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.