rather, it benefits the government's interest in preserving railroad corridors. That is the Trails Act's purpose.

The conversion of a private easement to a railroad for the railroad's purposes to a public easement for a hiking and biking trail is exactly why a taking occurs

under the Fifth Amendment. The government's argument that railbanking "aids in the accommodation of railroads by preserving corridors for future railroad use" (*see* Govt's Br. at 36) is tantamount to the same argument made by the government since 1996, that railbanking is a railroad purpose, which has been rejected by this Court every time the government has argued it.

II. THE CFC ABUSED ITS DISCRETION BY NOT ALLOWING PLAINTIFFS TO BRIEF STATE LAW ABANDONMENT PRIOR TO THE ISSUANCE OF THE NITU, WHICH IS AN ALTERNATIVE PATH TO LIABILITY, AFTER THE ISSUE HAD ALREADY BEEN FULLY BRIEFED AND THE CFC FAILED TO RULE

Plaintiffs filed a motion for partial summary judgment pertaining to state law abandonment in 2017. *See* Appx1098-1211. After the CFC stayed further briefing, the issue of state law abandonment under prong 3 of *Preseault II* was fully briefed again in 2019. *See* Appx1402-1683. The CFC then entered an Order that denied all pending motions, including Plaintiffs' motion for summary judgment on both prongs 2 and 3 of *Preseault II* and the government's cross-motion for summary judgment, on September 27, 2019. *See* Appx26-30. The CFC denied all the pending motions as "moot," ostensibly because Professor Ely wrote an expert's report pertaining to the scope of the easements, even though Professor Ely's expert report did not even pertain to the portion of Plaintiffs' motion for summary judgment related to state law abandonment. *See* Appx1896-1897.

Although Plaintiffs have found no precise definition of what constitutes "good cause" for the failure to refile a motion for summary judgment on state law abandonment after the CFC denied the original motion as moot, the government's argument that "Plaintiffs did not act diligently or provide a reasonable explanation for their delay" (*see* Govt's Br. at 53) is not applicable under these facts. In fact, Plaintiffs diligently filed motions for partial summary judgment on state law abandonment on two occasions before the CFC denied Plaintiffs' motion as moot and whatever delay occurred after the CFC's denial of the second motion as moot did not prejudice either the government or the CFC while Plaintiffs' motion on the scope of the easements was being briefed and resolved.

The CFC abused its discretion because the importance of Plaintiffs' motion on state law abandonment was obvious, particularly when the CFC denied Plaintiffs' motion based on the scope of the easements. The resulting prejudice to the Plaintiffs far outweighs any delay that would have occurred if the CFC allowed the Plaintiffs to file the same motion for a third time. *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).

Because Plaintiffs' already submitted motions for partial summary judgment on state law abandonment on two occasions, once when the CFC stayed briefing and once when the motion was denied as moot, the CFC abused its discretion by not

allowing Plaintiffs to refile the motion a third time. Plaintiffs diligently presented the issue to the CFC, and the prejudice experienced by the Plaintiffs far outweighs any delay that occurred after Plaintiffs' second motion was denied as moot and the third motion was filed. Accordingly, justice requires that Plaintiffs be given an opportunity to brief liability based on state law abandonment.

Furthermore, the CFC's abuse of discretion in not allowing Plaintiffs to file their third motion for partial summary judgment on state law abandonment is not harmless or inconsequential error, as both the evidence in the record and Missouri law indicate that the Plaintiffs should prevail under such an analysis. In Missouri, an easement granted to a railroad is extinguished when the railroad ceases to use its right-of-way for railroad purposes,[13] and the abandonment of an easement in Missouri under prong 3 of *Preseault II* is proven by evidence of non-use plus an intention to abandon.[14] The uncontroverted evidence in this case is that the railroad ceased running trains more than 40 years ago,[15] thus establishing non-use, and the intent to abandon was established through both the railroad's Verified Petition with

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[13] *See Schuermann Enterprises, Inc. v. St. Louis County,* 436 S.W.2d 666, 668 (Mo. 1969); *State Highway Comm'n v. Griffith,* 114 S.W.2d 976, 980 (Mo. 1937).

[14] *See Hatton v. Kansas City C&S Ry. Co.,* 162 S.W. 227 (Mo. 1913); *Dalton v. Johnson,* 320 S.W.2d 659, 674 (Mo. 1959); *Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc.,* 742 S.W.2d 182 (Mo. App. 1986).

[15] *See* Pls. Br. at 50, fn. 65. The evidence that trains stopped running around 1980 was established in Plaintiffs' interrogatory answers, which is unrefuted. *See* Appx1578-1613.

the STB seeking permission to abandon the line and their removal of the rails and ties.[16]

In *Moore,* the Court confirmed the rule that "abandonment is proven by evidence of an intention to abandon without an intention to again possess it" and that the removal of the rails and ties is strong evidence of abandonment under Missouri law. *See Moore,* 991 S.W.2d at 688 ("the abandonment clearly occurred either in 1986, when all railroad operations ceased, or in 1988, when the track was pulled up. Once abandoned, title to the tracks reverted to the grantees of the original owners, free from the burden of the easement"). The CFC confirmed its standard in *Glosemeyer* when Judge Bruggink concluded that the railroad's Verified Petition to the STB was the best evidence of the railroad's intent to abandon the line. *See Glosemeyer,* 45 Fed. Cl. at 777 (citing *Boyles,* 981 S.W.2d at 649).

The unrefuted evidence in this case establishes state law abandonment under prong 3 of *Preseault II* just like the evidence did in *Moore, Glosemeyer,* and *Boyles.* The railroad did not use the right-of-way for railroad purposes for more than 40 years and then filed a Verified Petition to abandon the corridor with the STB. This made its intent to abandon clear, and the railroad further confirmed its intent when it proceeded to remove the tracks and ties and sell the corridor to a trail user. Under these facts, and based on Missouri law, the CFC abused its discretion and erred in

[16] *See Glosemeyer,* 45 Fed. Cl. at 777-78; *Moore,* 991 S.W.2d at 688.

not allowing Plaintiffs to establish state law abandonment under prong 3 of *Preseault II,* and the resulting prejudice and hardship to the Plaintiffs is obvious given the CFC's erroneous ruling on the scope of the easements granted to the railroad.

III. CONCLUSION

The CFC's ruling that the easements granted to the railroad as voluntary grants in 1901 were broad enough to encompass railbanking and the construction of a hiking and biking trail should be reversed as a matter of law based on Missouri's voluntary grant statute, the decisions interpreting the statute, and Missouri law addressing the scope of the easements and numerous controlling decisions. Additionally, the CFC's decision to strike Plaintiffs' alternative motion for summary judgment on state law abandonment should be reversed as an abuse of discretion because the Plaintiffs filed the same motion on two prior occasions and the CFC failed to rule.

Dated: April 15, 2022

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