**2023-1760**

# United States Court of Appeals for the Federal Circuit

ATS FORD DRIVE INVESTMENT, LLC, *et al.*,

*Plaintiff,*

GODBY PROPERTIES, LP, REZIN FAMILY INVESTMENTS LLS, c/o Greenstone Asset Management, BRIAN L. SCHOONVELD, GRACE L. SCHOONVELD, Co-Trustees of the Brian L. Schoonveld and Grace L. Schoonveld Revocable Trust UTA 6/13/00, MAYS PROPERTY MANAGEMENT COMPANY LLP, JULIA ANN MCKIM, KIMBERLY A. JONES, CAESAR B. DOYLE, VASCO WALTON, BRINKLEY INVESTMENT GROUP, LLC,

*Plaintiffs-Appellants,*

– v. –

UNITED STATES,

*Defendant-Appellee.*

*On Appeal from the United States Court of Federal Claims in No. 1:19-cv-00471-MMS*

## BRIEF FOR PLAINTIFFS-APPELLANTS

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AUGUST 11, 2023

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FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF INTEREST

**Case Number** 23-1760

**Short Case Caption** ATS Ford Drive Investment, LLC v. United States

**Filing Party/Entity** Plaintiffs-Appellants

**Instructions:**

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

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

Date: 4/26/23

Signature: /s/ Stephen S. Davis

Name: Stephen S. Davis

| **1. Represented Entities.** Fed. Cir. R. 47.4(a)(1). | **2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2). | **3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). |
|---|---|---|
| Provide the full names of all entities represented by undersigned counsel in this case. | Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.<br><br>☑ None/Not Applicable | Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.<br><br>☑ None/Not Applicable |
| ATS Ford Drive Investment, LLC (not an appellant) | | |
| Godby Properties, LP | | |
| Rezin Family Investments LLS c/o Greenstone Asset | | |
| Brian & Grace Schoonveld, Co-Trustees of the | | |
| Mays Property Management Company LLP | | |
| Julia Ann McKim | | |
| Kimberly A. Jones | | |
| Caesar B. Doyle | | |
| Vasco Walton | | |
| Brinkley Investment Group, LLC | | |
| | | |

☐ Additional pages attached

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

☑ None/Not Applicable ☐ Additional pages attached

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**5. Related Cases.** Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☑ Yes (file separate notice; see below) ☐ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

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

☑ None/Not Applicable ☐ Additional pages attached

| | | |
|---|---|---|
| | | |
| | | |

Case: 23-1760 Document: 13 Page: 4 Filed: 03/21/2023

**5. Related Cases.**

*Oldham v. United States*,
U.S. Court of Federal Claims No. 18-1961L (consolidated with *Overlook At The Fairgrounds LP v. United States*, No. 18-1962L)

*Pressly v United States*,
U.S. Court of Federal Claims No. 18-1964L (consolidated with *Jones v. United States*, No. 19-1375L)

*Bradley v. United States*,
U.S. Court of Federal Claims No. 19-400L

*Episcopal Diocese of Indianapolis v. United States*,
U.S. Court of Federal Claims No. 19-881L

*Doyle v. United States*,
U.S. Court of Federal Claims, No. 19-882L

*ID Castings, LLC v. United States*,
U.S. Court of Federal Claims No. 19-1158L

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## STATEMENT OF RELATED CASES

Under Federal Circuit Rule 47.5, counsel for plaintiffs-appellants states that: (a) no other appeal in or from the same proceeding was previously before any appellate court; (b)(1) the following cases, pending in the U.S. Court of Federal Claims, may be affected by the Court's decision in this case:

> *Oldham v. United States*, U.S. Court of Federal Claims No. 18-1961L (consolidated with *Overlook At The Fairgrounds LP v. United States*, No. 18-1962L),
>
> *Pressly v United States*, U.S. Court of Federal Claims No. 18-1964L (consolidated with *Jones v. United States*, No. 19-1375L),
>
> *Bradley v. United States*, U.S. Court of Federal Claims No. 19-400L,
>
> *Episcopal Diocese of Indianapolis v. United States*, U.S. Court of Federal Claims No. 19-881L,
>
> *Doyle v. United States*, U.S. Court of Federal Claims, No. 19-882L,
>
> *ID Castings, LLC v. United States*, U.S. Court of Federal Claims No. 19-1158L;

(b)(2)(A) the parties in the above-listed cases include:

> United States of America, Leon E. Oldham, George Hendricks d/b/a Son Shine Service, Sheila Campbell, Michelle Edens, Anita Guffey, & Harvey Campbell, Michael A. McElroy, Sr. & Marjorie A. McElroy, Robert J. Rennier, Mecislovas Basinskas & Lileta Dacenko, Stephanie L. Broadus, Indiana Ice Arena, LLC, Rochelle S. Dueser, Nathan D. & Martha G. Irwin, Joseph W. & Amy J. Lyon, John F. Moe, Luke R. Letourneau, Jr. & Eleanor M. Letourneau, Fred Lee & Linda Sue Deaver, Jan Ouellette, Beth N. Backus, Angela Y. Rice, Castleton Village Associates, Overlook at the Fairgrounds, LP, Robert E. & Mary L. Hayes, Richard W. & Wendy A. Cass, Harold G. Morgan, Cynthia Ann Cote, KLC Realty, LLC, Alice M. Allen n/k/a Alice M. Rigsby, Violet L. Reynolds, Daniel L. & Linda M. Scott, Dennis E. & Christie

Spurling and J.W. Goodwin, KAB Enterprises of Elwood, LLC, Patriot Engineering & Environmental, Inc., Castleton Park Indianapolis, LP, Boyd Realty, LLC, Annetta M. Gill, Mark A. & Toni J. Van Horn, Michael R. Eldridge & Shari L. Held, Indiana Association of Seventh-day Adventists, Inc., Ralph Mayfield & Joanne Hollingsworth Mayfield, John C. & Cherie, L. Placie, Charlezetta L. Edwards, Robert J. Burkert & Linda Frances Burkert, RCCM, LLC, The Lisa H. Jones Living Trust, Alinda L. & Rocky A. Edens Revocable Trust, Kathleen A. Leamon Bradfield, Gene K. Alderson, Cureton Properties, LLC, Harvey E. Campbell, Peggy Pfister, Marc L. Harbit, Dan R. Thomas, Spirit of Joy Church, Inc., Jaclyn P. Sage, Ana Contreras & Ana A. Dominguez, Jessica Ann & Frank Watz, Jacob T. Everett, Syds 19th Hole, LLC, Resuha Tishner & Stephen S. Molden, Daniel L. Richter, John Dean Farms, Inc., Denise L. Mack, Kevin J. & Alicia M. Wilson, Larry J. & Linda J. Roudebush, Anita Guffey, Cicero Place Apartments, LLC, Castleton Village, LP, Eloise Starks, Carson Manufacturing Company, Inc., Robert Pressly and Jane Pressly, 8599 Car Lot, LLC, Diane Akers and William Akers, Michael Akers and Alexis Akers, John Albatarseh, Joseph Ambs and Christina Ambs, Scott Anders and Carrie Anders, Ardsley Maintenance Services, Inc., Harold Sidney & Mary Elizabeth Asbell Living Trust, Michael Atkinson, AY Comp, LLC, Bartlett Reserve Indy, LLC, Bash Business, LLC, Berner Real Estate Investments, LLC, Black Diamond North, LLC, Brian Bock and Melissa Bock, Peter Borromeo and Robin Borromeo, John J. Bower, Braden Municipal Drive, LLC, Braden Technology Lane, LLC, Randall Brown and Duanita Brown, Bullock Stony Creek, LLC, Grant A. Byers and Jennette J. Byers, Citimark Visionary Way Land, LLC, CKH Four, LLC, Brandon P. Cockrum and Melissa Cockrum, Michael L. Collins, Community Life Line Christian Church, Inc., Michael Conlon and Lucille Conlon, Craig 220, LLC, Crosspointe Partners IV, LLC, Crosspointe Partners V, LLC, Donna S. Cunningham Living Trust, Jeffrey W. Day and Susan Day, the Estate of Richard Dayan, Brian K. Denny, Robin Dohner, Deborah Earlewine and David Earlewine, East 65th Street, LLC, Eastside Development Company, LLC, Terry Edwards and Mildred Edwards, Fairlane Center Owners Association, Inc., Jennifer Farrell, Ronald Featherston and Robin Featherston, Fishers Trade Flex, LLC, Dana Fitzgerald, Daniel Flanagan and Carol Flanagan, Thomas Flannery and Rosemary Flannery, Paul Foster and Mary Foster, Larry France, Gregory Francis, Carlos Parra Franco, Carol Kim Fred, Gallagher Real Estate, LLC, Graves, LLC, James W. Halliburton and Julie L. Halliburton, Michael Hammond, Hawthorn Park, LLC, Carmen Hendrixson, Heidi L. Herald, Jeffrey Hoffman and Beth Hoffman, Michael Holom, Bryce Huebner, Steven Schmidt and Paula O. Schmidt, Javelina Construction, Inc.,

Daniel Jensen, Joseph Jerrell and Kathryn Jerrell, Robert Keck and Sheri L. Keck, Leslie P. Konicki Declaration of Trust, L & R Ventures, LLC, Kurtis A. Lamm, Matthew G. Lee and Jennifer Lee, Cheryl Lenon, Leslie Coatings, Inc., Life Journey Metropolitan Community Church, Inc, Lippitt, LLC, Kimberly Logan and Robert Logan, Mann Realty Co., Julia A. Martin, Doublas E. McClellan, Meadowlands, Inc., Meeta & Vimas, LP, Maria I. Majia, Metro Centre Indianapolis, LLC, James H. Meyer and Debra K. Meyer, Michael Martin Properties, LLC, Millwork Acquisition, LLC, Monon Partners, LLC, Sestilio Montarsi, Palmetto Rental Properties, LLC, Erick Puckett and Jennifer Puckett, Nathan Pyle and Sarah Pyle, R.E. Lutin, LLC, Joseph K. Reedy, Rita Reese, Regency Windsor Sunblest II Limited Partnership, Joshua Richardson and Kari Richardson, Rock Investment, LLC, San Key Properties, LLC, Colin Schermann, Karrie L. Schlegel and Robert Schlegel, John Seyfried and Kim Seyfried, Luther F. Shackelford, William Shank, Chris Simmonds, David Conwell Smith and Jennifer Smith, Leslie Spencer, Lesley Stanley and Iva Stanley, Sttel House Rules, LLC, Todor Marchev Stefanov and Talitha Stefanov, Cathy Stoops and David Stoops, Ashlie N. Straw, Karl Szabo, Third Phase Inc., Kert Toler, Kevin Tully and Eva Tully, Uptown Village, LLC, Andrew Vinson, Violette Family Trust, Laura Welklin and Daniel Welklin, Wheaton Van Lines, Inc., Jeffrey Widholm, Matthew Wooten and Kimberly Wooten, AM Fishers Properties, LLC, Asphalt Patching, Inc., Jeffrey Bachmann and Ashlee Bachmann, Nicholas Barnard, Michael Beer and Carrie Beer, Robert Burns and Sandra Burns, Linda Clemens, Richard Coy and Elizabeth Coy, CSS V LLC, Charles decker, Michael Ernest and Maggie Ernest, Falcon Holdings Group, LLC, Robert Frash, Kirk Hunter and Carla Hunter, J & J Moore Properties, LLC, J D Rentals Partnership, Jetz LLC, Marcy Keller, Paul Lacy, Michael A. Lamirand and Diana Lamirand, Masters 96$^{th}$ LLC, MCS Realty, Kevin McWilliams, Kayla Miller, North & Maple LLC, Odin Corporation, Sean Owens and Joanne Owens, Adam Purpura, Arthur Thaddeus Perry and Amy M. Perry, Robert D. Peterson, RBS Realty, Real Estate Technologies LLC, Ted A. Ringle and Leslie Ringle, Joyce Ritchison, Jeff Sawyer and Amy Sawyer, David Skelding and Megan Skelding, Darrin Snider, Nikila Stevens and Solomon Mitchell, Sullivan Corporation, Alhuda Foundation, Inc., Herbert Anderson, Matthew Atwell, Ares Properties, LLC, Samuel Barron and Audrey Barron, Jeffrey Barton, Bayhill Realty, LLC, Adam Bender, Brian Benedict and Susanne Benedict, Michael Beresford and Lori Beresford, William Berry, Bobby Mac, LLC n/k/a The Ralph Roe Building, LLC, Bold Real Estate LLC, Ronald A. Bosch and De-Andra Kuzemka, Trad Breedlove, Jason Brehm, Brockton Capital Partners, LLC, Bruce Gunstra Builders, Inc.,

The Jamie Brener Separate Property Trust, Buckingham DA LLC, Mark Buselli and Andrea Buselli, C & J Office Park, LLC, Castleton Buildings Company LLC, Sara Clark, CLI LLC, Zachary Cobb and Liza Cobb, Joel Conaway and Barbara Conaway, Blake Coots, Cottingham Civic Association, LLC, Susan Crandall, David Cunningham, D and D Transmissions, LLC, Delaware Township, Amy Delucia and John Delucia, Enclave of Fishers Pointe Co-Owners Association, Inc., Sean Finley and Mallory West, Fishers Pointe Inc., Carol Flanagan and Timothy Flanagan, Thomas Forkner and Deborah Forkner, Stephen Fryman and Tamara Fryman, Aijia Fudnerburk and Thomas Funderburk, G-1 Properties, LLC, Ryan Glaser and Betsy Glaser, Mark George, Susan Goldsmith, David Goodman and Kathryn Goodman, Michael Grotz and Donna Grotz, Hamilton Southeastern Consolidated School Building Corporation, David Helder, Helmer Family Living Trust, High Alpha II LLC, Michael Hooks and Susan Hooks, Marilyn Hoffman, Michael Hosking and Sarah Hosking, Indiana Veneer Corp., Jeffrey Ipock, Steven Irvin and Jann Irvin, Ivywood Multifamily Partners LLC, James Jackson, Timothy Jackson and Shelley Jackson, Jat Properties LLC, JMJ Holdings LLC, John M. Wooley Lumber Company, Inc., Adam Kaps and Kayla Kaps, Deanna Kent and Ronald Kent, Jr., Todd King and Sandra King, Thomas Knoll, Lahr Rev. Living Trust, James Landis and Marlo Landis, Christopher Latty and Sallie Latty, Charles Light, Terri Lovette and Tamara Lovette, Mark Lutz and Dora Lutz, Jennifer Massa and Alex Lyons, Lisa Martin and Michael Martin, Kathleen A. Meyer, Mikes Corporate Office, LLC, Mark Montgomery, Marie Nagle and Jeffrey Nagle, Natco LLC, Norman G. & Nancy A.. Wilson Living Trust, Victor Nieto and Heather Nieto, Ocean Vices, LLC, Soraya Partazian, Pet Wellness Clinics, Inc., Pledge Realty Corporation, Precision Metal Cleaning Inc., Realty Income Corporation, Jackie Reuther and Jeffery Reuther, Nancy Revak, Katrina Howard-Rife and David Rife, Schmoll Development Company, LP, Gregory Schmoll, Nicholas Shotts and Rachel Shotts, Charles Simpson, Marcus Singleton, Sommerwood Homeowners Association, Inc., Stallander Properties, LLC, Chad Stanley, Daniel Stoddard and Lauren Garst, Stone Center of Indiana LLC, Suchko Enterprises LLC< Alisha Survant and Dustin Survant, Sydco LLC, Thomas & Skinner, Inc., Two Metroplex, LLC, Edward Uppole, Urban Core Associates, LLC, Alicia Vargas, Adam Velazquez and Christine Velazquez, Mark Vershaw, Kelli Vikt-Tord, Peter Yeadon and Emily Yeadon, Wellington North Civic Association, Inc., Jennifer Williams, Williamsburg North 2017, LLC, Honest Karls Used Bikes, LLC, Paul Martin, Railroad SC Realty, LLC, Casey Tuturow and Gwendolyn Jenkins, J S C LLC, Lowell Beaver Post #470 The American Legion, Inc., Roger Thornburg, John McClain, John Moyer and Kristen

Moyer, Christopher Morris and Nicole Morris, Christopher Jones, Crown Technology Inc., Myrna Alexander, Martin Harrison Realty Noblesville III LLC, and Martin Pressley Properties Reserve Parcel II LLC, Martin Harrison Realty Noblesville IV LLC and Martin Pressley Properties Reserve Parcel III, Lit Industrial Limited Partnership, Hotel Alpha Tango, LLC, John Lahr and Jane Lahr, Sandra Francis, Helen McClain, Sherry Knoll, Kelley Light, Donna McClellan, and Citimark Visionary Way, LLC, Elizabeth G. Bradley, Bennett & Associates Real Estate, LLC, Denny W. Branham and Roberta L. Anderson, Brulin & Company, Inc., Burnett Partnership LLP, Mimir Partners, LLP and Three Feathers Realty Group LLP, Charles Butler, D-Two, Inc., David A. and Patricia A. Eads, Maxwell Heger, Jewish Federation of Greater Indianapolis, Inc., Jeffrey A. and Jane A. Malkoff, Marcy A. Mangold, Molly McAffee and Deanna Strossner, Adrian Murray, Christina Nelson, Ronald and Patricia Nytko, Paul B. Schafer, Donna Schildmeier, Steinmeier Village Homeowners Association, Inc., Julie Turner, Beacher A. and Donna M. Ward, Rosa L. Warren and Anthony Mack, James L. Wellington, Jr., Earl and Opal Williams, Holly R. Wood, Episcopal Diocese of Indianapolis, for the use and benefit of the Holy Family Church of Fishers, Morey David Doyle, D.V.M. as Successor Trustee under the provisions of the Boger-Doyle Land Trust Agreement dated October 6, 1978, ID Castings, LLC; and

(b)(2)(B) the following law firms, partners, and associates appeared in the above-listed cases:

J. Robert Sears of Baker, Sterchi, Cowden & Rice, LLC

Steven M. Wald of Stewart, Wald & Smith, LLC

Lindsay S.C. Brinton of Lewis Rice LLC

Craig D. Doyle of Doyle & Foutty, P.C.

James M. Hinshaw of Bingham Greenebaum Doll LLP

Alex E. Gude of Dentons Bingham Greenebaum LLP

Samantha G. Peltz of the U.S. Department of Justice

Brian R. Herman of the U.S. Department of Justice

Daniela Alejandra Arregui Labarca of the U.S. Department of Justice

## JURISDICTIONAL STATEMENT

The Fifth Amendment requires the United States to justly compensate landowners when it takes their property. The Tucker Act, 28 U.S.C. §1491(a)(1), grants the U.S. Court of Federal Claims jurisdiction to hear claims founded upon the Constitution. These owners filed timely claims for compensation on March 29, 2019, and the CFC entered judgment denying and finally disposing of all of these plaintiffs-appellants' claims on March 31, 2023. Appx58-59.

On April 7, 2023, these landowners filed a timely notice of appeal. Appx2041. Title 28 U.S.C. §1295(a)(3) grants this Court exclusive jurisdiction over an appeal "from a final decision of the United States Court of Federal Claims."

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the United States Court of Federal Claims (CFC) erred when it refused to certify a question of Indiana property law to the Indiana Supreme Court.

Whether the CFC erred when it held that, as a matter of Indiana law, right-of-way and damage-release forms landowners signed in the 1840s and 1850s granted the railroad title to the fee simple estate in the strip of land used for a railway line.

## INTRODUCTION

In this Trails Act[1] taking case, the CFC erred in granting the government's motion for summary judgment and holding that "release" form documents (Releases or Release documents) executed in the 1840s and 1850s by these nine plaintiff-landowners' predecessors-in-title to the Peru & Indianapolis Railroad conveyed the fee-simple estate to the railroad in the strip of land upon which the railroad constructed and operated its railway, instead of an easement for railroad purposes. The Release documents, in fact, granted the railroad all that the railroad needed and exactly what the documents themselves provided – a "right of way" over and across the landowners' property for the purpose of constructing and operating a railroad and a waiver of any damages to the landowners' property resulting from the railroad's construction. The CFC erred in misinterpreting the Release documents as granting the entire fee-simple estate to the railroad, and it erred again by refusing to certify this question of Indiana state property law to the Indiana Supreme Court for determination.

The CFC's ruling in favor of the government was premised upon the conclusion that, when these present-day landowners' predecessors-in-title signed preprinted forms releasing and relinquishing claims to "the right of way for so much

[1] National Trails System Act Amendments of 1983, 16 U.S.C. §1241, *et seq*.

of said road as may pass through or cut the following piece, parcel or lot of land" and releasing a "right to damages which [the landowner] might sustain or be entitled to," the plaintiffs' predecessors actually gave the railroad company title to the fee-simple estate in the strip of land across which the railroad built a railway. See Appx3 (language of the Release documents). These Release forms do not acknowledge any compensation the railroad paid the landowner and do not conform to the formalities Indiana requires for a deed conveying title to an estate in land.

What interest the landowners granted the Peru & Indianapolis Railroad in the 1840s and 1850s determines the government's liability under the Fifth Amendment. If the landowners in the 1840s and 1850s gave the railroad full title in the fee simple estate in the strip of land across which the railroad built a railway line, the government need not pay these present-day landowners for the new federal public recreational rail-trail corridor. However, if the landowners granted the Peru & Indianapolis Railroad a right-of-way easement for a railway across a strip of the owners' land, then the government must pay for taking a new easement (for a new and different use) across these owners' land.

More than one-hundred-and-fifty years after the original landowners signed these Release documents, the Peru & Indianapolis Railroad's successor-railroad abandoned the railway line, and the federal Surface Transportation Board (the Board) entered an order invoking section 8(d) of the National Trails System Act, 16

U.S.C. §1247(d). The Board's order invoking the Trails Act encumbered these present-day owners' land with a new easement for public recreation and so-called "railbanking" (preserving the corridor for potential future railroad use).

The government's constitutional obligation to justly compensate these plaintiffs turns upon whether, in the 1840s and 1850s, as a matter of Indiana law, the owners who signed these Releases intended to give the Peru & Indianapolis Railroad Company a right-of-way easement to operate a railway line across the owners' land, or instead (as the government argued and the CFC ruled), the owners' predecessors-in-title actually conveyed to the Peru & Indianapolis Railroad title to the fee simple estate in the strip of land. What property interest (an easement or title to the fee simple estate) the railroad obtained in the strip of land by reason of these preprinted form Release documents is a novel question of Indiana law.

Property interests are defined by state law. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 20 (1990) (*Preseault I*) (O'Connor, Scalia, and Kennedy, JJ., concurring).[2] Federalism directs federal courts confronting an

[2] Justice O'Connor concurred in *Preseault I* to explain, "[a]s the Court acknowledges, state law creates and defines the scope of the reversionary or other real property interests affected by the [Board]'s actions pursuant to [the Trails Act]. In determining whether a taking has occurred, we are mindful of the basic axiom that [p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." 494 U.S. at 20 (internal quotations and citations omitted).

unsettled question of state law to refer the question of state law to the state's highest court for a definitive answer. Allowing state courts to decide questions of state law promotes federalism because, when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 78-79 (1997). This case demonstrates why federal courts should not declare novel issues of state law.

Contrary to the Supreme Court's guidance in *Arizonans*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941), the CFC did not certify (or abstain from deciding) a novel application of Indiana property law. Instead, the CFC made an *Erie*-guess about how Indiana's highest court might decide this question of Indiana law.

The CFC erred by not certifying this novel application of Indiana state law to the Indiana Supreme Court. The CFC erred further when it wrongly guessed how Indiana's Supreme Court might decide this question of Indiana property law. And, in doing so, the CFC unsettled Indiana property law and undermined the certainty of land title contrary to this Court's admonition in *Leo Sheep v. United States*, 440 U.S. 668, 687-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to

upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”).

This Court should vacate the CFC’s decision and certify to the Indiana Supreme Court the question of whether these preprinted form Release documents either: (a) granted the Peru & Indianapolis Railroad an easement for a right-of-way across the owners’ land for the operation of a railway line; or (b) gave the Peru and Indianapolis Railroad fee simple absolute title to the land across which the railroad built and operated its railway line.

Alternatively, should this Court not certify this question to the Indiana Supreme Court, this Court should reverse the CFC and hold that, under Indiana law, the preprinted Release forms the landowners signed in the 1840s and 1850s were, as the documents themselves stated, an acknowledgement of a right-of-way easement for the operation of a railway line across a strip of the owner’s land and a release of claims for damages occasioned by the construction of the railway line. In other words, the Releases granted the railroad only an easement, not the fee estate in the strip of land, and when the strip of land was no longer used for a railway line, the plaintiff-landowners, as the present-day successors to the original landowners, held unencumbered title to the land, which was then taken by the federal government under the Trails Act to create a public recreational rail-trail.

## STATEMENT OF THE CASE

### I. Factual Background.

The Peru & Indianapolis Railroad Company was incorporated and chartered by the Indiana legislature in 1946, and was thereby authorized to construct a railroad line originating in the town of Peru, Indiana, and running south through the cities of Tipton, Noblesville, and Fishers, until it terminated in Indianapolis. See *ATS Ford Invest., LLC v. United States*, 156 Fed. Cl. 397, 399 (2021). See also Appx129-141 (Notice of Interim Trail Use or Abandonment). Over the years, the railroad, which came to be known as the "Nickel Plate Line," passed through several successor-railroads, including Norfolk Southern; until in 1995, the cities of Fishers and Noblesville purchased the railroad, and then in 2006, Hamilton County became a third joint owner of the railroad. See Appx104-105; Appx117-118; Appx125-127.

The CFC noted that "[a]ll but two of the releases in the record before the court include identical preprinted language." *ATS Ford*, 156 Fed. Cl. at 401. The text provided:

> I, ___ of the county of ____ and State of Indiana, for, and in consideration of the advantages which can or will result to the public in general, and myself in particular, by the construction of the "PERU AND INDIANAPOLIS RAILROAD," as now is, or may hereafter be, surveyed, or finally located, and for the purpose of facilitating the construction and completion of said work, do hereby, and for myself, my heirs, executors, administrators and assigns, RELEASE and RELINQUISH to the "PERU AND INDIANAPOLIS RAILROAD

> COMPANY" the right of way for so much of said road as may pass through or cut the following piece, parcel or lot of land, to wit: ___
>
> And I do further release and relinquish to the said PERU AND INDIANAPOLIS RAILROAD COMPANY all DAMAGES and right to DAMAGES which I might sustain or be entitled to, by reason of anything connected with or consequent upon the construction of said road or the repairing thereof.

*Id.*[3]

The CFC further noted, "[m]oreover, most of these releases include a third preprinted paragraph, stating, "And I do [license] and permit said Company, or any authorized agent of the same to enter upon said land, and take therefrom any timber, stone, sand, gravel, earth or other materials for the construction and repairing of said road from time to time. 156 Fed. Cl. at 401; Appx3-4. The CFC further noted, "[o]n all of the preprinted releases, a description of the 'piece, parcel or lot of land' was handwritten at the end of the first paragraph." 156 Fed. Cl. at 402; Appx4.[4]

With the consolidation of railroad companies in Indiana and the Midwest through the Twentieth Century, the Indiana Nickel Plate Line was no longer needed, and in 2017, Noblesville, Fishers, and Hamilton County requested permission from the Board to abandon it and build a public recreational rail-trail along thirty-seven

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[3] Capitalization and underlining in original. See also Appx3.

[4] Copies of the Release documents are provided at Appx217-313.

miles of the abandoned railroad.[5] See Appx102-115. When the cities purchased the railway, they "contemplated...that the railroad corridor might be re-deployed for transit purposes." Appx106. Freight service over the railway terminated in 2003. See *id.* And for a few years following the cities' purchase of the railway, the Indiana Transportation Museum ran excursion trains across the railway, but those ceased in 2015. See *id.* The municipalities and the county asked the Board to issue a Notice of Interim Trail Use or Abandonment (NITU), which the Board issued on December 21, 2018. Appx125-126; Appx129-141. After the Board issued the 2018 NITU at the cities' request, landowners owning property adjacent to and underlying the former railway filed taking claims in the CFC in several cases. See *ATS Ford*, 156 Fed. Cl. at 400; Appx1.[6]

[5] In addition to serving walkers, hikers, bikers, and other recreational users, the Nickel Plate Trail hosts several annual events, including the "Wild Warrior 5K Walk/Run," the "Chili Night Ride" (a sixteen-mile, police-escorted bicycle ride and chili dinner), the "Thanksgiving Day Trot n' Gobble" 5K/10K walk/run, and other events. See http://www.nickelplatetrail.org/trail-events/yearly-events.

[6] These cases included *ATS Ford* and also *Oldham v. United States*, No. 18-1961L (consolidated with *Overlook At The Fairgrounds LP v. United States*, No. 18-1962L); *Pressly v. United States*, No. 18-1964L (consolidated with *Jones v. United States*, No. 19-1375L); *Bradley v. United States*, No. 19-400L; *Episcopal Diocese of Indianapolis v. United States*, No. 19-881L (consolidated with *Doyle v. United States*, No. 19-882L); and *ID Castings, LLC v. United States*, No. 19-1158L.

## II. The federal Trails Act.

Congress wanted to preserve otherwise-abandoned railroad corridors to be repurposed for public recreation. Congress initially sought to accomplish this objective by delaying the railroad's authority to abandon railroad service across unprofitable railway corridors for six-months to allow a non-railroad (such as a local government or a private conservation organization) to acquire the otherwise-abandoned right-of-way for public recreation. See *National Wildlife Federation v. Interstate Commerce Comm'n*, 850 F.2d 694, 697 (DC Cir. 1988). This scheme didn't work because, under state-law, the railroad had nothing to sell or transfer. The owner of the fee estate regained unencumbered title to the land when the railroad stopped operating and the original right-of-way easement terminated. See *Brandt Rev. Trust v. United States*, 572 U.S. 93, 105 (2014), and *Preseault I*, 494 U.S. at 8. Landowners' state-law "reversionary" interest in the land was a "problem."[7] As the Supreme Court observed in *Preseault I*, 494 U.S. at 7-8, "many railroads do not own their rights-of-way outright but rather hold them under easements [and]...the property reverts to the abutting landowner upon abandonment of rail operations."

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[7] "Reversionary" is a shorthand term for the fee owner's interest in the land unencumbered by an easement. "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest...a 'reversion' in fee." *Preseault II*, 100 F.3d at 1533. See also *Brandt*, 572 U.S. at 105, n.4.

So, in 1983, Congress amended the Trails Act adding section 8(d) providing that "interim [public recreational trail] use [or railbanking] 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). Congress adopted section 8(d) for the express purpose of preempting state law and "destroying" and "effectively eliminating" landowners' state-law reversionary property interests and thereby allowing the Board to impose a new easement for railbanking and public recreation.[8] Once the Board invokes section 8(d) of the Trails Act,

> [t]he [Board] retains jurisdiction over [the land once used for] a rail line throughout the CITU/NITU negotiating period, any period of rail banking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. At that point, the right-of-way may revert to reversionary landowner interest, if any, pursuant to state law.

*National Trails System Act and Railroad Rights-of-Way*, 2012 WL 1498609, *5 (STB Decision April 25, 2012).

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[8] "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (*Ladd I*) (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)) (emphasis added). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use") (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996)) (emphasis added).

The Board's invocation of section 8(d) "pre-empt[s] the operation and effect of certain state laws that 'conflict with or interfere with federal authority over the same activity.'" *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring). State courts "cannot enforce or give effect to asserted reversionary interests...." *Id*. at 22. The federal government's jurisdiction over the strip of land is plenary and exclusive. *Chicago & N.W. Transp. v. Kalo Brick & Tile, Co*., 450 U.S. 311, 321 (1981) ("The exclusive and plenary nature of the [ICC], authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce.").

The Board's invocation of the Trails Act allows the railroad to sell or give the right-of-way to a non-railroad "trail-sponsor" even though, under state law and the terms of the original railroad easement, the railroad had no property interest in the land and no ability to transfer any interest in the right-of-way to a non-railroad. See *East Alabama Ry. v. Doe*, 114 U.S. 340, 350-51 (1885) ("the grant to the 'assigns' of the [railroad] corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad").[9]

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[9] See also *Monroe County Comm'n v. Nettles*, 288 So.3d 452, 459 (Ala. 2019) ("the quitclaim deed [from the railroad] conveyed nothing to the [trail-sponsor] because the railroad, at the time of conveyance, had nothing to transfer"); *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144, 1149 (DC Cir. 2001) ("Under the Trails Act...if the railroad is willing to enter into an agreement for trail use, a trail sponsor offers to assume responsibility for management, payment of

A grant from a landowner to a railroad describing a strip of land used for a railway line is an *easement*, not a conveyance of title to the *fee simple estate* in the strip of land across which the railway line is built. And the easement (which is a servitude not ownership of the fee estate in land) terminates when the railroad no longer uses the strip of land for the operation of a railway. "Unlike most possessory estates, easements...may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *Brandt*, 572 U.S. at 105.[10] Thus, when the federal government invokes the Trails Act, the federal government has encumbered an owner's land with a new easement for a public recreational rail-trail corridor, and the federal government has taken private property in violation of the Fifth Amendment. See *Preseault I*, 494 U.S. at 8, and *Preseault II*, 100 F.3d at 1550. The Trails Act "gives rise to a takings question in the typical

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taxes, and legal liability for the right-of-way and agrees to return the right-of-way should there ever be a proposal to reactivate the line for rail service."); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 780 (2000). See also Mark F. (Thor) Hearne, II, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 REAL PROPERTY, TRUST & ESTATE LAW JOURNAL 115, 131-32 (Spring 2010).

[10] Internal quotation and citation omitted; quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.2, Comment d, §7.4, Comments a, f.

rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." *Preseault I*, 494 U.S. at 8. See also *Howard v. United States*, 106 Fed. Cl. 343, 362 (2012) ("Had the STB not imposed a trail use condition on plaintiffs' property, under [Indiana] state law plaintiffs would have been entitled to their property free and clear of encumbrances."); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 718 (2011); *Howard v. United States*, 964 N.E.2d 779, 781 (Ind. 2012) (decision of Indiana Supreme Court upon certified question from the CFC).

Justice O'Connor wrote a concurring opinion in *Preseault I* to emphasize that,

> [a]lthough the [Surface Transportation Board]'s actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. The [Board]'s actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the [Board]'s power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.

494 U.S. at 22.[11]

[11] O'Connor, Scalia, and Kennedy, JJ., concurring; citations omitted; citing *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1003-04, 1012 (1984) (state law creates property right in trade secrets for purposes of Fifth Amendment, and regulatory regime does not pre-empt state property law), and *National Wildlife Federation*, 850 F.2d at 704-05, n.16.

In *Preseault II*, this Court, sitting *en banc*, held the Trails Act imposes "a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the [landowners]." 100 F.3d at 1550. In *Toews v. United States*, this Court explained, "[i]t is elementary law that if the Government uses…an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use. … As a result of the imposition of the recreational trail and linear park, the easement for railroad purposes was converted into a new and different easement." 376 F.3d 1371, 1381 (Fed. Cir. 2004). See also *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) ("Though the conveyance here took the form of a quit claim deed from [the railroad] to Defendants, as a matter of federal law it granted 'a new easement for the new use.'") (quoting *Preseault II*, 100 F.3d at 1550).

Following the Supreme Court's decision in *Preseault I* and *Preseault II*, this Court has repeatedly declared that if the railroad only held an easement for railroad purposes and trail use exceeds the scope of the railroad's easement, then the Board's issuance of a NITU invocating §1247(d) gives rise to a compensable taking. See *Caldwell*, 391 F.3d at 1234, and *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006). In *Ladd I*, this Court explained this is so because "[t]he NITU is the government action that prevents the landowners from possession of their property

unencumbered by the easement." 630 F.3d at 1023.[12] This Court in *Bright v. United States,* 603 F.3d 1273, 1276 (2010), stated, "the effect of the NITU was to stay railroad abandonment during the pendency of trail use. A further effect of the NITU was to accrue an action for compensation by any affected landowners based on a Fifth Amendment taking." In *Navajo Nation v. United States*, this Court relied upon and reaffirmed *Ladd I* and *Caldwell*, stating,

> a takings claim accrues when the *government takes action which deprives landowners of "possession of their property unencumbered by [an] easement,"* regardless of whether third parties ever take physical possession of that easement. *Caldwell* conclude[ed] that nay taking occurred when *the government took action preventing landowners' state law reversionary interests in a railroad right-of-way from vesting,* not when subsequent actions by third parties caused the right-of-way to be converted to an interim trail for recreational use.

631 F.3d 1268, 1275 (Fed. Cir. 2010) (quoting *Ladd I*, 630 F.3d at 1023, and citing *Caldwell*, 391 F.3d at 1233-35) (emphasis added).

In *Preseault II*, this Court ruled, "we conclude that the taking that resulted from the establishment of the recreational trail is property laid at the doorstep of the

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[12] This Court denied the government's petition for *en banc* review of *Ladd*. All but two members of the Court voted to deny rehearing. Those two members, Judge Gajarsa and Judge Moore, dissented. They dissented, *not* because they disagreed with the Court's decision in *Ladd,* but because they disagreed with *Caldwell*. The dissent acknowledged the law on this point was settled and could only be changed by an *en banc* decision overturning *Caldwell*, *Barclay*, and *Ladd I*. They wrote, "*Out precedent, however, assumes that the issuance of a NITU is a physical taking.*" 646 F.3d at 912 (emphasis added). *Ladd I* merely applied the settled rule that "issuance of the NITU is a physical taking" of the owners' right to unencumbered possession of their land.

Federal Government." 100 F.3d at 1531. Most recently, in *Behrens v. United States*, the this Court explained, "a taking effectuated by the NITU occurs at the time that, had there been no NITU, the easement would have terminated under state law." 59 F.4th 1339, 1343 (Fed. Cir. 2023) (citing *Preseault II*, 100 F.3d at 1550, and *Caquelin v. United States*, 959 F.3d 1360, 1363, 1370-73 (Fed. Cir. 2020)). *Behrens* continued, "[i]t is now well-settled that the issuance of a NITU under the Trails Act may result in a taking of property owned by the original grantor of the easement." 49 F.4th at 1342 (citing *Preseault I*, 494 U.S. at 8).

The Supreme Court rejected the notion that Congress may redefine existing property interests without violating the Fifth Amendment's obligation to justly compensate the owner for the taking of the property. In *Leo Sheep*, the Supreme Court held that redefining rules defining private property interests would be a taking of private property the Takings Clause forbids without the government paying the owner just compensation. 440 U.S. at 687-88 ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation."). In *Brandt*, the Supreme Court affirmed *Leo Sheep* and declared railroad rights-of-way are common law easements governed by those principles of property law defining

easements. 134 S.Ct. at 1265.[13] The Supreme Court reiterated the principle noting that it is "a taking if [the government] recharacterize[s] as public property what was previously private property." *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Protection*, 560 U.S. 702, 714 (2010) (citing *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163-65 (1980)).

Earlier this summer, in *Tyler v. Hennepin County*, the Supreme Court the Supreme Court reaffirmed its prior holdings in *Stop the Beach Renourishment*, *Webb's Fabulous Pharmacies*, and other decisions holding that a court's redefinition of the rules defining private property interests would be a taking of private property the Takings Clause forbids without the government paying the owner just compensation. See 143 S.Ct. 1369, 1375 (2023). *Tyler* reaffirmed the principle that an individual's rights in their property are defined by state law and by "'traditional property law principles,' plus historical practice and this Court's precedents." *Id.* In other words, the federal government and federal agencies such as the Board do not define (and cannot redefine) or determine the nature or dimensions of private property. When the government acts to redefine established property interests, the

[13] See also *Smith v. Townsend,* 148 U.S. 490, 449 (1893) ("if ever the use of the right of way was abandoned by the railroad company the easement would cease, and the full title to the right of way would vest in the [owner] of the land").

government has violated the Fifth Amendment unless it pays the owner "just compensation."

A citizen's right to be secure in ownership of their property is one of the primary objects for which the national government was formed.[14] In *Lynch v. Household Fin. Corp.,* 405 U.S. 538, 552 (1972), this Court observed "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.… That rights in property are basic civil rights has long been recognized." *Id.*

The Board's invocation of the Trails Act is a "direct appropriation of [the owner's reversionary] property, or the functional equivalent of a practical ouster of the owner's possession." *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992). The Supreme Court has further explained "the right to exclude is universally held to be a fundamental element of the property right and is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072-73 (2021). See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982),

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[14] See James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3rd ed. 2008), p. 55 ("The takings clause established an additional safeguard for property owners. This provision significantly limits the power of eminent domain under which government can seize private property for a public purpose.").

*United States v. Causby*, 328 U.S. 256, 267 (1946), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). When the government "depriv[es] the owner of the right to possess, use and dispose of the property," and denies the owner's right to exclude others from his or her property the government has a "categorical" duty to compensate the owner. *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015).

The Fifth Amendment is self-executing and imposes a "categorical" obligation upon the government to justly compensate the owner. *Cedar Point Nursery*, 141 S.Ct. at 2071; *Horne*, 576 U.S. at 358 ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").[15] *Knick v. Township of Scott*, 139 S.Ct. 2162, 2172 (2019) ("because a taking without compensation violates the self-executing Fifth

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[15] See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) ("As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and 'the self-executing character of the constitutional provision with respect to compensation,' is triggered.") Justice Brennan's dissenting opinion was later adopted by the Court in *First English Evangelical Lutheran Church of Glendale v. County of Lost Angeles*, 482 U.S. 304, 318 (1987).

Amendment *at the time of the taking*, the property owner can bring a federal suit at that time").[16]

The federal government's liability in Trails Act cases turns upon three points set forth in *Preseault II* and summarized in *Ellamae Phillips*, where this Court held,

> the determinative issues for takings liability are:
>
> (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate;
>
> (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and
>
> (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).[17]

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[16] Emphasis added. See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.") (citation omitted; citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

[17] *Ellamae Phillips*, 564 F.3d at 1373 (citing *Preseault II*, 100 F.3d at 1533) (paragraph breaks added). The third point in this analysis ("*if the* grant of the railroad's easement was broad enough to encompass a recreational trail") arises *only* when the original easement granted the railroad included a right for the railroad to sell the right-of-way to a non-railroad to use the strip of land for public recreation. For example, this Court, in *Behrens*, 59 F.4th at 1348, held that a taking occurred under the first two points when "easements granted to the railroad were not broad enough to encompass interim trail use or railbanking, and thus Fifth Amendment takings have occurred."

This Court announced a "bright-line rule" that a Trails Act taking occurs, and an owner's claim for compensation accrues, when the Board first invokes the Trails Act. *Caldwell*, 391 F.3d at 1229 ("A Fifth Amendment taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail.").[18] See also *Behrens*, 59 F.4th at 1348 ("we have held that under Vermont law the preservation of a tract of land for future rail use under the Trails Act does not transform interim trail use into a railroad purpose.") (citing *Preseault II*, 100 F.3d at 1550). The government took these owners' private property on December 21, 2018, almost a half-decade ago. And yet, the government

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[18] *Barclay*, 443 F.3d at 1378 ("the issuance of the original NITU triggers the accrual of the cause of action" for a taking); *Illig v. United States*, 274 Fed. Appx. 883, 883 (Fed. Cir. 2008); *Ladd I*, 630 F.3d at 1023-24, *reh'g and reh'g en banc denied*, 646 F.3d at 910 ("[I]t is settled law. A taking occurs when state law reversionary property interests are blocked. …The issuance of the NITU is the *only* event that must occur to entitle the plaintiff to institute an action.") (emphasis added; internal quotations omitted); *Ladd v. United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) (*Ladd II*) ("In the context of Trails Act cases, the cause of action accrues when the government issues the first NITU that concerns the landowner's property."). This Court affirmed this settled rule of law most recently in *Behrens*, 59 F.4th at 1345, and *Memmer v. United States*, 50 F.4th 136, 145 (Fed. Cir. 2022). See also Brief for the United States in Opposition to Petition for Writ of Certiorari in *Illig v. United States*, 2009 WL 1526939, *12-13 (S.Ct. No. 08-852, May 29, 2009). Then-Solicitor General Elena Kagan wrote for the United States, "When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date." *Id.*

has still not honored its constitutional obligation to pay these owners that just compensation our Constitution requires the government to pay them.

### III. The Court of Federal Claims' decision below.

The CFC's decision turned principally: 1) two decisions of the Indiana Supreme Court from the 1800s, *Newcastle & Richmond Railroad Co., v. Peru & Indianapolis Railroad Company*, 30 Ind. 464 (1852), and *Indianapolis, Peru & Chicago Railway Co. v. Rayl*, 69 Ind. 424 (1880); 2) the text of preprinted form documents that the railroad had landowners sign that purported to "RELEASE and RELINQUISH to [the railroad] the right of way for so much of said road as may pass through or cut the following piece, parcel or lot of land" and to "further release and relinquish...all DAMAGES and right to DAMAGES which I might sustain or be entitled to, by reason of anything connected with or consequent upon the construction of said road or the repairing thereof;"[19] and 3) the portions of the charter the Indiana legislature granted the Peru & Indianapolis Railroad in 1846. The relevant portions upon the charter upon which the CFC relied (sections 15, 16, 18 and 19) are quoted in the CFC's decision.[20]

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[19] *ATS Ford*, 156 Fed. Cl at 401 (capitalization and underlining in original).
[20] *Id.* at 400-01.

Indiana invites federal court's including the CFC to certify questions of Indiana law to the Indiana Supreme Court. See *Howard v. United States*, 100 Fed. Cl. 230, 239 (2011), *cert. question answered*, 964 N.E.2d 779 (Ind. 2012), and *Howard v. United States*, 948 N.E.2d 1179 (Ind. 2011). The Indiana Supreme Court noted that "[p]ursuant to Indiana Appellate Rule 64, we accept the question [from the Court of Federal Claims]." 964 N.E.2d at 780. Despite the novelty of the question of Indiana law and the application to these Release documents and conflicts with past Indiana authorities and authorities of this Court and the CFC applying Indiana law and similar provisions on other states. See, *e.g.*, *Macy Elevator*, 97 Fed. Cl. 708 (2011) (applying Indiana law), and *Behrens*, 59 F.4th at 1346 (applying similar principles of Missouri law). The CFC did not certify this question of Indiana law to the Indiana Supreme Court. See *ATS Ford*, 156 Fed. Cl. at 418.

Upon this record the CFC concluded that the owners granted the railroad title to the fee simple estate in the strip of land across which the railroad built and operated a railway line. The CFC held the interest granted the railroad was not an easement, and thus, the owners had no interest in the land across which the now-abandoned railway line had been located. On this basis the CFC granted the government's motion for summary judgment and denied the landowner's motion for summary judgment. See *ATS Ford*, 156 Fed. Cl. at 414-17.

## SUMMARY OF THE ARGUMENT

The CFC erred by failing to certify an unsettled question of Indiana state law to the Indiana Supreme Court. Principles of federalism direct that such questions of state law should be determined by the state's highest court when certification is available, and federal courts should not make an "*Erie*-guess" about state law.

The CFC erred further when, failing to certify this question of Indiana law to the Indiana Supreme Court, the CFC proceeded to hold that preprinted form language in "right-of-way and damage release" documents signed in the 1840s and 1850s conveyed fee simple title to the strip of land across which the railroad operated a railway line when such a holding is contrary to all controlling authority.

## ARGUMENT

### I. The CFC erred by making an *Erie*-guess about state law when it should have certified unsettled questions of Indiana law to Indiana's Supreme Court.

#### A. This Court reviews the CFC's decision *de novo*.

The CFC granted the government's motion for summary judgment under Rule 56. An order granting summary judgment is reviewed *de novo* "in all respects." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). "The Federal Circuit reviews a decision of the Court of Federal Claims granting summary judgment *de novo*." *Rogers v. United States*, 814 F.3d 1299, 1305 (Fed. Cir. 2015) (citing *Ladd II*, 713 F.3d at 651); *Behrens*, 59 F.4th at 1344 (citing *Ladd I*, 630 F.3d

at 1019). "We consider whether the United States has made a compensable taking under the Fifth Amendment as a question of law[, and w]e analyze the property rights of the parties in a rails-to-trails case under the relevant state law." *Id.* (citing *Preseault II*, 100 F.3d at 1523). "The Federal Circuit gives no deference to legal conclusions made by the Court of Federal Claims regarding either federal or state law." *Id.* (citing *Barclay*, 443 F.3d at 1372-73, and *Hash v. United States*, 403 F.3d 1308, 1312 (Fed. Cir. 2005)).

### B. The CFC's *Erie*-guess about Indiana state law was wrong.

This Court and the CFC, in other Trails Act cases, has appropriately certified unsettled questions of state property law. See *Rogers*, 814 F.3d at 1304.[21] See also See *Howard*, 948 N.E.2d at 1180.

Under *Erie*, a federal court cannot presume to independently declare state law; federal courts must defer to the interpretation of the highest state court. See 304 U.S. at 78-79. Particularly when state law is unsettled, federalism concerns strongly favor certifying questions to a state's highest court instead of a federal court presuming to independently decide them.

[21] This Court certified the question in *Rogers* to the Florida Supreme Court following oral argument, where Judge Moore observed "given what an awful job we obviously do of interpreting state law, why don't we just send this [case] to [the state court], so that we don't make another mistake?" Oral argument in *Rogers v. United States*, No. 2013-5098 (Fed. Cir. July 10, 2014), available at: https://cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments.

Long before certification became widely available, the Supreme Court held that principles of judicial federalism and constitutional avoidance sometime require federal courts to abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal courts to avoid adjudicating a federal constitutional issue. See *Pullman*, 312 U.S. at 501; *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209-10 (1960). With the development of certification procedures, the "*Pullman* abstention doctrine" has become a "*Pullman* certification doctrine," because certification is substantially less time consuming and disruptive than traditional abstention. See *Arizonans*, 520 U.S. at 75-76, 79.

The Supreme Court's guidance on when certification is appropriate is especially important given the CFC's exercise of exclusive jurisdiction over every Fifth Amendment taking case against the federal government involving more than $10,000. Fifth Amendment takings cases brought in the CFC often involve the intersection of unsettled questions of state property law and important federal constitutional issues – precisely the combination that *Arizonans* held compelled certification. The landowners vindicating their Fifth Amendment right to just compensation against the federal government greater than $10,000 do not have the option of litigating their lawsuit before a state tribunal or even a local federal district court. The factor above the determination of state law and policy. The perspective

and understanding of state law that state courts (or federal district courts sitting in the state) can provide through certification all the more valuable.

In *Pullman,* this Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court." 312 U.S. at 500. As the Court explained, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499. Accordingly, the Supreme Court directed the district court to stay proceedings while the parties sought an authoritative determination of state law in state court. Such a procedure was lengthy and costly because the parties had to litigate the unsettled state law issue up through the state court systems.

In the decades since *Pullman* was decided, virtually all states have adopted procedures that allow federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. PA. L. REV. 1459, 1548 (1997). Perhaps for this reason, the Supreme Court has urged federal courts to use certification to resolve unsettled questions of state law. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (reversing a lower federal court's failure to certify an unsettled question of state law).

The Supreme Court's unanimous opinion in *Arizonans* provides essential guidance. The Court admonished a lower federal court for deciding the constitutionality of a novel Arizona constitutional amendment (requiring that the state act only in English) without first certifying the question of the amendment's meaning to the Arizona Supreme Court: "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 78-79. And it stressed that the advantages of certification over abstention only strengthen the case for using certification to avoid a federal constitutional issue:

> *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court.… Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

*Id.* at 76, 117 (citations omitted).

The *Arizonans* Court ultimately concluded that the lower federal courts should not have decided the constitutionality of the Arizona amendment because the case had become moot when the plaintiff left her employment with the state. *Id*. at 72. Nonetheless, the Court went out of its way to discuss certification and provide

guidance for lower federal courts. Both the district court and the Ninth Circuit refused to certify the question of the amendment's meaning to the Arizona Supreme Court because they thought the meaning was "plain." *Id.* at 76. The Supreme Court stressed that "[a] more cautious approach was in order." *Id*. at 77. "Given the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and those of [the amendment's] sponsors, the certification requests merited more respectful consideration that they received in the proceedings below." *Id*. at 78.

Here, if the CFC had given certification "more respectful consideration," then it would have certified the unsettled question of state law – whether under Indiana property law the releases the landowners granted the railroad were an easement or a conveyance of title to the fee simple estate in a strip of land – before declaring the releases conveyed title to the fee simple estate in the land and not an easement without any state law on point.

Basic principles of federalism direct federal courts to not declare (or guess at) novel concepts of state law or novel applications of state law. Confronted with an unsettled question of state law a federal court must abstain or refer the question to the State's highest court for a definitive answer. This is because "[f]ederal courts lack competence to rule definitely on the meaning of state legislation." *Arizonans*, 520 U.S. at 48. And, we add, state property law. When a federal court elects to

decide "a novel state [law question] not yet reviewed by the State's highest court," it risks friction-generating error." *Id.* at 78-79.

Justice O'Connor (sitting by designation on the Second Circuit) reiterated the Supreme Court's direction that interpretation of state law is a "job surely best left to the state courts, especially when they 'stand willing to address questions of state law on certification from a federal court.'" *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2nd Cir. 2013).[22] Certifying questions of state law to a state's highest court is, like jurisdiction, a fundamental feature of a federal court's authority not an argument personal to a party. As such, certification, like jurisdiction, may be raised for the first time on appeal – indeed, certification could be raised for the first time by the Supreme Court sua sponte and it would be proper even if both parties opposed certification. Here, however, the landowners raised and the CFC considered and denied certification.

### C. Indiana invites federal courts to certify questions of Indiana law.

Indiana provides a ready mechanism for the CFC and this Court to certify questions of Indiana law directly to Indiana's Supreme Court. See Ind. R. App. P. 64 (federal courts "may certify a question of Indiana law to the Supreme Court when it appears to the federal court that a proceeding presents an issue of state law that is

[22] Citing *Arizonans*, 520 U.S. at 79, and quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring).

determinative of the case and on which there is no clear controlling Indiana precedent"). As noted above, welcoming certification of state law question from federal courts is common to almost every state. See Clark, *Ascertaining the Laws of the Several States*, 145 U. PA. L. REV. at 1548. New York's highest court similarly explained,

> We take this opportunity to underscore the great value in New York's certification procedure where Federal appellate courts…are faced with determinative questions of New York law on which this Court has not previously spoken. Indeed, the certification procedure can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation. As shown by actual experience, and by this Court's acceptance of all but a few of the questions that have been certified to us by the Circuit Court, inter-jurisdictional certification is an effective device that can benefit Federal and State courts as well as litigants.

*Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000) (citations omitted).

## II. The CFC erred by concluding the Releases granted the Peru & Indianapolis Railroad title to the fee simple estate in the strip of land across which the railroad built its railway line.

### A. Background principles common law govern interpretation of the Releases.

#### 1. The intent of the grantor determines the nature of the interest the railroad acquired.

In Indiana a deed is to be interpreted to ascertain the grantors intent. *Clark v. CSX Transp., Inc.*, 737 N.E.2d 752, 757 (Ind. Ct. App. 2000) (citing *Brown v. Penn Central Corp.*, 510 N.E.2d 641, 643 (Ind. 1987)). In construing a deed, Indiana

courts consider the deed in its entirety so that no part is rejected. *Brown*, 510 N.E.2d at 643. The deed is to be interpreted so that all parts of it are reconciled and the deed does not contradict itself. *Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964).

Indiana public policy does not favor conveyances in strips of land in fee simple to railroad companies for right-of-way purposes whether by deed or condemnation. *Ross*, 199 N.E.2d at 348. The Indiana Supreme Court based this policy upon the following reasoning:

> Alienation of such strips from the primary of parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved. Therefore, where there is an ambiguity as to the character of the interest of title conveyed such ambiguity will generally be construed *in favor of the original grantors*, their heirs and assigns.

*Id*. (emphasis added).

The strip-and-gore doctrine and its cousin, the centerline presumption, are background principles of law that inform the interpretation of documents describing a railroad's interest in the strips of land across which the railroad operates railway lines. The common law disfavors the creation of fee estates in narrow strips and gores of land. In *Paine v. Consumers' Forwarding & Storage, Co.*, 71 F. 626, 629-30, 632 (6th Cir. 1895), then-Judge Taft (later President and Chief Justice Taft) held,

> existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods

> of time, is as great an evil as are "strips and gores" of land along highways or running streams. The litigation that may arise therefrom after long years…[is] vexatious…[P]ublic policy [seeks] to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands.

More recently, in *Penn Central v. U.S. R.R. Vest Corp.*, Judge Easterbrook explained this strip-and-gore doctrine as it applied to Indiana law to determine what interest a railroad held in a strip of land used for a railway line. 955 F.2d 1158, 1160 (7th Cir. 1992). *Penn Central* involved a property dispute regarding whether a railroad has a fee simple or easement interest in certain property. The Seventh Circuit considered an Indiana statute claiming that after a railroad was abandoned, Indiana landowners could acquire that property merely by filing an affidavit that went unchallenged for six months. *Id.* The court laid out the standard by stating "[t]he *presumption* is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple." *Id.* (emphasis added). The court ultimately concluded that the statute was unconstitutional. *Id.* at 1164. See also *Castillo v. United States*, 952 F.3d 1311, 1320 (Fed. Cir. 2020) (affirming governance of the centerline presumption, a related rule of the strip-and-gore doctrine, in Trails Act cases). The Seventh Circuit explained,

> The presumption is that a deed to a railroad or other right of way company…conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple.… If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor…. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.

*Penn Central*, 955 F.2d at 1160 (citations omitted).[23]

In *Castillo*, a Florida Trails Act taking case, this Court explained that, in the context of railroad rights-of-way, the strip-and-gore doctrine and related centerline presumption "suppl[y] a default rule to perform that important task – with the content of the rule being a presumption that the corridor, commonly a narrow strip, is not to be owned separately from the abutting land." 952 F.3d at 1321 (citing Dale A. Whitman, THE LAW OF PROPERTY (4th ed. 2019) §11.2, pp. 713, 719). This Court explained that under the centerline presumption, "if a grantor conveys property identified as bounded by a road, stream, or similar corridor, and the grantor owns the land under that boundary corridor, the grant also conveys title to the land

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[23] A number of Trails Act cases before this Court, and one before the Indiana Supreme Court upon certification by this Court, concerning Indiana trails have recognized the same themes and public policy considerations under Indiana law. See *Schulenburg v. United States*, 137 Fed. Cl. 79 (2018); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708 (2011); *Howard v. United States*, 964 N.E.2d 779 (Ind. 2012).

underlying the corridor up to the corridor's centerline, unless there is clear evidence of non-conveyance as to that corridor land." *Castillo*, 952 F.3d at 1318. This Court noted that

> [l]ong ago, the Supreme Court of the United States described the centerline presumption as a "familiar principle of law" to the effect that "a grant of land bordering on a road or river, carries the title to the centre of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines."

*Id.* at 1320 (quoting *Banks v. Ogden*, 69 U.S. 57, 68 (1864)).

In *Castillo*, this Court pointed out that "[m]any other jurisdictions – very much the predominant number among those whose law has been cited to us – have applied the centerline presumption to railroad rights-of-way." 952 F.3d at 1321. Indiana follows the strip-and-gore doctrine and the related centerline presumption. Indiana public policy does not favor conveyances in strips of land in fee simple to railroad companies for right-of-way purposes whether by deed or condemnation. See *Ross*, , 199 N.E.2d at 348. The Indiana Supreme Court based this policy upon the following reasoning:

> Alienation of such strips from the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved. Therefore, where there is an ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed *in favor of the original grantors*, their heirs and assigns.

*Id.* (emphasis added).

Other factors to consider in the analysis of a deed include: 1) use of the terms "over, across, and through," which indicate the grantor intended to grant an easement not title to the fee simple estate; 2) lack of consideration or nominal consideration which likewise indicates the grantor intended to grant the railroad an easement; 3) the applicable statute; and 4) that if ambiguous and drafted by the railroad, the deed will be construed against the railroad (as an easement). See *Clark*, 737 N.E.2d at 759-60. A document granting a "right" to use the land owned by another conveys an easement (also called a servitude) not ownership of the fee hold estate in the land itself. *Id.* at 758.

**2. A deed referencing a "right-of-way" conveys an easement.**

Professors Jon W. Bruce and James W. Ely, Jr., explain, in THE LAW OF EASEMENTS & LICENSES IN LAND (2021-22) §1:22, "Generally, courts conclude that a conveyance of a "right-of-way" creates only an easement whether the grantee is an individual, a railroad, or another entity." The use of the term "right of way" generally suggests the creation of only an easement.[24] See also THOMPSON ON REAL

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[24] This Court relied upon Professors Bruce and Ely's treatise in *Preseault II*, 100 F.3d at 1542 ("In a leading treatise on the subject, the authors state the general rule to be "[w]hen precise language is employed to create an easement, such terminology governs the extent of usage.") (quoting Bruce & Ely, THE LAW OF EASEMENTS & LICENSES IN LAND ¶8.02[1] (rev. ed. 1995)). The Supreme Court has relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96, *United States Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1844 (2020), and *Sveen v. Melin*, 138 S.Ct. 1815, 1828 (2018) (Gorsuch, J., dissenting).

PROPERTY (2nd ed.) §60.03(a)(7)(ii). Recently, in *United States Forest Serv. v. Cowpasture River Preservation Ass'n*, a case arising under the Trails Act, the Supreme Court held, "[t]he Trails Act refers to the granted interests as 'rights-of-way,' both when describing agreements with the Federal Government and with private and state property owners." 140 S.Ct. 1837, 1845 (2020). The Court continued, "[w]hen applied to a private or state property owner, 'right-of-way' would carry its ordinary meaning of a limited right to enjoy another's land." *Id.*

Indiana courts have consistently held that when conveying an interest in land, reference to the interest as a "right of way" is an easement. As the Indiana Supreme Court held in *Brown*,

> The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land without additional language as the use or purpose to which the land is to be put or other ways limiting the estate conveyed, is to be construed as passing an estate in fee, *but reference to a right-of-way* in such a conveyance generally leads to its construction as conveying only an easement.

510 N.E.2d at 644 (emphasis added).

See also *Cincinnati, I., St. L. & C.R. Co. v. Geisel*, 21 N.E. 470, 470 (Ind. 1889) (in its analysis of deed granting "the right of way," court explained that a "right of way is an incorporeal hereditament, and this is all that the deed conveys."); *Vandalia R. Co. v. Topping*, 113 N.E. 421, 423 (Ind. Ct. App. 1916) (for deed that did "release,

relinquish and forever quitclaim to the [Railroad] the right of way," court held easement conveyed).[25]

State legislatures chartered railroad corporations for the public purpose of providing transportation of goods and people over a specific corridor with defined terminus points. Railroad corporations of this period were named for the points across which the corporation was authorized to operate. Two railroad corporations that enter this discussion are the Peru & Indianapolis Railroad Company and the Newcastle & Richmond Railroad Company. The name of these and other railroads of the day is taken from the route the Indiana legislature chartered the railroad to operate across.[26]

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[25] See also *Burrow v. Terre Haute & L.R. Co*., 8 N.E. 167, 169 (Ind. 1886) (in construing deed granting "the right of way," court stated "the fair and just construction of this contract is that is grants an easement to the railroad company.…"); *Douglass v. Thomas*, 2 N.E. 562, 564 (Ind. 1885) (deed executed conveying to a railroad company "the right of way" conveyed an easement); *Ingalls v. Byers*, 94 Ind. 134, 136 (Ind. 1883) (explaining that deed conveying "to the said company the right of way" was "language [that] clearly imports an intention to convey an easement to the grantee for a particular purpose"); *L&G Realty & Const. Co. v. City of Indianapolis*, 139 N.E.2d 580, 588 (Ind. Ct. App. 1957) (railroad acquired a limited easement from deed granting "the Right of Way for Railroad and other purposes."); *Geisel*, 21 N.E. at 470 ("The grant of a right of way is the grant of an easement, and implies that the fee remains in the grantor."); *Lake Erie & W.R. Co. v. Ziebarth*, 33 N.E. 256, 258 (Ind. Ct. App. 1893) (grant of "the right of way for the construction and operation of said company's railroad" conveyed easement).

[26] "[I]n 1860, President Lincoln's winning platform proclaimed: 'That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its

State legislatures granted railroad corporations the authority to acquire property by voluntary grant and the power of eminent domain to condemn private property. But this legislatively-granted authority was limited to the specific public purpose for which the legislature chartered the railroad corporation (providing public railway transportation), and the railroad corporation's authority was further limited to only the exercise of this authority (especially the power of eminent domain) to build a railway line across the specified route. And the interest the railroad corporation obtained in the land the railroad acquired – whether by voluntary grant or by condemnation – was limited to only that interest necessary for the railroad to achieve the public purpose for which the railroad was chartered. In the case of a railway line (tracks and ties laid across a strip of land), the only interest the railroad needed in the land across which the railroad laid its tracks was an easement. The railroad did not need to acquire title to the fee simple estate (including mineral interests) in the land to accomplish the purpose for which the railroad had been established.

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construction.'" *Brandt*, 572 U.S. at 96 (citing James W. Ely, Jr., RAILROADS & AMERICAN LAW (2001), p. 51).

### 3. *Preseault II* provides the paradigm by which this Court should analyze a railroad's interest in strips of land used for railway lines.

This litigation recalls Yogi Berra's famous observation, "this is *déjà vu* all over again." In *Preseault II*, the this Court answered *precisely* the same question this Court is now presented. To wit: Did the landowners whose property was condemned for a railroad right-of-way in the early 1900s, and the owners who signed documents granting the railroad a right-of-way across their land in the 1900s, give the railroad title to the *fee estate* in a strip of land upon which the railroad built and operated a railway line, or did the landowners grant the railroad an *easement* to operate a railway line across the strip of land? When *Preseault II* is followed, it is clear that the railroad was only granted an easement to construct and operate a railway line across a strip of these owner's land by the Release documents.[27]

*Preseault II* involved three tracts of land, including the "old Barker Estate" tract, over which the railroad had gained its right-of-way by condemnation. See 100 F.3d at 1531. The Claims Court had determined that "[t]he portion of the right-of-way consisting of the parcel of land condemned from the Barker Estate and taken by

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[27] Judge Plager authored the this Court's *en banc* decision in *Preseault II.* Judge Plager's authorship of *Preseault II* is noteworthy because Judge Plager is distinguished for his expertise in property law during his tenure as a professor of property and environmental law at the universities of Florida, Wisconsin, and Illinois before becoming dean of Indiana University Law School. See www.repository.law.indiana.edu./plager.

commissioner's award is indisputably an easement under the law of the State of Vermont." *Id.* at 1535. Following an "independent examination" of the Claim Court's finding that the Barker-tract right-of-way was an easement, this Court concluded, "there is little real dispute about this. That was the rule in the early Vermont cases, and continues to be the rule today." *Id.* (citing *Dessureau v. Maurice Memorials, Inc.*, 318 A.2d 652, 653 (Vt. 1974), and *Troy & Boston Railroad v. Potter*, 42 Vt. 265, 274 (1869)). Quoting the Vermont Supreme Court in *Dessureau*, 318 A.2d at 653, this Court acknowledged and affirmed that a taking by a railroad "pursuant to statutory authority, gave the railroad only an easement, not a fee, and upon abandonment, the property reverts to the former owner." *Id.* at 1535. This Court further explained that the "Vermont cases are consistent in holding that, practically without regard to the documentation and manner of acquisition, when a railroad for its purposes acquires an estate in land for laying track and operating railroad equipment thereon, the estate acquired is no more than that needed for the purpose," which "typically means an easement, not a fee simple estate. *Id.*

*Preseault II*'s holding that the railroad acquired only an easement across the Barker land, and not title to the fee estate, reaffirmed the principle common to Indiana and every other state surveyed, that a railroad exercising eminent domain power to acquire a right-of-way obtains only an easement.

This Court, in *Preseault II*, then turned to the railroad's interest in the parcel that was conveyed to the railroad by the Manwell deed. This deed, this Court explained, appeared to be a warranty deed by which Fredrick and Mary Manwell conveyed the railroad fee simple title to a strip of land. See *Preseault II*, 100 F.3d at 1535. This Court noted that the Manwell deed contained "the usual habendum clause found in a warranty deed, and purports to convey the described strip of land to the grantee railroad '[t]o have and to hold the above granted and bargained premises...unto it the said grantee, its successors and assigns forever, to its and their own proper use, benefit and behoof forever'[, and] further warrants that the grantors have 'a good, indefeasible estate, *in fee simple*, and have good right to bargain and sell the same in manner and form as above written....'" *Id.* (emphasis added). None of this language is present in the Release documents.

This Court continued, "[i]n short, the deed appears to be the standard form used to convey a fee simple title from a grantor to a grantee. *But did it?*" *Preseault II*, 100 F.3d at 1535-36 (emphasis added). This Court noted that "the deed was given following survey and location of the right-of-way," and thus, "despite the apparent terms of the deed indicating a transfer in fee, the legal effect was to convey only an easement." *Id.* at 1536. After citing *Hill v. Western Vermont Railroad*, 32 Vt. 68, 73 (1859), and *Troy*, 42 Vt. at 274, this Court held,

> Thus it is that a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes, and that the act of survey and location is the operative determinant, and not the particular form of transfer, if any. Here, the evidence is that the Railroad had obtained a survey and location of its right-of-way, after which the Manwell deed was executed confirming and memorializing the Railroad's action.
>
> On balance it would seem that, consistent with the view expressed in *Hill*, the proceeding retained its eminent domain flavor, and the railroad acquired only that which it needed, an easement for its roadway. Nothing the Government points to or that we can find in the later cases would seem to undermine that view of the case....

*Preseault II*, at 100 F.3d at 1537 (paragraph break added).

The relevant law in both Vermont and Indiana (and for that matter in every other state) were identical in the early 1900s. In fact, the leading decisions of the Vermont Supreme Court upon which this Court relied in *Preseault II* – *Hill* and *Troy* – were cited by this Court and the courts of several states as authority for the proposition that railroads obtain only an easement in strips of land used for a railway line.[28] Not only that, Vermont Supreme Court Chief Justice Isaac Redfield, who

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[28] See, *e.g.*, *Jackson v. United States*, 135 Fed. Cl. 436, 457 (2017) ("Here, as in *Preseault II*, the governing state statute strongly supports an interpretation that the [railroad] form conveyances granted the railroad an easement, not a fee simple.") (applying Georgia law) (citing and quoting *Preseault II*, 100 F.3d at 1534-35, 1537, and *Hill*, 32 Vt. at 76); *Carpenter v. United States*, 147 Fed. Cl. 643, 653 (2020) (applying Vermont law) ("The [Vermont Supreme C]ourt [in *Hill*] found the [railroad] only had the power to exercise its eminent domain power to acquire easements.") (citing *Hill*, 32 Vt. at 74); *Page v. Heineberg*, 40 Vt. 81, 83 (1868) ("A deed of the fee of land for railway purposes, has been held to convey no attachable interest.") (citing *Hill*, 32 Vt. at 68, and Redfield, LAW OF RAILWAYS, v.1, p. 248);

authored the *Hill* decision, also authored the nation's leading treatise on railroad law.

See Isaac F. Redfield, THE LAW OF RAILWAYS (3rd ed. 1867).

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*West Texas Utilities Co. v. Lee*, 26 S.W.2d 457, 459 (Tex. Ct. App. 1930) ("a deed should be so interpreted as to give effect to the intention of the parties, and where the conveyance is made for a particular use it must of necessity carry the implication of such limitation upon the estate conveyed") (citing *Hill*, 32 Vt. at 74); *Abercrombie v. Simmons*, 81 P. 208, 210 (Kan. 1905) ("parties may by their contract create an estate less than a fee, or a right less in extent than that which the law authorizes the grantee to acquire") (citing *Hill*, 32 Vt. at 74); *Beasley v. Aberdeen & Rockfish R. Co.*, 59 S.E. 60, 62 (N.C. 1907) ("We have construed such grants of easements to railroads as conveying no more than may be reasonably within the contemplation of the parties.") (citing and quoting *Hill*, 32 Vt. at 68); *Bradley v. Crane*, 94 N.E. 359, 363 (NY Ct. App. 1911) ("No reason or purpose demanded or permitted that the city should take an estate greater than the opening and extending of the road compelled and superfluous thereto, which did not likewise demand that it take an excessive quantity of land. In fact, excess of both land and interest or estate was by the conveyance forbidden it.") (citing *Hill*, 32 Vt. at 68); *Malone v. City of Toledo*, 28 Ohio St. 643, 651 (1876) ("under no circumstances, would the state take a fee simple absolute under this statute, but that at the best it would be a fee simple conditional or a fee simple determinable on condition") (citing *Hill*, 32 Vt. at 73); *Kansas City S. Ry. Co. v. Sandlin*, 158 S.W. 857, 858 (Mo. Ct. App. 1913) ("all such conveyances must be construed as passing an easement only to the grantee") (citing *Hill*, 32 Vt. at 74, and cases in West Virginia, Kansas, Michigan, Indiana, Iowa, North Carolina, and Ohio holding the same); *Atlanta, B&A Ry. Co. v. Coffee County*, 110 S.E. 214, 216 (Ga. 1921) (grantor "did not intend to vest in that company an absolute fee-simple title to the strip of land in controversy") (citing and quoting *Hill*, 32 Vt. at 74); *St. Onge v. Day*, 18 P. 278, 280 (Colo. 1888) ("It should not be inferred from what has been said that the railway company has right to burden the property with any other or different use than that for which it was granted or acquired.") (citing *Troy & Boston RR*, 42 Vt. at 274); *Woodward Governor Co. v. City of Loves Park, Winnebago County*, 82 N.E.2d 387, 390 (Ill. App. Ct. 1948) (citing and quoting *Troy & Boston RR*, 42 Vt. at 265); *Vermilya v. Chicago, M & St. P.RR. Co.*, 24 N.W. 234, 237 (Iowa 1885) (decisions of other states, including *Troy & Boston RR*, 42 Vt. at 265, "are in no manner in conflict with our views").

A railroad corporation's franchise was limited to the operation of a railway line and did not extend to unrelated use of the land such as public recreation trails or so called "railbanking." See *Preseault II*, 100 F.3d at 1554 (Rader and Lourie, JJ., concurring),[29] and *Toews*, 376 F.3d at 1376 ("it appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains"). Likewise, the Peru & Indianapolis Railroad was not constructed for the purpose of hiking, biking, Thanksgiving Day Trot n' Gobble 5Ks, or chili dinners. See, *supra*, note 5.

**B. The CFC wrongly applied and incorrectly read *Newcastle* and *Rayl*.**

The CFC reached its conclusion that the railroad obtained title to the fee simple interest in the strip of land across which the railroad built a railway line primarily upon the two decisions, *Newcastle & Richmond Railroad Co. v. Peru & Indianapolis Railroad Co.*, 3 Ind. 464 (1852), and *Indianapolis Peru & Chicago*

[29] "While there is some dispute over the comparative burden of scheduled rumbling freight trains versus obnoxious in-line rollerskaters, the issue can be resolved on simpler terms. Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion. ... The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation."

*Railway Co. v. Rayl*, 69 Ind. 424 (1880). *See ATS Ford*, 156 Fed. Cl. at 413-18. The CFC stated that in "*Newcastle*, the Indiana Supreme Court held that releases and condemnation proceedings authorized by the [Peru & Indianapolis Railroad]'s legislative charter conveyed fee simple estates to the [railroad], and in *Rayl*, the court held that the [railroad] acquire a fee simple estate in the railroad corridor through the Richmond release." *Id.* at 418.

But the CFC erred in its reading of the Indiana Supreme Court's 1852 *Newcastle* decision and 1880 *Rayl* decision. *Newcastle* concerned the authority the railroad corporation was granted in the legislative charter, not the interest in land that the signatory of the Release document intended to convey in the strip of land across which the railroad built a railway line. The CFC acknowledges this limited nature of the holding in *Newcastle*, stating, "[n]otably, the Indiana Supreme Court in *Newcastle* was concerned only with the [railroad]'s legislative charter *and not any specific conveyances made pursuant to the charter*." *Id.* at 408 (emphasis added).

First, these Release documents do not conform to the statutory formalities of conveyances, such as a warranty deed or even a quit claim deed, and were insufficient, as a matter of Indiana law, to convey title to the fee estate. Indiana's statute, enacted in 1852 and since repealed and recodified, provided:

> Any conveyance of lands worded in substance as follows: "A.B. conveys and warrants to C.D." (here describe the premises) "for the sum of" (here insert the consideration,) the said conveyance being dated

> and duly signed, sealed, and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all encumbrances, and that he will warrant and defend the title to the same against all lawful claims.

Ind. Stat. §32-1-2-12 (1 R.S. 1852, Ch. 23 §12).

The Release documents executed in the 1840s and 1850s contain none of the statutory requirements for conveying a fee simple estate in Indiana. Therefore, under Indiana law, the greatest interest the Release documents could have conveyed was the interest they purported to convey – a "right of way" easement over and across these landowners' property. See *Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779, 781, n.3 (Ind. 1997) ("we adopt the Court of Appeal's reasoning that the use of the term 'right of way' in the deeds in issue in this case conveyed to the railroad only an easement") (citing and quoting "1 RS 1852, Ch. 23 § 12 [old statute]").

Even assuming the CFC was correct in concluding the railroad's charter did grant the railroad authority to obtain title to the fee simple estate in a strip of land instead of an easement (a point that is not at all established), the CFC overlooked the fundamental difference between what interest in strip of land a railroads charter *allows* a railroad to possibly acquire and what interest an individual landowner who signed a specific Release document *in fact intended to grant* the railroad. If the

notion that, because a railroad's charter *allows* the railroad to acquire title a fee simple interest in land, then (as the CFC reasoned) all these releases and other transfers to the railroad *must be read* assuming the grantor intended to convey the railroad title to the fee simple absolute no matter what the actual language in the Release document states. If this were so, there would be no railroad easements and all the property conveyed to Indiana railroads from the 1830s until today would be a network of strips and gores of land held in fee simple. This is, of course, utterly contrary to the strips and gore doctrine we explained above.

These are two different questions, and the CFC admits that *Newcastle* does not address the second question. See *ATS Ford*, 156 Fed. Cl. at 408. The CFC reviewed a series of subsequent Indiana decisions discussing *Newcastle* and *Rayl* for the proposition that "courts affirmed that a railroad company retained the right to contract for a greater or lesser estate than what was described in the legislative charter." *Id.* at 412. Thus, even under the CFC's reading of *Newcastle*, *Rayl*, and subsequent Indiana authorities – which provide that a railroad *can* obtain a fee estate interest in land if it needs that interest and if the railroad's charter authorizes it to do so, *whether* the railroad was actually conveyed a fee interest depends upon the text of the Release documents.

When we turn to the text of the Release documents, the purpose and intent for the Release documents and the text is to recognize an easement, not the conveyance

of fee simple title. The Releases describe that the "purpose" of the Release is "facilitating the construction and completion" of the railroad by "release[ing] and relinquish[ing] to the [railroad] the right of way for so much of said road as may pass through or cut the following piece, parcel or lot of land." See *ATS Ford*, 156 Fed. Cl. at 401. And the damage release is related to "anything connected with or consequent upon the construction of said road or the repairing thereof." *Id.* When the text of the Release documents are considered, it is obvious, explicit, and emphatic that the intent of the parties was to create or recognize a "right-of-way" for a railway line "pass[ing] through" the landowners' property, not to convey fee simple title to the railroad in a strip of land. See *Consolidated Rail*, 682 N.E.2d at 781 ("We stressed that a railroad is responsible for the printed words when the railroad prepares a conveyance form; thus, we will construe the form in a light most favorable to the grantors.") (citing *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 853-54 (Ind. 1997), and *Brown*, 510 N.E.2d at 643).

Under Indiana common law and Indiana statute, the form Release documents that the railroad had these landowners' predecessors-in-title sign could not and did not convey fee simple title to the strip of land across their properties upon which the railroad constructed and operated its now-abandoned railway line. Because the Releases granted only a "right of way" easement for railroad purposes, the Trails

Act preempted these landowners' Indiana state law "reversionary" right to regain unencumbered fee title to their land adjacent to and underlying the former railroad corridor. Accordingly, the government took these owners' property under the Trails Act, for which the government is obligated to pay these owners "just compensation."

## CONCLUSION

We ask this Court to vacate the decision of the CFC below and certify the following question to the Indiana Supreme Court under Rule 64 of that Court's appellate procedure:

> Under Indiana law, did the Release documents containing the language and provisions of those documents these Indiana landowners' predecessors-in-title executed in the 1840s and 1850s (and reproduced in the Court of Federal Claims' opinion and record), according to the facts and circumstances in which these documents were executed, convey to the railroad title to the fee simple estate in the strip of land upon which the railroad constructed and operated its railway line, or instead, did the Releases grant the railroad an easement to construct and operate a railway line across the strip of land?

Alternatively, should this Court not certify this question to the Indiana Supreme Court, this Court should reverse the CFC's decision and hold that the 1840s and 1850s Release documents, as a matter of Indiana law, granted the railroad a right-of-way easement to construct and operate a railway line across the strip of land, not title to the fee simple estate in the land; and accordingly, the federal government is liable for taking these landowners' property without "just compensation" in

violation of the Fifth Amendment, for which the government must pay them just compensation.

Respectfully submitted,

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# Addendum

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# In the United States Court of Federal Claims

No. 19-471L
(Filed: December 3, 2021)
(Nunc Pro Tunc: March 23, 2021)

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|---|---|
| ATS FORD DRIVE INVESTMENT, LLC et al., Plaintiffs, v. THE UNITED STATES, Defendant. | Trails Act; Indiana Law; Property Interest Conveyed via Release Executed Pursuant to Railroad Company's Legislative Charter; Fee Simple Versus Easement; Cross-Motions for Summary Judgment; Request to Certify Questions to the Indiana Supreme Court; Indiana Supreme Court's Adherence to Its Prior Rulings |

Mark F. Hearne, II, St. Louis, MO, for plaintiffs.

Brian R. Herman, United States Department of Justice, Washington, DC, for defendant.

**OPINION AND ORDER**

**SWEENEY**, Senior Judge

Plaintiffs in this case, along with plaintiffs in five other cases before the undersigned, own real property adjacent to a railroad line in Marion and Hamilton Counties, Indiana.[1] They contend that the United States violated the Fifth Amendment to the United States Constitution by authorizing the conversion of the railroad line into a recreational trail pursuant to the National Trail Systems Act ("Trails Act"), thus acquiring their property by inverse condemnation. Four of the cases, including this one, are proceeding in a coordinated manner,[2] and a subset of plaintiffs from these cases ("Group 2 plaintiffs") assert claims that require the resolution of a single dispositive legal issue: whether a particular instrument by which the railroad company acquired the portion of the railroad corridor adjacent to their parcels conveyed an easement or a fee simple

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[1] The six cases are Oldham v. United States, No. 18-1961L (consolidated with Overlook At The Fairgrounds LP v. United States, No. 18-1962L); Pressly v United States, No. 18-1964L (consolidated with Jones v. United States, No. 19-1375L); Bradley v. United States, No. 19-400L; ATS Ford Drive Investment, LLC v. United States, No. 19-471L ("ATS Ford"); Episcopal Diocese of Indianapolis v. United States, No. 19-881L (consolidated with Doyle v. United States, No. 19-882L); and ID Castings, LLC v. United States, No. 19-1158L.

[2] The four cases are Oldham, Pressly, Bradley, and ATS Ford.

estate. The parties filed nearly identical cross-motions for summary judgment in each case. As explained in more detail below, the court denies plaintiffs' motion and grants in part defendant's motion.

## I. BACKGROUND

On January 19, 1846, the Indiana General Assembly enacted an "Act to incorporate the Peru and Indianapolis Railroad Company."[3] Pursuant to that legislative charter, the Peru and Indianapolis Railroad Company ("PIRC") was authorized to construct a railroad line within Indiana originating in the town of Peru, running through the towns of Kokomo and Noblesville, and terminating in Indianapolis. The legislative charter provided that the railroad corridor was to be no more than eighty feet wide, and could be acquired using a number of mechanisms:

> Sec. 15. It shall be lawful for the corporation, either before or after the location of any section of the Road, to obtain from the persons through whose land the same may pass, a relinquishment of so much of the land as may be necessary for the construction and location of the road; as also, the stone, gravel and timber, and other materials that may be obtained on the said route, and may contract for stone, gravel, timber, and other materials that may be obtained from any land near thereto: and it shall be lawful for said corporation to receive by donations, gifts, grants, or bequests, land, money, labor, property, stone, gravel, wood, or other materials, for the benefit of said corporation . . . .
>
> Sec. 16. That in all cases where any person through whose land the road may run, shall refuse to relinquish the same, or when a contract by the parties cannot be made, it shall be lawful for the corporation to [initiate condemnation proceedings].
>
> . . . .
>
> Sec. 18. That if it shall be found necessary and advantageous to the location and construction of said road, the corporation shall have the right to lay the same along and upon any county or State road: Provided however, That before such location is made, the corporation shall make application to the county commissioners of the proper county, for such right; and said commissioners are hereby vested with power to grant the same, by an order entered upon their records: And provided also, That such right shall be granted on condition that the corporation shall leave a sufficiency of said State or county road in as good repair, for common use, as previous to such occupation.

Further, with respect to the PIRC's acquisition of the railroad corridor, the charter provided (footnote added):

[3] The facts in this section are derived from the exhibits attached to the parties' summary judgment briefing and are not in dispute.

> Sec. 19. That when said corporation shall have procured the right of way, as herein before provided, they shall be seized, in fee simple, of the right to such land, and they shall have the sole use and occupancy of the same, but not to interfere with the right of way of any Railroad company heretofore incorporated;[4] and no person, body politic or corporate, shall in any way interfere with, molest, disturb or injure any of the rights or privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.

In accordance with its legislative charter, the PIRC acquired the portions of the railroad corridor at issue in this case in the 1840s (primarily in 1848) and early 1850s (either in 1851 or 1853). Frequently, its acquisitions were accomplished using recorded instruments that will be referred to generally as "releases." All but two of the releases in the record before the court include identical preprinted language:[5]

> I, ________ of the county of ________ and State of Indiana, for, and in consideration of the advantages which can or will result to the public in general, and myself in particular, by the construction of the "PERU AND INDIANAPOLIS RAILROAD," as now is, or may hereafter be, surveyed, or finally located, and for the purpose of facilitating the construction and completion of said work, do hereby, and for myself, my heirs, executors, administrators and assigns, RELEASE and RELINQUISH to the "PERU AND INDIANAPOLIS RAILROAD COMPANY" the right of way for so much of said road as may pass through or cut the following piece, parcel or lot of land, to wit: ________
>
> And I do further release and relinquish to the said PERU AND INDIANAPOLIS RAILROAD COMPANY all DAMAGES and right to DAMAGES which I might sustain or be entitled to, by reason of anything connected with or consequent upon the construction of said road or the repairing thereof.

Moreover, most of these releases include a third preprinted paragraph:

> And I do [license] and permit said Company, or any authorized agent of the same, to enter upon said land, and take therefrom any timber, stone, sand,

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[4] In the mid-nineteenth century, the Indiana General Assembly, drafters of real estate conveyance instruments, and Indiana courts regularly used plural pronouns and verbs in conjunction with collective nouns such as "corporation" and "company." Although not preferred in modern American English, this usage is common in British English, and was common in American English in the years following the American Revolution. See Bryan A. Garner, A Dictionary of Modern Legal Usage 170-71 (2d ed. 1995) (defining "collective nouns"). Due to its prevalence, the court does not disturb this usage when quoting the PIRC's legislative charter, the conveyance instruments executed by the PIRC, and Indiana case law.

[5] On some of the releases, minor handwritten additions and deletions were made to the preprinted language. Those alterations do not affect the construction of the releases.

> gravel, earth or other materials for the construction and repairing of said road from time to time.

On all of the preprinted releases, a description of the "piece, parcel or lot of land" was handwritten at the end of the first paragraph. Two of these releases included additional handwritten language after the description. On the release executed by Silas McCole on March 9, 1853 ("McCole release") was this handwritten clause: "and do further relinquish all damage for earth taken out Side of the right of way and for earth put out Side the eighty feet or for using other earth or materials taken to construct the Peru & Indianapolis Rail Road across said land." And on the release executed by Richard Shelley in September 1848 ("Shelley release") was this handwritten clause:

> the above Relinquishment is given in consideration of the President & Directors of the Peru & Indianapolis Rail Road Company paying the undersigned Seventeen Dollars & fifty cents and the company further agree to dig two pits for the undersigned where he may designate for the use of his fences where . . . the same may cross.

The other two releases in the record before the court are entirely handwritten. The first was executed by Daniel Lovett ("Lovett release") and provided:

> This indenture made this Second day of Nov. AD 1848 between Daniel Lovett . . . and the Peru and Indianapolis Rail Road Company . . . , that the said Lovett for and in consideration of the advantages which can or will result to the public and to himself in particular by the construction of the Peru and Indianapolis Rail Road, as it is now located through the tract of land hereinafter described and for the purpose of facilitating the construction and completion of said work does hereby for himself and his heirs and assigns, release and relinquish to the Peru and Indianapolis Rail Road Company the right of way for so much of said Road as may pass through or cut the following piece parcel or lot of land, to wit, [description of land]. The foregoing grant and release is upon the following [agreement] and condition, to wit, the said Peru and Indianapolis Rail Road Company shall pay to the said Lovett for the land so taken and occupied by them at the rate of twenty dollars per acre, which in the wood land shall include the whole width from which it is necessary to cut off the wood and timber, and upon the residue of the land it shall include all that part occupied by the grade . . . and the fence enclosing the road. The said Rail Road Company agree to dig plank up and keep in repair pits at each and every place where any fence upon said tract of land now crosses the track of said Road or they may enclose the road with a good fence and keep the same in repair, and to pay for all the injury that may be done by means of said Road and the transportation of produce merchandise or passengers thereon, and by means of said pits to the live stock of any and all persons who may be occupants of the premises hereinbefore described before the said enclosing fences shall be constructed or while the same shall be out of repair. The said Rail Road Company agree to leave all of the apple trees uninjured which may stand upon said premises outside of the grade of said Road. The said Lovett

> reserves to himself his heirs and assigns all the wood and timber upon said premises standing or being within the survey of said Road, and the right to remove the same at all reasonable times. Said Lovett also reserves the right to cross the track of said Road upon said premises with teams and loaded vehicles at all convenient times and places. The said Rail Road Company agree to pay the said Lovett for the said release as follows, to wit, twenty five dollars by the first day of Nov. 1848, and the residue by the first day of February 1849.

The second was executed by Elijah James ("James release") and provided:

> This indenture made this Second day of Nov. AD 1848 between Elijah James . . . and the Peru and Indianapolis Rail Road Company . . . , that the said Elijah James . . . in consideration of the advantages which can or will result to the public in general and to himself . . . in particular by the construction of the Peru and Indianapolis Rail Road, as the same is now located, and for the purpose of facilitating the construction of said work does hereby for himself . . . and for his . . . heirs and assigns, grant release and relinquish unto the said Peru and Indianapolis Rail Road Company the right of way for so much of said Road as may pass through or cut the following piece parcel or lot of land, to wit, [description of land], for the sum of one hundred and thirty seven dollars and fifty cents, to be paid as follows, to wit, one half of said sum shall be paid on the Second day of November AD 1848, and the other half shall be paid in three months from that date. The foregoing release is upon the following condition, to wit, that the said Elijah James reserves to himself . . . all the wood and timber now standing or being upon the track of said Road. The said Rail Road Company agree to dig two pits upon said Road sufficient to keep cattle sheep and hogs, and horses and . . . other live stock from passing over them, at such places upon the premises as the said Elijah James shall designate, and it is further agreed that the said Elijah James shall furnish timber and lumber for the construction of such pits and plank up the same.

A railroad line was constructed, and a railroad operated, in the corridor acquired by the PIRC. Eventually, in 1995, the line was purchased by three Indiana municipalities: the City of Fisher, the City of Noblesville, and Hamilton County. In 2017, the municipalities advised the Surface Transportation Board ("Board") of their collective desire to invoke the Trails Act, 16 U.S.C. §§ 1241-1251, which, as amended, provides for the preservation of "established railroad rights-of-way for future reactivation of rail service" by authorizing the interim use of such rights-of-way as recreational and historical trails. Id. § 1247(d). The following year, they submitted three separate requests to the Board, each relating to the portion of the railroad line for their respective municipalities, for the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"). A NITU permits the discontinuation of rail service, the salvaging of track and materials, and, if an agreement regarding trail use is not reached, the abandonment of the line. 49 C.F.R. § 1152.29(d)(1). The Board issued the three NITUs on December 21, 2018, and the municipalities executed trail-use agreements in 2019.

After the Board issued the NITUs, a number of suits were filed in this court in which owners of parcels adjacent to the railroad line alleged that through the operation of the Trails Act and the issuance of the NITUs, defendant had taken their property without paying just compensation in violation of the Fifth Amendment. In June 2020, the plaintiffs in Oldham, Pressly, Bradley, and ATS Ford proposed a coordinated approach to resolving their claims. Specifically, they sought to divide themselves into three groups: Group 1 plaintiffs had no outstanding liability issues and could proceed to damages; Group 2 plaintiffs had claims that required the resolution of an essentially identical threshold title issue; and Group 3 plaintiffs had other outstanding liability issues. Further, with respect to Group 2, plaintiffs proposed that the court set a schedule for the parties to brief a motion to certify questions to the Indiana Supreme Court that would affect the outcome of the Group 2 plaintiffs' claims.

In a July 22, 2020 order, the court adopted plaintiffs' proposal, over defendant's objection, to divide plaintiffs into the three identified groups. However, it was not persuaded that separately briefing whether to certify questions to the Indiana Supreme Court would be the most efficient approach to resolving the issue presented by the claims of the Group 2 plaintiffs. Rather, it directed the parties to brief cross-motions for summary judgment, while permitting plaintiffs to request certification to the Indiana Supreme Court within their motions. It further noted that it would not hear argument on these motions unless requested by one or more of the parties.

The Group 2 cross-motions for summary judgment are now fully briefed, and none of the parties requested oral argument.[6] Thus, the motions are ripe for adjudication.

## II. DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. R. Ct. Fed. Cl. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The primary issue addressed by the parties in their cross-motions for summary judgment is straightforward: whether the releases by which the PIRC acquired portions of its railroad corridor conveyed easements or fee simple estates. The relevant facts are not in dispute, making this issue particularly well suited for resolution by summary judgment. See Varilease Tech. Grp., Inc. v. United States, 289 F.3d 795, 798 (Fed. Cir. 2002) ("Contract interpretation is a question of law generally amenable to summary judgment.").

### A. The Claims at Issue

As a threshold matter, the parties dispute whether it was appropriate for defendant to seek summary judgment with respect to the claims of certain Group 2 plaintiffs whose property interests were not affected by the releases described above. In its cross-motion for summary judgment, defendant contends that although the claims of certain Group 2 plaintiffs are not

[6] The briefing is substantively identical in all four cases. Accordingly, the court is filing a substantively identical decision in each case. The only difference among the four decisions is the case caption.

dependent on the interpretation of the releases, the binding Indiana Supreme Court precedent construing the PIRC's legislative charter applies in equal force to those claims, and therefore those claims can be resolved. Plaintiffs respond that such claims are beyond the scope of the summary judgment briefing ordered by the court.

The parties' disagreement arises from their competing interpretations of the court's July 22, 2020 order. In that order, the court discussed the status of the claims of each of the three groups of plaintiffs. For the Group 2 plaintiffs, the court concluded:

> [B]ecause the identical issues (pertaining to whether the Releases conveyed a fee simple interest or an easement to the PIRC) affects a significant number of plaintiffs in the moving plaintiffs' cases, the court finds that a coordinated approach to resolving the issues is prudent. Consequently, the court will set a schedule for briefing cross-motions for summary judgment limited solely to these issues. . . . Due to the narrowness of the legal issues, the court believes that the parties' motions can be resolved expeditiously.

Order 6. For the Group 3 plaintiffs, the court observed that "[t]he moving plaintiffs represent that there may be non-Release-related threshold title issues with respect to these plaintiffs' claims that prevents the parties from reaching an agreement on liability," and advised that it would "not schedule summary judgment briefing on any remaining threshold title issues before the conclusion of summary judgment briefing related to the Releases." Id. at 7. Then, in providing a schedule for further proceedings, the court directed the filing in each case of a notice identifying the plaintiffs "(1) that are eligible to proceed to the damages phase (Group 1 plaintiffs), (2) for which the government's liability depends solely on how PIRC's legislative charter and the Releases are interpreted (Group 2 plaintiffs), and (3) that have claims with other unresolved threshold title issues (Group 3 plaintiffs)." Id. at 8. Finally, the court introduced the summary judgment briefing schedule with the following directive: "With respect to the plaintiffs that assert claims for which liability depends solely on the interpretation of the Releases and/or the PIRC legislative charter, the parties shall brief cross-motions for summary judgment . . . ." Id. at 9.

Defendant interprets the court's order to mean that it should brief issues that involved construction of the PIRC's legislative charter, regardless of whether a release was at issue. It further remarks that some of the plaintiffs placed in Group 2 do not assert claims dependent on the construction of a release, and therefore those claims are properly before the court on summary judgment. Plaintiffs acknowledge that some plaintiffs with claims not dependent on the interpretation of a release were included in Group 2, but assert that the court's order should be read to limit summary judgment briefing to those claims that required the construction of a release.

When it issued its order, the court understood that plaintiffs intended to include in Group 2 only those plaintiffs whose claims depended on the construction of a release, and recognized that it was defendant's position that reference to the PIRC's legislative charter (and certain Indiana Supreme Court precedent) was necessary for such construction. Thus, it described the "narrow[]" issues that would be addressed for the Group 2 plaintiffs on summary judgment as

those that "pertain[ed] to whether the Releases conveyed a fee simple interest or an easement . . . ." It also stated that it would not schedule briefing on any unresolved "non-Release-related threshold title issues before the conclusion of summary judgment briefing related to the Releases." The court did not intend for its subsequent references to the PIRC's legislative charter to broaden the scope of the summary judgment motions. Thus, even if defendant is correct that a decision regarding the interplay of the releases, legislative charter, and state-court precedent may compel or strongly support a certain result for other claims, the court declines to render summary judgment on those claims through the motions before the court.

In the table below, the court identifies the claims (by case, release, and claim number) that it will address in this decision:[7]

| Release | Oldham | Pressly | Bradley | ATS Ford |
|---|---|---|---|---|
| Bradley | | 24, 47, 51, 114, 136, 142, 186, 197, 224, 225, 266a, 266b, 301, 302, 307 | | |
| Cropper | | 115, 119a, 119b, 228, 236a | 36, 37 | 31 |
| Culbertson | 12 | | 24 | |
| James | 16, 21, 24 | 5, 43a, 43b, 43c, 43d, 59, 86, 121, 173, 180, 254, 257 | 27, 38 | 36, 37 |
| Lovett | 4 | 11, 60, 189 | | 41, 42, 43, 44, 45 |
| McCole | | 157 | | 1 |
| Oaput/ Opput[8] | 30 | 135c | | |
| Phipps | 15 | 37, 96, 125, 126, 131, 135a, 185, 233, 281 | 20, 29 | 28 |
| Shelley | | 236b | | 30 |
| Silvey | | 20, 164 | | |

[7] Several claims appear in the table more than once because their resolution depends on the construction of more than one release: Oldham claim 9; Pressly claims 71, 226, and 289; and Bradley claim 24. In addition, three claims in the table are identified by plaintiffs as belonging to a Group 2 plaintiff but do not appear in Exhibit 5 to defendant's cross-motion for summary judgment: Pressly claims 46, 157, and 303.

[8] In their table setting forth the claims of the Group 2 plaintiffs, plaintiffs in Pressly identify the source conveyance for claim 135c as "Gappert-Deed Book 182 & Page 142." It is apparent that this "Gappert" conveyance is the same as the "Wm. Oapert Release" identified by the Oldham plaintiffs as the source conveyance for claim 30, since the Interstate Commerce Commission ("ICC") valuation map and parcel number (V9 3/7) are the same for both conveyances.

| | | | | |
|---|---|---|---|---|
| Smith | | 10, 49, 73, 77, 82, 91, 105, 113, 139, 178, 196, 201, 273, 303 | 24, 34 | 33 |
| Sterritt | | 71, 183 | | |
| Sutherland | | 14, 167a, 167b, 245 | 18 | |
| Threlkell[9] | 19, 33 | 46 | | |
| Weever | 32 | 2, 8, 31a, 31b, 33, 65(b), 90, 98, 100, 107, 152, 154, 190, 202, 212, 230, 232, 286 | 11 | |
| West | | 45a, 45b, 45c, 45d, 71, 177a, 177c, 223, 279 | | 26 |
| Wright (1848) | 9, 10 | 42, 52, 67a, 67b, 72 (part),[10] 75, 209a, 209b, 226, 289 | | |
| Wright (undated) | | 17, 21a, 21b, 226, 277 | | |
| Young | 9 | 289, 296, 297 | | |

Relatedly, although plaintiffs included the following claims in Group 2, they are not solely dependent on the construction of a release. Thus, the court will not address them in this decision and instead moves them into Group 3:

| Case | Claim |
|---|---|
| Oldham | 6, 13, 22 |
| Bradley | 16, 19, 28,[11] 32, 33 |
| ATS Ford | 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 27[12] |

[9] Plaintiffs in ATS Ford identified the release executed by Willis Threlkell on February 12, 1849 ("Threlkell release") as one of two source conveyances for claim 34, but included claim 34 in Group 3. Thus, the court does not address this claim in this decision.

[10] The parcel described in Pressly claim 72 is adjacent to two segments of the railroad corridor: one acquired by the PIRC via a release and one acquired by the PIRC via adverse possession. Only the acquisition of the former segment is at issue in this decision.

[11] Plaintiffs in Bradley identified two source conveyances for claim 28: a release in the court's record and an instrument referred to as "Anna M. Sutton, Book 291, Page 478- IN HAND." Because the latter instrument is neither identified as a release nor in the record before the court, the court cannot address Bradley claim 28 in this decision.

[12] Plaintiffs in ATS Ford identified the source conveyance for claim 27 as "Jwright" and the relevant ICC valuation map and parcel number as V9 4/13. It is unclear whether this source conveyance is the release executed by James T. Wright in 1848 ("1848 Wright release"), the release executed by James T. Wright on an unspecified date in the 1840s ("undated Wright release"), or neither; plaintiffs in the other cases associate the 1848 Wright release and undated Wright release only with the following ICC valuation maps and parcel numbers: V9 3/12; V9

Having specified the claims at issue, the court turns to their resolution.

## B. The Property Interest Acquired by the PIRC via the Releases

The Fifth Amendment prohibits the federal government from taking private property for public use without paying just compensation. U.S. Const. amend. V. To establish a taking, a plaintiff must first "identif[y] a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1348 (Fed. Cir. 2013); accord Klamath Irrigation Dist. v. United States, 635 F.3d 505, 520 n.12 (Fed. Cir. 2011) ("It is plaintiffs' burden to establish cognizable property interests for purposes of their takings . . . claims."). To demonstrate a cognizable property interest in a Trails Act case, a plaintiff must establish, among other things, that the railroad company acquired an easement for railroad purposes. Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Preseault v. United States ("Preseault II"), 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc). In general, state law governs the determination of the property interest acquired by the railroad company. See Preseault v. Interstate Com. Comm'n, 494 U.S. 1, 8 (1990) ("State law generally governs the disposition of reversionary interests . . . ."); Preseault II, 100 F.3d at 1534 ("The question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of [the state] then in effect."). Moreover, the acquisition of property rights is governed by the law in effect at the time the rights were acquired. See Hash v. United States, 403 F.3d 1308, 1315 (Fed. Cir. 2005); Preseault II, 100 F.3d at 1534.

As noted above, the issue before the court is whether the releases by which the PIRC acquired portions of its railroad corridor adjacent to parcels owned by the Group 2 plaintiffs conveyed easements or fee simple estates. Defendant contends that the Indiana Supreme Court has concluded that the releases, when read in conjunction with the PIRC's legislative charter, conveyed a fee simple estate to the PIRC. It relies on the Indiana Supreme Court's decisions in Newcastle & Richmond Railroad Co. v. Peru & Indianapolis Railroad Co., 3 Ind. 464 (1852), and Indianapolis, Peru & Chicago Railway Co. v. Rayl, 69 Ind. 424 (1880). Plaintiffs respond that the statements that defendant relies on from those decisions are mere dicta and that Indiana courts have declined to broadly apply that purported dicta in subsequent decisions. Moreover, they contend that those decisions may no longer be good law in light of more recent Indiana Supreme Court precedent that addresses the use of the term "right of way" in a deed.

As it must, the court begins its analysis by considering the law in effect in Indiana at the time the releases at issue were executed.

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4/1; V9 4/10; and V9 4/12. Accordingly, the court cannot address ATS Ford claim 27 in this decision.

### 1. Railroad Law and Property Law in Indiana in the Mid-Nineteenth Century

Indiana became a state on December 11, 1816. Resolution for admitting the state of Indiana into the Union, 3 Stat. 399 (1816). When the Indiana General Assembly enacted the statute incorporating the PIRC almost thirty years later in 1846, Indiana did not have a law governing the incorporation of railroad companies. See Douglass v. Thomas, 2 N.E. 562, 564 (Ind. 1885); see also Ind. Rev. Stat. ch. 83 (1852) (reflecting that the "Act to provide for the incorporation of Rail Road Companies" was approved on May 11, 1852); Vandalia R.R. Co. v. Topping, 113 N.E. 421, 423 (Ind. App. 1916) (recognizing that "the law providing for the incorporation of railroad companies approved May 11, 1852," governed the construction of the release at issue). Rather, the legislature incorporated railroad companies by enacting individual charters. Louisville & Ind. R.R. Co. v. Ind. Gas Co., 829 N.E.2d 7, 9 n.1 (Ind. 2005). Consequently, different railroad companies could have different powers to acquire land to construct their railroads. See, e.g., Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364, 375 (1872) (observing that "the legislature may grant to different companies power to take a greater or less quantity of land, and such grant will be conclusive as to the necessity for the uses specified"). However, regardless of a legislative charter's provisions, a railroad company retained its common-law right to "make contracts" related to the acquisition of real estate. See Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Coburn, 91 Ind. 557, 559-60 (1883) (per curiam).

In a statute enacted on May 11, 1852, the Indiana General Assembly standardized the incorporation of railroad companies. See Ind. Rev. Stat. ch. 83 (1852). However, existing railroad companies continued to operate under their pre-1852 legislative charters unless they subsequently accepted the terms of the new statute. See id. at ch. 83, § 36 ("All existing railroad companies may acquire all of the powers or benefits conferred by this act, by filing an acceptance thereof in the office of the Secretary of State . . . , and the acceptance of any part of this act shall be deemed to be an acceptance of the whole act, and a surrender of the act under which such company may be organized . . . ."). There is no evidence in the record indicating that the PIRC accepted the 1852 statute in lieu of its legislative charter.

### 2. Indiana Supreme Court Decisions Directly Addressing the PIRC's Legislative Charter and Acquisition of the Railroad Corridor

The Indiana Supreme Court first considered the PIRC's legislative charter in Newcastle. In that case, the PIRC sought to enjoin a competitor from constructing a railroad, 3 Ind. at 465, contending that the competitor could not cross the PIRC's railroad without violating the PIRC's "exclusive right to the use of the ground over which the track of their road passes," id. at 468. The court began its analysis by describing the relevant provisions of the charter:

> Section 15 of the charter of said company authorizes them to obtain releases of the land along the line of the road; section 16 permits them, where a voluntary release is refused, to have the land condemned in the manner usual in such cases; and section 19 declares "that when said corporation shall have procured the right of way" in either of said modes, "they shall be seized in fee simple of the right to such land, and they shall have the sole use and occupancy of the same," etc.

Id. It then rejected the PIRC's contention that section 19 was "a contract on the part of the state for the exclusive possession by said company of the lands mentioned," explaining its view that section 19 was

> simply intended as declaratory of the effect which the releases and condemnations of land spoken of in the 15th and 16th sections should have; that is, whether they should be taken to convey an easement, a right of way merely, or a fee-simple title, and declaring it should be the latter; that they should have the same force that deeds from the proprietors in the usual form to the company, conveying to their sole use, etc., would have, subject of course, as expressly declared in the section, to all previous grants of rights of way, and subject, impliedly of course, as all ordinary grants of land by one person to another, or by the state to a person, are, to the right of the state to take the lands granted, on compensation made, for the public use.

Id. In other words, it concluded that releases executed pursuant to the PIRC's legislative charter conveyed fee simple title, subject to existing easements and the state's authority to later take the land for public use upon providing compensation.

Notably, the Indiana Supreme Court in Newcastle was concerned only with the PIRC's legislative charter and not any specific conveyances made pursuant to the charter. However, almost thirty years later, it rendered decisions in two cases involving such conveyances. The first case concerned a deed executed in 1951 in which the landowners agreed to "give, grant, convey and confirm" nine lots that "were the property" of one of the landowners to the PIRC to use as a railroad depot. Indianapolis, Peru & Chi. Ry. Co. v. Hood, 66 Ind. 580, 583 (1879). A successor to the PIRC stopped using the lots for a depot in 1869, and the landowners' heirs sued to quiet title in the lots. Id. at 581-82. Without mentioning the PIRC's legislative charter, the court concluded that the railroad company "took and held the said lots . . . upon the condition subsequent" that it "permanently locate and construct its depot . . . upon the said lots," that the condition was breached when the railroad company stopped using the lots for a railroad depot, and that "the ownership [of the lots] reverted to" the landowners' heirs. Id. at 584; accord id. at 585 (holding that "breach of the condition subsequent in the said deed . . . worked a forfeiture of the [railroad company]'s estate in said lots under said deed, and rendered them subject to be recovered back by the [landowners'] heirs").

In the second case, Rayl, the plaintiffs owned lots adjoining a strip of land that the public had begun to use as a street, which, in turn, adjoined a railroad line owned by a successor to the PIRC. 69 Ind. at 424, 427-28. The railroad company, without initiating condemnation proceedings, constructed a side track on the land being used as a street, causing injury to the plaintiffs. Id. at 424-25. The issue to be decided by the Indiana Supreme Court was whether the evidence was sufficient to support the trial court's finding that the railroad company did not own the strip of land. Id.

After describing the relevant sections of the PIRC's legislative charter, the court set forth the contents of the original conveyance to the PIRC. Id. at 426-27. In contrast to the

conveyance at issue in Hood—a deed in which the landowners agreed to "give, grant, convey and confirm" nine lots to the PIRC, 66 Ind. at 583—the conveyance in Rayl was a release ("Richmond release") that used language nearly identical to the language appearing in most of the releases at issue in this case:

> I, Corydon Richmond, of the county of Howard and State of Indiana, for and in consideration of the advantages which can or will result to the public in general and myself in particular, by the construction of the Peru and Indianapolis Railroad, as now is, or may hereafter be, surveyed or located, for the purpose of facilitating the construction and completion of said work, do hereby, and for myself, my heirs, executors, administrators and assigns, release and relinquish to the Peru and Indianapolis Railroad Company the right of way for so much of said road as may pass through and out the following piece or parcel of land, to wit: The south-east quarter of section 25, township 24 north, range 3 east; and I do further release and relinquish to said Peru and Indianapolis Railroad Company all damages, and right to damages, which I may sustain or be entitled to by reason of anything connected with, or consequent upon, the construction of said road or road-bed.

69 Ind. at 426-27. The plaintiffs argued that the Richmond release was void for two reasons: "because it did not specify the extent or width of the land intended to be relinquished by it" and because, "at the time the relinquishment was made, the legal title to the land was not in Richmond, but in the United States." Id. at 428; see also id. at 426-27 (indicating that although Mr. Richmond possessed and occupied the tract of land at issue when he executed the release in 1847, the United States did not patent and convey the tract to Mr. Richmond until 1849[13]).

To address the plaintiffs' first contention, the court referred to the PIRC's legislative charter. It observed that the charter allowed the PIRC to use a strip of land not exceeding eighty

[13] During the nineteenth century, Congress enacted a series of laws allowing citizens to acquire public land from the federal government; the government conveyed title to the land by issuing a patent. See United States v. Schurz, 102 U.S. 378, 396 (1880); accord Swendig v. Wash. Power Co., 265 U.S. 322, 331 (1924) ("[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States." (citation omitted)). See generally Russian-Am. Packing Co. v. United States, 199 U.S. 570, 577-78 (1905) ("[T]he occupation and cultivation of public lands with a view to pre-emption confers a preference over others in the purchase of such lands by the bona fide settler . . . . [A] vested right, under the pre-emption laws, is . . . obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. . . . When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office and ultimately to a patent."). Indeed, the patent referenced in Rayl reflects that the United States conveyed the specified tract to Mr. Richmond and his heirs "forever." U.S. Gen. Land Office, Bureau of Land Mgmt., Land Patent Accession No. IN1940__.455 (Apr. 10, 1849), https://glorecords.blm.gov/search/default.aspx?searchTabIndex=0&searchByTypeIndex=0 (choose "Indiana" from the state dropdown; then enter "Richmond" and "Coryden" in the name fields; then click "Search Patents"; then click on the image icon).

feet in width, and concluded that "under section 15 of [the charter], a general relinquishment of the right of way over a tract of land, without specifying any width, conferred upon that company the right to take and appropriate a strip of ground, over the tract specified, not exceeding eighty feet in width." Id. at 428-29. It further explained that "the act of incorporation thus form[ed] a part of the contract of relinquishment." Id. at 429.

In addressing the plaintiffs' second contention, the court again referred to the PIRC's legislative charter and, without mentioning Newcastle,[14] concluded:

> That relinquishment, as we have construed it, supplemented by section 19 . . . of the act of incorporation, enacting that the right of way, when acquired, should be held by the company in fee-simple, purported to convey to the company an estate in fee-simple to so much of the land described in it as constituted the right of way through the land under such relinquishment. Under such circumstances, whatever title Richmond subsequently acquired to the land relinquished by him enured to the benefit of the company.

Id. Mr. Richmond subsequently acquired full title to the land from the United States. Id. at 427. The court therefore held "that the strip of ground in controversy, . . . was not, and never had been, a public street of the town . . . , but was at the time the side-track complained of was laid down, and has since continued to be, the property of the [railroad company]." Id. at 429-30; see also id. at 430 (indicating that it was reversing the trial court's judgment). In other words, under the Richmond release, the PIRC obtained a fee simple interest in the strip of land on which it constructed the side track.

**3. Later References to Newcastle and Rayl by Indiana Appellate Courts**

Although the Indiana Supreme Court has not had further occasion to construe the PIRC's legislative charter or conveyances executed pursuant to the charter, both it and the intermediate state appellate court have mentioned or discussed Newcastle and Rayl in subsequent decisions. A brief summary of the relevant decisions, presented chronologically, follows.

In its 1872 decision in Burkhart, the Indiana Supreme Court addressed a dispute over ownership of a strip of land on which a canal was constructed, and needed to determine the interest that the State of Indiana acquired through appropriation. 41 Ind. at 365, 368. In discussing the power of the State to appropriate the land, the court cited Newcastle and other decisions for the proposition that "the legislature is the sole and exclusive judge of the public exigency, and of the mode and manner of exercising the right of taking the property required, subject only to the limitation of making proper provision for ascertaining and making compensation for the property taken." Id. at 375-76.

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[14] The court also did not mention Hood, likely because that case involved a deed rather than a release, 68 Ind. at 583, and because the charter was not part of the record before the court, see id. (indicating that the statement of facts, which did not refer to the charter, and the deed "constituted all the evidence given in the cause").

The Indiana Supreme Court next mentioned Newcastle in its 1883 decision in Coburn. 91 Ind. at 559-60. In that case, a railroad company sought to quiet title in a strip of land that had been enclosed, in part, by adjoining landowners. Id. at 557-58. The railroad company's predecessor was chartered in 1848. Id. at 558. Section 21 of the charter, which was nearly identical to section 19 of the PIRC's legislative charter, provided that "when said company shall have procured the right of way as hereinbefore provided they shall be seized in fee simple of the right of said land, and shall have the sole use and occupation of the same, and no person . . . shall in any way interfere therewith, or disturb, molest or injure any of the rights and privileges hereby granted, so as to detract from or affect the profits of said corporation." Id. at 558-59 (omission in original). The court observed that "[t]he language of this section is somewhat obscure" and that "[i]n the absence of any judicial construction of this language, it might be supposed to mean that the company shall be the owner of the right relinquished, which might be a fee, or a less estate, or a mere easement, according to the terms of the written relinquishment." Id. at 559. "But," it noted, it construed "the very same language, in another charter" in Newcastle. Id. It remarked that "[u]nder [that] construction, an unconditional relinquishment of the land undoubtedly would have vested in the railroad company the absolute fee simple of the land, but the statute under consideration can not be held to impair the right to make contracts." Id. at 559-60.

The court concluded that the release at issue was not unconditional. Id. at 561. In the release, the land was described as "[o]ut-block 182" and the landowner "reserve[d] the right to lay down and keep a railroad track in front of the lots adjoining the road, and also of connecting the same with the track of the railroad . . . ." Id. at 560-61. Other evidence reflected that the railroad company intended to build its depot on out-block 181. Id. at 561. The court determined that the intent to build the depot on out-block 181, the location of the track on out-block 182, and the railroad company's acceptance of the release "were parts of one transaction," and that the parties' intention was for the construction and permanent maintenance of a depot and a track approaching the depot. Id. It therefore held "that the relinquishment in controversy created in the railroad company an estate upon condition subsequent, liable to be defeated upon the non-performance of the condition." Id. at 562.

Subsequently, in its 1885 decision in Douglass, the Indiana Supreme Court described the holding of Rayl as being tied to the specific facts of that case: "It was held in [Rayl] that an instrument conveying the right of way to the railroad company there concerned, supplemented by the nineteenth section of the act under which it was incorporated, did [convey a fee simple]." Douglass, 2 N.E. at 563-64. It further observed that "[t]he act of incorporation in that case . . . expressly provided that the right of way, when acquired, should be held in fee-simple by the corporation." Id. at 564; cf. id. (distinguishing Rayl because the record before it did not include any information regarding the nature of the railroad company's charter, requiring it to "construe the deed according to the terms employed in the instrument").

Less than three years later, in Quick v. Taylor, the Indiana Supreme Court determined who owned a strip of land originally acquired by a railroad company via condemnation "under the general railroad law in force since 1853." 16 N.E. 588, 589 (Ind. 1888). It acknowledged its holding in Burkart that the state legislature intended to appropriate the land to construct the canal at issue in that case in fee simple, but noted that the "ruling has been followed reluctantly, and has not been applied except to lands acquired under the internal improvement act of 1836." Id.

Then, it remarked that "the rule that controlled the decision of [those] cases," including Rayl, "had not been applied to the taking of land by private or merely quasi public corporations, in the absence of an express statute authorizing the appropriation of the fee-simple," an apparent reference to railroad company legislative charters specifically authorizing the appropriation of fee simple estates. Id. It concluded:

> The doctrine generally accepted is that the right acquired by the power of eminent domain extends only to an easement in the land taken, unless the statute plainly provides for the acquisition of a larger interest. There can be no doubt but that the state has the power to take land in fee for a public use; nor can it be doubted but that power so to take land may, by express enactment, be conferred upon a railway or other corporation; but unless the act from which the power to take is derived in express terms confers the power to take the fee, or unless the retention of the fee by the land-owner would be necessarily inconsistent with the use for which the land was to be appropriated, the presumption will be indulged that only an easement is to be taken.

Id. at 589-90 (citations omitted).

The Appellate Court of Indiana discussed Newcastle and related decisions in Meyer v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., 113 N.E. 443 (Ind. App. 1916). In that case, a railroad company sought to quiet title to a tract of land that it had occupied adversely for longer than the statutory period. Id. at 443-44. It asserted that its adverse possession resulted in fee simple title, rather than a prescriptive easement, relying in part on the provisions of its predecessor's legislative charter, which was enacted in 1832. Id. at 444-45. In that charter, sections 14 and 15 provided for the acquisition of a right of way by, respectively, relinquishment and condemnation, and section 19, which was nearly identical to section 19 of the PIRC's legislative charter, provided:

> That when said corporation shall have procured the right of way as herein provided, they shall be seised in fee simple of the right to use such land, and shall have the sole use and occupancy of the same; and no person . . . shall in any way interfere with, molest, disturb or injure any of the rights and privileges hereby granted, or that could be calculated to detract from or affect the profits of such corporation.

Id. at 445 (omission in original). The court remarked that "[l]iterally construed, the language used" in section 19 "seems to refer to a right in the land as distinguished from the land itself," id., and observed that "a fee may exist in an easement," id. (quoting Branson v. Studabaker, 33 N.E. 98, 104 (Ind. 1892)). It recognized, however, that "the question of the title acquired by relinquishment or condemnation under the act is not an open one" and proceeded to describe the relevant holdings of Newcastle and Coburn. Id. at 445-46; accord id. at 446 ("[I]t is recognized that under the [legislative charters discussed in this case, Newcastle, and Coburn], the courts hold that by condemnation or by release, in the absence of a contract to the contrary, the lands involved are acquired in fee."). Ultimately, the court distinguished the case before it, concluding that "[w]hatever interest or estate [the railroad company] owns in the land involved here is based

on the fact that the use of such lands for the full prescriptive period, or in other words, such interest or estate, is in the nature of a prescriptive right." Id. at 447. Thus, it held that the railroad company held merely an easement over the land for railroad purposes. Id.

There are several common threads running through these decisions. First, the courts acknowledged that Newcastle and Rayl were binding precedent. See Quick, 16 N.E. at 589; Douglass, 2 N.E. at 564; Coburn, 91 Ind. at 559-60; Burkart, 41 Ind. at 375-76; Meyer, 113 N.E. at 445-46. Second, the courts recognized, either explicitly or implicitly, that the state legislature could, by statute, define the scope of the property interest that could be acquired by condemnation or relinquishment. See Quick, 16 N.E. at 589-90 (condemnation); Douglass, 2 N.E. at 563-64 (any acquisition); Coburn, 91 Ind. at 559-60, 562 (relinquishment); Burkart, 41 Ind. at 375-76 (condemnation); Meyer, 113 N.E. at 445-46 (condemnation and relinquishment). Third, the courts affirmed that a railroad company retained the right to contract for a greater or lesser estate than what was described in its legislative charter. See Coburn, 91 Ind. at 559-60; Meyer, 113 N.E. at 446. Finally, neither court disturbed the holding of Newcastle that the PIRC's legislative charter provided that the releases it authorized conveyed fee simple estates or the holding of Rayl that the Richmond release, executed pursuant to the PIRC's legislative charter, conveyed a fee simple estate.

**4. The Relevant Portions of Newcastle and Rayl Are Not Dicta**

Notwithstanding the Indiana Supreme Court's treatment of Newcastle and Rayl as settled law, plaintiffs argue that the discussions in those decisions of section 19 of the PIRC's legislative charter and the Richmond release are dicta because they had no effect on the court's ultimate conclusions in those decisions. See Nat'l Am. Ins. Co. v. United States, 498 F.3d 1301, 1306 (Fed. Cir. 2007) (defining dicta as statements that are not necessary for a decision). Plaintiffs are mistaken.

As described above, the issue in Newcastle was whether the PIRC held the exclusive right to the land on which it constructed its railroad. 3 Ind. at 468. The PIRC argued that its exclusive right derived from section 19 of its legislative charter. Id. The Indiana Supreme Court disagreed, explaining that section 19 merely declared that the effect of a release or condemnation under the charter was to convey a fee simple estate (as opposed to an easement or a right of way), and did not disturb any preexisting easements over the land or the state's authority to permit the condemnation of the land. Id. The court determined that the PIRC did not have the exclusive right to the land it acquired to construct its railroad, and to reach that conclusion it found it necessary to determine both the scope of the rights actually granted by the PIRC's legislative charter and whether those rights were exclusive, even as to the State. It could not engage in such an analysis without determining how section 19 of the charter should be construed. Consequently, the court's construction of section 19 is not dicta. Accord Coburn, 91 Ind. at 559-60 (recognizing Newcastle's construction of section 19 of the PIRC's legislative charter as binding authority); Meyer, 113 N.E. at 445 (same).

In Rayl, the issue before the Indiana Supreme Court was whether a successor to the PIRC owned a strip of land, adjacent to its line, that had been put to use as a public street. 69 Ind. at 424-25. The railroad company claimed ownership of the land through the Richmond release. Id.

at 424-25, 428. But, according to the plaintiffs, the Richmond release was void because it did not specify the width of the strip of land and because Mr. Richmond did not own the land at the time he executed the release. Id. at 425, 428. The court addressed both contentions by analyzing the Richmond release in light of the provisions of the PIRC's legislative charter, and concluded that they lacked merit. Id. at 428-30. Notably, with respect to the second contention, the court concluded that the Richmond release, when read in conjunction with section 19 of the PIRC's legislative charter, "purported to convey to the company an estate in fee-simple to so much of the land described in it as constituted the right of way through the land under such relinquishment," and that Mr. Richmond relinquished to the PIRC "whatever title [he] subsequently acquired to the land . . . ." Id. at 429; accord Ind. Rev. Stat. ch, 28, § 20 (1843) ("A deed of release or quit claim of the usual form shall pass all the estate which the grantor had and could convey by a deed of bargain and sale."). Because Mr. Richmond subsequently acquired title to the land from the United States via a patent, 69 Ind. at 427, the court held that the strip of land "was . . . the property of the" railroad company, id. at 429-30.[15]

Clearly, the Indiana Supreme Court could not have concluded that the railroad company owned the land without first determining that the Richmond release conveyed a fee simple estate to the PIRC. Accordingly, its construction of the Richmond release is not dicta. Moreover, plaintiffs' characterization of Rayl as a case regarding the width of the right of way granted by the Richmond release ignores the remainder of the court's analysis of why the Richmond release was not void, as well as court's conclusion that the PIRC acquired via the Richmond release all that Mr. Richmond owned—a fee simple estate. In short, the overarching issue in Rayl was who owned the strip of land at issue, and the Indiana Supreme Court concluded that pursuant to the Richmond release, the owner was the railroad company. Accord Douglass, 2 N.E. at 563-64 (recognizing Rayl's construction of the Richmond release, in light of section 19 of the PIRC's legislative charter, as binding authority).

In addition to contending that the discussions of section 19 of the PIRC's legislative charter and the Richmond release in Newcastle and Rayl are dicta, plaintiffs advance the related argument that neither decision is relevant to this case because they did not concern fee-simple-versus-easement disputes. Stated differently, plaintiffs contend that Newcastle and Rayl should not control this court's construction of the releases at issue because the Indiana Supreme Court was not asked to, and did not, address whether an instrument executed by the PIRC conveyed a fee simple estate or an easement. But the fact that those cases did not involve such a dispute does not render the decisions inconsequential. To the contrary, the Indiana Supreme Court's analysis and construction of the PIRC's legislative charter and the Richmond release, both separately and together, are directly relevant to how this court undertakes those same tasks. Accordingly, the court rejects plaintiffs' suggestion that Newcastle and Rayl should be disregarded.

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[15] Because the Indiana Supreme Court concluded that the PIRC acquired Mr. Richmond's title to the land, the fact that "a fee may exist in an easement," Branson, 33 N.E. at 104, is, contrary to plaintiffs' contention, of no moment. Mr. Richmond held a fee simple estate, and therefore conveyed a fee simple estate, not an easement, to the PIRC.

**5. The Indiana Supreme Court Has Not Abrogated Newcastle and Rayl With Respect to Releases Executed Under the PIRC's Legislative Charter**

Plaintiffs next argue that even if the court determines that Newcastle and Rayl have some relevance to the construction of the releases at issue in this case, Indiana courts no longer subscribe to the proposition that a release executed in favor of a railroad company conveys a fee simple estate. This contention misses the mark.

The circumstances in this case are unique: at issue are releases (1) executed by a particular railroad company pursuant to a pre-1852 legislative charter, (2) executed when the law provided that such releases conveyed all of the interest held by the landowner, and (3) that are nearly identical to a release construed by the Indiana Supreme Court to convey all title held by the landowner. Not one of the later decisions discussed by plaintiffs as demonstrating the purported shift in how railroad charters are viewed by Indiana courts satisfy all three of these criteria. See, e.g., Ross, Inc. v. Legler, 199 N.E.2d 346, 347-49 (Ind. 1964) (construing deeds executed in 1908 and not mentioning the railroad company's charter); Cincinnati, Indianapolis, St. Louis, & Chi. Ry. Co. v. Geisel, 21 N.E. 470 (Ind. 1889) (failing to specify when the railroad company was chartered or when the release was executed); Quick, 16 N.E. at 588 (reflecting that the land at issue was acquired by the railroad company through condemnation "under the general railroad law in force since 1853"[16]); Douglass, 2 N.E. at 564 (failing to set forth the entirety of the "deed" executed in June 1852 and noting that the record before it did not include any information "concerning the nature of the charter" of the railroad company); Coburn, 91 Ind. at 560-61 (construing a release in conjunction with other evidence constituting part of the same transaction); L. & G. Realty & Constr. Co. v. City of Indianapolis, 139 N.E.2d 580, 582-83 (Ind. App. 1957) (en banc) (construing a deed executed in 1903 and not mentioning the railroad company's charter); Meyer, 113 N.E. at 444 (characterizing the dispute as whether a railroad company acquires a fee or an easement from its adverse occupancy of land); Topping, 113 N.E. at 422 (construing a release executed in 1866 and not mentioning the railroad company's charter).

The more recent decisions discussed by plaintiffs as representing the modern view that the grant of a right of way to a railroad company conveys an easement also fail to satisfy these three criteria. See, e.g., Tazian v. Cline, 686 N.E.2d 95, 96, 98 (Ind. 1997) (construing a deed executed in 1873 and not mentioning the railroad company's charter); Brown v. Penn Cent. Corp., 510 N.E.2d 641, 642-43 (Ind. 1987) (construing a deed executed in 1871 and not mentioning the railroad company's charter); Clark v. CSX Transp., 737 N.E.2d 752, 759 (Ind. Ct. App. 2000) (remarking that "[t]he property statute in effect at the time of conveyance" was enacted in 1852 and not mentioning the railroad company's charter); Consol. Rail Corp. v.

[16] Plaintiffs also describe a number of Indiana appellate court decisions in support of the proposition that railroad companies obtain only an easement through condemnation. These decisions, however, address condemnations occurring after the changes to the law in 1853, and not condemnations occurring pursuant to a pre-1853 legislative charter. See, e.g., Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Smith, 97 N.E. 164, 169 (Ind. 1912); Chi. & W. Mich. R.R. Co. v. Huncheon, 30 N.E. 636, 637 (Ind. 1892); Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Doan, 94 N.E. 598, 598 (Ind. App. 1911).

Lewellen, 666 N.E.2d 958, 962 (Ind. Ct. App. 1996) (construing post-1852 deeds and not mentioning the railroad company's charter), aff'd, 682 N.E.2d 779 (Ind. 1997); Lake Cty. Tr. Co. v. Lane, 478 N.E.2d 684, 688 (Ind. Ct. App. 1985) (indicating that although the record before it did not include the language of the quit claim deed executed in 1883, a later deed reflected that an easement had been conveyed, and not mentioning the railroad company's charter); Richard S. Brunt Tr. v. Plantz, 458 N.E.2d 251, 252-53, 252 n.1 (Ind. Ct. App. 1983) (construing releases executed in 1881 and noting that "the railroad's charter does not provide for the amount of estate conveyed"). Moreover, the court must ascertain the property interest acquired by the PIRC in light of the law that existed at the time of the acquisition, and the Indiana appellate courts in these modern decisions (and many of the earlier decisions plaintiffs discuss) construe instruments executed under a different statutory regime than the one in place at the time the releases at issue in this case were executed. Accord Tazian, 686 N.E.2d at 96, 98 (noting that language used in a deed executed in 1873 was "consistent with the controlling property statute in effect at the time of conveyance"); Clark, 737 N.E.2d at 759 (remarking that, "in construing a deed," courts in Indiana "consider[] the instrument relative to the statutes in effect at the time of the conveyance"); see also Lewellen, 682 N.E.2d at 781 (acknowledging the contention that deeds should be construed in light of "the statute in place at the time the deeds were executed," but "emphasiz[ing] that the language of the deeds in question . . . [did] not trace the cited property statutes").

Had the Indiana Supreme Court not rendered the decisions in Newcastle and Rayl, plaintiffs would have a compelling argument under Indiana precedent that the releases at issue in this case conveyed easements. But those decisions exist, are directly applicable to the legislative charter and releases at issue in this case, and have not been overruled.

**6. All of the Releases at Issue Conveyed Fee Simple Estates to the PIRC**

Because the holdings of Newcastle and Rayl remain authoritative with respect to releases executed pursuant to the PIRC's legislative charter, the court is bound by the Indiana Supreme Court's construction of the Richmond release when construing substantively similar releases. Two of the releases at issue in this case are nearly identical to the Richmond release: the releases executed by Benjamin Young on March 25, 1851, and John Sutherland on August 24, 1853. Thus, as in Rayl, these releases conveyed a fee simple interest to the PIRC, and the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to these releases do not have cognizable property interests affected by the Board's issuance of the NITUs.

Thirteen other releases include preprinted language nearly identical to the language in the Richmond release, along with a third preprinted paragraph granting the PIRC a license and permit to enter the described land and remove materials for the construction and repair of the railroad: the 1848 Wright release, the Threlkell release, the undated Wright release, and the releases executed by Peter Weever on July 1, 1848; John Sterritt on September 28, 1848; Abram R. Phipps on October 6, 1848; Daniel R. Smith on November 2, 1848; George West on September 28, 1848; Hilary L. Silvey on October 6, 1848; William Oaput/Opput on October 6, 1848; William Bradley on July 1, 1848; William Culbertson on November 2, 1848; and Leavin Cropper on September 25, 1848. This additional paragraph closely tracks the language in section 15 of the PIRC's legislative charter that identifies what could be relinquished in a release ("the

stone, gravel and timber, and other materials" on or near the railroad corridor). Thus, its presence does not alter how the releases are construed and, in fact, plaintiffs do not so argue. Consequently, as in Rayl, these releases conveyed a fee simple interest to the PIRC, and the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to these releases do not have cognizable property interests affected by the Board's issuance of the NITUs.

The four remaining releases at issue—the McCole release, the Shelley release, the Lovett release, and the James release—require particularized analyses.

The McCole release is substantively similar to the Richmond release with one exception. After the description of land is the following handwritten clause: "and do further relinquish all damage for earth taken out Side of the right of way and for earth put out Side the eighty feet or for using other earth or materials taken to construct the Peru & Indianapolis Rail Road across said land." This clause does not change the character of the interest conveyed by the release, but instead absolves the PIRC of the responsibility to pay damages for moving earth to construct its railroad. Indeed, unless the clause can be construed to grant the PIRC permission to enter Mr. McCole's land for the purposes of taking and placing earth (not unlike the preprinted paragraph in the majority of the releases at issue), it seems to offer the PIRC no greater protection than the preprinted clause in which Mr. McCole relinquishes the right to damages "by reason of anything connected with or consequent upon" the construction and repair of the railroad. Thus, the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to this release do not have cognizable property interests affected by the Board's issuance of the NITUs.

The Shelley release is also substantively similar to the Richmond release with one exception. After the description of land is the following handwritten clause: "the above Relinquishment is given in consideration of the [PIRC] paying the undersigned Seventeen Dollars & fifty cents and the company further agree to dig two pits for the undersigned where he may designate for the use of his fences where the . . . same may cross." The additional agreements in this clause are covenants that are part of the consideration for the release. See Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 417 (Ind. Ct. App. 1999) (stating that agreements or promises "to do, or not to do, a particular act . . . relating to real property that are created in conveyances" are covenants); see also Lake Erie & W. R.R. Co. v. Priest, 31 N.E. 77, 78 (Ind. 1892) (holding that "stipulations contained in the proviso" of a deed, in which a railroad company agreed to erect a fence and construct a farm crossing with cattle guards within a year of constructing the railroad, "form[ed] a material part of the consideration for the conveyance" and that "[t]he acceptance of the deed imposed a burden upon the land"); Chi., Indianapolis & Louisville Ry. Co. v. Beisel, 106 N.E.2d 117, 120 (Ind. App. 1952) (describing language appearing after a granting clause in a deed in which the grantee railroad company agreed "to build and maintain fences, and crossings, and cattle guards" as a covenant); Chi. & Se. Ry. Co. v. McEwen, 71 N.E. 926, 929 (Ind. App. 1904) ("[T]he covenants in the deed and in the contract which is made a part thereof were covenants to build and maintain fences, cattle guards, farm crossings, and maintain an underground passway. They were real covenants running with the land, and, being made by the [railroad company] in part consideration of the conveyance to it by appellee of a strip of land for right of way, they are supported by valuable consideration"). They therefore do not alter the property interest conveyed by the release. Cf. Cincinnati, Bluffton & Chi. R.R. v. Wall, 96 N.E. 389 (Ind. App. 1911) (indicating that the

remedy for breach of a covenant is damages or specific performance, not the forfeiture of the estate granted in the instrument); accord 21 C.J.S. Covenants § 65 (2021). Accordingly, the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to this release do not have cognizable property interests affected by the Board's issuance of the NITUs.

The Lovett release is the first of two fully handwritten releases in the record before the court. The granting clause of this release is substantively similar to the granting clauses in the previously discussed preprinted releases and the Richmond release. What follows the description of the land, however, is completely different from the other releases. The rest of the Lovett release is prefaced by the following recitation: "The foregoing grant and release is upon the following [agreement] and condition . . . ." Thereafter, several additional agreements between Mr. Lovett and the PIRC are set out: (1) the PIRC agreed to pay Mr. Lovett $20 per acre for the land used for the railroad corridor; (2) the PIRC agreed to either "plank up and keep in repair pits at each and every place where any fence upon said tract of land now crosses the track" or "enclose the road with a good fence and keep the same in repair"; (3) the PIRC agreed to pay for any damages caused by the operation of the railroad and the absence or disrepair of required fences; (4) the PIRC agreed to leave apple trees not in the railroad corridor unharmed; (5) Mr. Lovett reserved all of the wood and timber on the land and in the railroad corridor; (6) Mr. Lovett reserved the right to cross the railroad track; and (7) the PIRC agreed to pay Mr. Lovett in two installments.

As discussed with respect to the Shelley release, the promises made by the PIRC were covenants made in consideration for the conveyance of the right of way through Mr. Lovett's land. See, e.g., Priest, 31 N.E. at 78; Beisel, 106 N.E.2d at 120; McEwen, 71 N.E. at 929. Mr. Lovett's reservations are also covenants. See, e.g., Conduitt v. Ross, 26 N.E. 198, 199 (Ind. 1885) (describing two types of covenants: one "in which a right attached to the estate or interest granted is reserved," and one in which "the grantee covenants that he will do some act on the estate or interest granted which will be beneficial to the grantor").

Because a covenant does not change the property interest conveyed by the granting clause, and because the granting clause in the Lovett release is substantively similar to the granting clause in the Richmond release, the Lovett release, like the Richmond release, conveyed a fee simple estate in the railroad corridor to the PIRC. Consequently, the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to this release do not have cognizable property interests affected by the Board's issuance of the NITUs.

The other handwritten release, the James release, bears many similarities to the Lovett release. The terminology in the granting clauses and the subsequent clauses prefacing the agreements are closely aligned: in the Lovett release, the granting clause uses the words "release and relinquish" and the later clause refers to the conveyance as "[t]he foregoing grant and release," while in the James release, the granting clause uses the words "grant release and relinquish" and the later clause refers to the conveyance as "[t]he foregoing release." In addition, both releases set forth the amount that the PIRC would pay to the landowners and when the payments would be paid; the primary difference is that in the James release, these terms are set forth immediately following the description of the land. Finally, the remaining provisions in the James release track those set forth in the Lovett release: (1) Mr. James reserved all of the

wood and timber in the railroad corridor; (2) the PIRC agreed to dig two pits at locations of Mr. James's choosing to prevent the movement of livestock over the railroad tracks; and (3) Mr. James agreed to provide the PIRC with timber and lumber to construct and plank up the pits.

Although there are differences between the James and Lovett releases, those differences are not sufficiently meaningful to warrant different analyses. Both instruments are releases and both instruments include covenants that have no effect on the nature of the estate conveyed by the granting clauses; indeed, plaintiffs do not contend otherwise. Accordingly, the Lovett release conveyed a fee simple estate in the railroad corridor to the PIRC, and the Group 2 plaintiffs whose parcels are adjacent to the land acquired by the PIRC pursuant to this release do not have cognizable property interests affected by the Board's issuance of the NITUs.

### 7. The Respect That the Indiana Supreme Court Accords Its Prior Rulings Makes it Highly Unlikely That It Would Overrule Newcastle and Rayl or Decline to Extend the Holdings of Newcastle and Rayl to the Releases at Issue in This Case

In short, the Indiana Supreme Court's holdings in Newcastle and Rayl compel the conclusion that all of the releases at issue in this case conveyed fee simple estates to the PIRC in the railroad corridor. Nevertheless, plaintiffs contend that the Indiana Supreme Court would, if given the opportunity, either overrule the holdings of those decisions or reconcile those holdings with its more recent precedent regarding the construction of deeds such that it would conclude that the releases at issue conveyed easements to the PIRC.

As discussed above, the Indiana Supreme Court has not expressly or implicitly overruled the collective holding of Newcastle and Rayl that a release that looks like the Richmond release, executed pursuant to the PIRC's legislative charter, conveys a fee simple estate in the railroad corridor to the PIRC. That the court has not disturbed its original construction of the PIRC's legislative charter and the Richmond release is consistent with its position that "stability in the decisions of a court of last resort is greatly to be desired." Haskett v. Maxey, 33 N.E. 358, 359 (Ind. 1893). The court explained: "To overrule precedents which have become recognized rules of property, and the basis of contract relations, unsettles titles, disturbs business transactions, and introduces an element of uncertainty into the administration of justice from which the public suffer great inconvenience."[17] Id.; accord Nash Eng'g Co. v. Marcy Realty Corp., 54 N.E.2d

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[17] The Indiana Supreme Court is not alone in its concern with disturbing titles to real property. Almost thirty years earlier, the United States Supreme Court observed:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

263, 268 (Ind. 1944) (observing that "stare decisis . . . is most frequently applied where to disturb the prior ruling would probably affect real property and vested rights"). Indeed, it has expressed a broad commitment to adhering to its prior rulings:

> The doctrine of stare decisis requires that we apply "a principle of law which has been firmly established." It is a maxim of judicial restraint supported by compelling policy reasons of continuity and predictability that we should be "reluctant to disturb long-standing precedent," and "a rule which has been deliberately declared should not be disturbed by the same court absent urgent reasons and a clear manifestation of error."

Layman v. State, 42 N.E.3d 972, 977 (Ind. 2015) (citations omitted) (quoting Marsillett v. State, 495 N.E.2d 699, 704-05 (Ind. 1986)); accord Prudential Ins. Co. of Am. v. Smith, 108 N.E.2d 61, 63 (Ind. 1952) (remarking that the court "is reluctant to overrule its own precedents if there is any justification in legal principles by which they can be sustained").

In Newcastle, the Indiana Supreme Court held that releases and condemnation proceedings authorized by the PIRC's legislative charter conveyed fee simple estates to the PIRC, and in Rayl, the court held that the PIRC acquired a fee simple estate in the railroad corridor through the Richmond release. For over 140 years, the PIRC, the PIRC's successors, and owners of land adjacent to the portion of the railroad corridor conveyed by the Richmond release have relied on the Indiana Supreme Court's construction of the PIRC's legislative charter and the Richmond release to define their property interests. Any conflicting construction of those documents would call into question the validity of those landowners' titles, as well as the titles of anyone else who acquired land adjacent to a portion of the railroad corridor originally acquired by the PIRC pursuant to a release similar to the Richmond release. Given the Indiana Supreme Court's reluctance to disturb established rules of property and contractual relationships, it seems unlikely that the court would have any interest in overturning the holdings of Newcastle and Rayl, or otherwise reconstruing the PIRC's legislative charter or releases executed by the PIRC substantively identical to the Richmond release.

For this reason, the court declines plaintiffs' suggestion that it certify the proper construction of the releases at issue in this case to the Indiana Supreme Court. Under the Indiana Rules of Appellate Procedure, a federal court may certify a question to the Indiana Supreme Court "when it appears . . . that a proceeding presents an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent." Ind. R. App. P. 64 (emphasis added). While the Indiana Supreme Court has previously accepted a certified question from this court, see Howard v. United States, 948 N.E.2d 1179 (Ind. 2011), there was no controlling Indiana precedent on the question certified, see Howard v. United States, 100 Fed. Cl. 230, 235 (2011), certified question accepted, 948 N.E.2d at 1179, certified question answered, 964 N.E.2d 779 (Ind. 2012). This case "stands on a quite different footing" because

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Minn. Mining Co. v. Nat'l Mining Co., 70 U.S. 332, 334 (1865); accord Arizona v. California, 460 U.S. 605, 620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open"), decision supplemented, 466 U.S. 144 (1984).

the Indiana Supreme Court has previously construed the PIRC's legislative charter and the Richmond release, leaving "no doubt as to the proper application of the state's law to the[] facts" of this case. Toews v. United States, 376 F.3d 1371, 1381 (Fed. Cir. 2004). "Furthermore, courts have a duty to decide the cases before them whenever it reasonably can be done. Basic fairness, avoidance of unwarranted delay and the imposition of additional costs on the parties, and conservation of judicial resources, all dictate that" courts should decide cases when they can do so "on the law . . . ." Id.; cf. Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (remarking that while certifying questions to a state court when state law is in doubt "save[s] time, energy, and resources and helps build a cooperative judicial federalism," the decision to use a state's certification procedure "in a given case rests in the sound discretion of the federal court"). The court can and will rule on the parties' cross-motions for summary judgment on the law.[18]

## III. CONCLUSION

For the reasons set forth above, the court **DENIES** plaintiffs' motion for summary judgment and, with respect to the claims of the Group 2 plaintiffs premised on the releases addressed in this decision, **GRANTS** defendant's cross-motion for summary judgment. Thus, the following claims are dismissed with prejudice:

- Oldham: 4, 9, 10, 12, 15, 16, 19, 21, 24, 30, 32, and 33.

- Pressly: 2, 5, 8, 10, 11, 14, 17, 20, 21a, 21b, 24, 31a, 31b, 33, 37, 42, 43a, 43b, 43c, 43d, 45a, 45b, 45c, 45d, 46, 47, 49, 51, 52, 59, 60, 65(b), 67a, 67b, 71, 72 (the portion adjacent to the segment acquired by the PIRC via a release), 73, 75, 77, 82, 86, 90, 91, 96, 98, 100, 105, 107, 113, 114, 115, 119a, 119b, 121, 125, 126, 131, 135a, 135c, 136, 139, 142, 152, 154, 157, 164, 167a, 167b, 173, 177a, 177c, 178, 180, 183, 185, 186, 189, 190, 196, 197, 201, 202, 209a, 209b, 212, 223, 224, 225, 226, 228, 230, 232, 233, 236a,

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[18] Although not binding on this court, one of the factors that the United States Court of Appeals for the Seventh Circuit considers when deciding whether to certify a question to a state court, including the Indiana Supreme Court, is whether the issue is one of broad significance or applies only to the particular facts of the case before it. See, e.g., Harney v. Speedway SuperAmerica, LLC, 526 F.3d 1099, 1101 (7th Cir. 2008); Erie Ins. Grp. v. Sear Corp., 102 F.3d 889, 892 (7th Cir. 1996). Plaintiffs contend that the construction of the releases at issue in this case has broad application because there are hundreds of miles of railroad rights of way acquired in Indiana via legislative charters that include provisions similar to those in the PIRC's legislative charter. However, this case does not concern every railroad corridor, legislative charter, and release in Indiana. Rather, it concerns only the railroad corridor acquired by the PIRC, between two cities that are less than eight-five miles apart, via releases, substantively similar to one previously construed by the Indiana Supreme Court, executed pursuant to a legislative charter approved before the enactment of Indiana's statute governing the incorporation of railroad companies. In other words, the decision in this case will have no effect on conveyances accomplished under other legislative charters or later-enacted state statutes.

236b, 245, 254, 257, 266a, 266b, 273, 277, 279, 281, 286, 289, 296, 297, 301, 302, 303, and 307.

- Bradley: 11, 18, 20, 24, 27, 29, 34, 36, 37, and 38.

- ATS Ford: 1, 26, 28, 30, 31, 33, 36, 37, 41, 42, 43, 44, and 45.

The remainder of defendant's motion is **DENIED** without prejudice.

In addition, plaintiffs in each case shall, **no later than Tuesday, April 6, 2021**, file updated notices identifying the claims in each group, as follows:

- The notices should reflect any corrections that may need to be made in light of defendant's remarks in the footnotes in Exhibit 5 to its cross-motion for summary judgment.

- In Oldham, Bradley, and ATS Ford, the claims premised, at least in part, on conveyances other than the releases addressed in this decision should be included in the Group 3 table. See supra section II.A.

- The notices shall not include tables setting forth the claims of the Group 2 plaintiffs.

- The notice in Pressly shall include a separate table for the surviving portion of claim 72 that includes the same information provided for the Group 1 plaintiffs.

Finally, **no later than Tuesday, April 6, 2021**, the parties shall file a joint status report suggesting a schedule for further proceedings with respect to Pressly claim 72 and the claims of the Group 3 plaintiffs. The identical joint status report shall be filed in each case.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Senior Judge

# In the United States Court of Federal Claims

No. 19-471L
(Filed: April 1, 2022)

| | | |
|---|---|---|
| ATS FORD DRIVE INVESTMENT, LLC et al., | * | Trails Act; Cross-Motions for Summary Judgment; Property Interest Acquired by the Railroad Company; Indiana Law; Legislative Charter; Adverse Possession; Prescription; Centerline Presumption; Competing Claims of Property Owners Association and Individual Property Owners; Lost Conveyance Instruments; ICC Valuation Schedules and Maps; Burdens of Proof; Quitclaim Deed; Common Property |
| Plaintiffs, | * | |
| v. | * | |
| THE UNITED STATES, | * | |
| Defendant. | * | |

Mark F. Hearne, II, St. Louis, MO, for plaintiffs.

Brian R. Herman, United States Department of Justice, Washington, DC, for defendant.

**OPINION AND ORDER**

**SWEENEY**, Senior Judge

Plaintiffs in this case, along with plaintiffs in five other cases before the undersigned, own real property adjacent to a railroad corridor in Marion and Hamilton Counties, Indiana.[1] They contend that the United States violated the Fifth Amendment to the United States Constitution by authorizing the conversion of the railroad corridor into a recreational trail pursuant to the National Trails System Act ("Trails Act"), thus acquiring their property by inverse condemnation. Four of the cases are proceeding in a coordinated manner, and a subset of plaintiffs from these cases assert claims that require the resolution of common threshold title issues. To resolve these issues, the parties in Pressly and ATS Ford cross-move for summary judgment. As explained in more detail below, the court grants in part and denies in part both motions in each case.

[1] The six cases are Oldham v. United States, No. 18-1961L (consolidated with Overlook At The Fairgrounds LP v. United States, No. 18-1962L); Pressly v United States, No. 18-1964L (consolidated with Jones v. United States, No. 19-1375L); Bradley v. United States, No. 19-400L; ATS Ford Drive Investment, LLC v. United States, No. 19-471L ("ATS Ford"); Episcopal Diocese of Indianapolis v. United States, No. 19-881L; and Doyle v. United States, No. 19-882L. A seventh case, ID Castings, LLC v. United States, No. 19-1158L, was voluntarily dismissed upon the parties' settlement of the plaintiff's claim.

## I. BACKGROUND

On January 19, 1846, the Indiana General Assembly enacted an "Act to incorporate the Peru and Indianapolis Railroad Company."[2] Pursuant to that legislative charter, the Peru and Indianapolis Railroad Company ("PIRC") was authorized to construct a railroad line within Indiana originating in the town of Peru, running through the towns of Kokomo and Noblesville, and terminating in Indianapolis. The legislative charter provided that the railroad corridor was to be no more than eighty feet wide, and could be acquired using a number of mechanisms:

> Sec. 15. It shall be lawful for the corporation, either before or after the location of any section of the Road, to obtain from the persons through whose land the same may pass, a relinquishment of so much of the land as may be necessary for the construction and location of the road; as also, the stone, gravel and timber, and other materials that may be obtained on the said route, and may contract for stone, gravel, timber, and other materials that may be obtained from any land near thereto: and it shall be lawful for said corporation to receive by donations, gifts, grants, or bequests, land, money, labor, property, stone, gravel, wood, or other materials, for the benefit of said corporation . . . .
>
> Sec. 16. That in all cases where any person through whose land the road may run, shall refuse to relinquish the same, or when a contract by the parties cannot be made, it shall be lawful for the corporation to [initiate condemnation proceedings].
>
> . . . .
>
> Sec. 18. That if it shall be found necessary and advantageous to the location and construction of said road, the corporation shall have the right to lay the same along and upon any county or State road: Provided however, That before such location is made, the corporation shall make application to the county commissioners of the proper county, for such right; and said commissioners are hereby vested with power to grant the same, by an order entered upon their records: And provided also, That such right shall be granted on condition that the corporation shall leave a sufficiency of said State or county road in as good repair, for common use, as previous to such occupation.

Further, with respect to the PIRC's acquisition of the railroad corridor, the legislative charter provided (footnote added):

> Sec. 19. That when said corporation shall have procured the right of way, as herein before provided, they shall be seized, in fee simple, of the right to such land, and they shall have the sole use and occupancy of the same, but not to

[2] The facts in this section are derived from the exhibits attached to the parties' summary judgment briefs and are not in dispute.

> interfere with the right of way of any Railroad company heretofore incorporated;[3] and no person, body politic or corporate, shall in any way interfere with, molest, disturb or injure any of the rights or privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation.

In accordance with its legislative charter, the PIRC acquired the portions of the railroad corridor at issue in this case. It accomplished its acquisitions under section 15 of its charter through instruments that will be referred to generally as "releases," as well as pursuant to section 18 of its charter. It also acquired portions of the railroad corridor through deed, prescription, and court order.

A railroad line was constructed, and a railroad operated, in the corridor acquired by the PIRC. Eventually, in 1995, the line was purchased by three Indiana municipalities: the City of Fishers, the City of Noblesville, and Hamilton County. In 2017, the municipalities advised the Surface Transportation Board ("Board") of their collective desire to invoke the Trails Act, 16 U.S.C. §§ 1241-1251, which, as amended, provides for the preservation of "established railroad rights-of-way for future reactivation of rail service" by authorizing the interim use of such rights-of-way as recreational and historical trails. Id. § 1247(d). The following year, they submitted three separate requests to the Board, each relating to a different segment of the railroad line, for the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"). A NITU permits the discontinuation of rail service, the salvaging of track and materials, and, if an agreement regarding trail use is not reached, the abandonment of the line. 49 C.F.R. § 1152.29(d)(1). The Board issued the three NITUs on December 21, 2018, and the municipalities executed trail-use agreements in 2019.

After the Board issued the NITUs, a number of suits were filed in this court in which owners of parcels adjacent to the railroad corridor alleged that through the operation of the Trails Act and the issuance of the NITUs, defendant took their property without paying just compensation in violation of the Fifth Amendment. In June 2020, the plaintiffs in Oldham, Pressly, Bradley, and ATS Ford proposed a coordinated approach to resolving their claims. Specifically, they sought to divide themselves into three groups: Group 1 plaintiffs had claims with no outstanding liability issues and could proceed to damages, Group 2 plaintiffs had claims that required the resolution of an essentially identical threshold title issue, and Group 3 plaintiffs had claims with other threshold title issues. The court adopted their proposal.

While the parties were taking steps to determine the amount of just compensation due to the Group 1 plaintiffs, they briefed cross-motions for summary judgment with respect to the claims of the Group 2 plaintiffs. The central issue presented in those motions was whether the

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[3] In the mid-nineteenth century, the Indiana General Assembly and Indiana courts regularly used plural pronouns and verbs in conjunction with collective nouns such as "corporation" and "company." Although not preferred in modern American English, this usage is common in British English, and was common in American English in the years following the American Revolution. See Bryan A. Garner, A Dictionary of Modern Legal Usage 170-71 (2d ed. 1995) (defining "collective nouns"). The court does not disturb this usage when quoting the PIRC's legislative charter and Indiana case law.

releases by which the railroad company acquired particular portions of the railroad corridor conveyed an easement or a fee simple estate. In four substantially identical decisions, the court determined that precedent from the Indiana Supreme Court compelled the conclusion that the releases conveyed fee simple estates.[4]

The parties Pressly and ATS Ford now cross-move for summary judgment with respect to the claims of the Group 3 plaintiffs.[5] They raise a number of threshold title issues common among the group, primarily concerning whether particular instruments (or the absence thereof) conveyed an easement to the railroad company. Indeed, plaintiffs' briefs in the two cases are substantially identical with respect to many of the issues, and defendant filed nearly identical briefs (save for the caption) in both cases.[6] The motions are now fully briefed, and none of the parties requested oral argument. Thus, the motions are ripe for adjudication.

## II. STANDARD OF REVIEW

Both plaintiffs and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a 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.

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 nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

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[4] The court issued these decisions on March 23, 2021, and reissued corrected decisions on December 3, 2021, nunc pro tunc to March 23, 2021. See generally Bradley v. United States, 156 Fed. Cl. 640 (2021); ATS Ford Drive Inv., LLC v. United States, 156 Fed. Cl. 397 (2021); Oldham v. United States, 156 Fed. Cl. 159 (2021); Pressly v. United States, 156 Fed. Cl. 138 (2021).

[5] Proceedings for the Group 3 plaintiffs in Bradley and Oldham are stayed pending the outcome of these motions, as are the proceedings in Episcopal Diocese of Indianapolis.

[6] Because the briefs are so similar, court is filing a substantively identical decision in each case. Only the captions are different.

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Com. Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

## III. DISCUSSION

The overarching issue raised by the parties in their motions is whether the Group 3 plaintiffs have a property interest in the railroad corridor such that the Board's issuance of the NITUs constituted a taking of that property interest.

### A. Legal Standard

The Fifth Amendment prohibits the federal government from taking private property for public use without paying just compensation. U.S. Const. amend. V. To establish a taking, a plaintiff must first "identif[y] a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1348 (Fed. Cir. 2013); accord Klamath Irrigation Dist. v. United States, 635 F.3d 505, 520 n.12 (Fed. Cir. 2011) ("It is plaintiffs' burden to establish cognizable property interests for purposes of their takings . . . claims."). To demonstrate a cognizable property interest in a Trails Act case, a plaintiff must establish ownership in land adjacent to the railroad line described in the NITU and that ownership in that land can be traced to the railroad company's acquisition. Brooks v. United States, 138 Fed. Cl. 371, 377 (2018). A plaintiff must also establish that the railroad company acquired an easement for railroad purposes that continued to exist at the time of the alleged taking. Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Preseault v. United States ("Preseault II"), 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc). In general, state law governs the determination of the property interest acquired by the railroad company. See Preseault v. United States, 494 U.S. 1, 8 (1990); Preseault II, 100 F.3d at 1534. Moreover, the acquisition of property rights is governed by the law in effect at the time the rights were acquired. See Hash v. United States, 403 F.3d 1308, 1315 (Fed. Cir. 2005); Preseault II, 100 F.3d at 1534.

### B. Interest Acquired by the Railroad Company Over a Public Road

One subset of the Group 3 plaintiffs owns parcels adjacent to a portion of the railroad corridor situated along a public road. The parties have identified four documents purportedly related to the railroad company's acquisition of some or all of this portion of the corridor: (1) a release executed by J.G. Burns and seventeen others in the PIRC's favor on August 11, 1848

("Burns release"); (2) a resolution adopted by the board of commissioners of Hamilton County on September 7, 1848 ("county resolution"); (3) an order issued by the United States Circuit Court for the District of Indiana on May 17, 1897 ("court decree"); and (4) an ordinance adopted by the City of Noblesville in 1915 ("city ordinance").[7]

The Burns release is not in the record before the court. Although it is likely that this instrument is similar, or identical, to the releases addressed in the court's decisions on the Group 2 summary judgment motions, the court declines to reach such a conclusion in the absence of the document. However, the evidence in the record reflects that if the Burns release only conveyed an easement to the PIRC, the PIRC subsequently obtained a fee simple interest in the corridor one month later via the county resolution.

The county resolution was adopted in response to a petition by the PIRC to lay its railroad along a public road:

> Your Petitioner to wit the President and directors of the Peru and Indianapolis Rail Road Company would represent and show unto your honorable board, that after a careful survey of a rout[e] for said Rail Road from the mouth of Stoney Creek in said county to the Town of Noblesville & thence along Polk Street in said Town, your petitioners have found it to be necessary and advantageous to the location and construction of said Road, to lay and locate the same along and upon the State Road leading from the Town of Noblesville to Indianapolis, as to so much of said Road as lies between said Town of Noblesville, and the place where said Road crosses said Creek; your Petitioner therefore prays your honorable board to grant the same by an order to be entered upon the records of this honorable board; on condition however that the said Corporation who are known by the same and style of the "President and directors of the Peru and Indianapolis Rail Road Company" – shall leave a sufficiency of said State Road in as good repair for common use, as previous to such occupation, agreeably to the provisions of the charter of Incorporation of said Peru & Indianapolis Rail Road . . . .

Pressly Pls.' Ex. G-1.[8] The county commissioners granted the petition:

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[7] For the following claims, the county resolution is the sole relevant conveyance: Pressly 16, 103, 147a, 147b, 211, 247a, 247b, 268a, 268b, 268c, and 268d; and ATS Ford 10, 11, and 12. In addition, for the following claims, the county resolution, the court decree, and the Burns release are the relevant conveyances: ATS Ford 2, 3, 4, 5, 6, 7, and 8. Finally, the county resolution, the court decree, and the city ordinance are the relevant conveyances for the following claims: Pressly 204a, 204b, 204c, and 204d.

[8] When, as here, an exhibit is submitted by more than one party in support of its motion for summary judgment, either in the same or a separate case, the court cites to only one submission.

> Whereupon the matters and things in said Petition contained being duly considered & the board being fully advised in the premises [–] do order & decree that said corporation shall have the right & authority to locate said Rail Road & lay the same along and upon said State Road agreeably to the prayer of said petition – but this right so to locate and occupy said State Road as aforesaid is granted on this express condition that the said corporation shall leave a sufficiency of said State Road in as good repair, for common use, as previous to such occupation.

Id. The language of the petition and county resolution mirrors the requirements of section 18 of the PIRC's legislative charter. As required in section 18, (1) the PIRC found it "necessary and advantageous to the location and construction" of its railroad "to lay and locate the same along and upon" the identified "State Road"; (2) the PIRC applied to the proper county's commissioners; (3) the proper county's commissioners granted the application and entered an order in the county's records; and (4) both the PIRC and the county commissioners indicated that the PIRC's application was granted "on condition" that the PIRC "shall leave a sufficiency of" the identified state road "in as good repair, for common use, as previous to such occupation." Furthermore, the PIRC's petition expressly referred to its legislative charter. Accordingly, there can be no dispute that the PIRC acquired the relevant portions of the railroad corridor pursuant to section 18 of its legislative charter.

As defendant observes, sections 15, 16, and 18 of the PIRC's legislative charter describe ways in which the PIRC could acquire its railroad corridor—through relinquishment, condemnation, and application to the county commissioners.[9] Section 19 then provides that when the PIRC "procured the right of way, as herein before provided," it "shall be seized, in fee simple, of the right to such land . . . ." The Indiana Supreme Court concluded that section 19 was

> simply intended as declaratory of the effect which the releases and condemnations of land spoken of in the 15th and 16th sections should have; that is, whether they should be taken to convey an easement, a right of way merely, or a fee-simple title, and declaring it should be the latter . . . .

Newcastle & Richmond R.R. Co. v. Peru & Indianapolis R.R. Co., 3 Ind. 464, 468 (1852); accord Indianapolis, Peru & Chi. Ry. Co. v. Rayl, 69 Ind. 424, 429 (1880) ("That relinquishment . . . , supplemented by section 19 . . . of the act of incorporation, enacting that the right of way, when acquired, should be held by the company in fee-simple, purported to convey to the company an estate in fee-simple to so much of the land described in it as constituted the right of way through the land under such relinquishment."); Douglass v. Thomas, 2 N.E. 562, 564 (Ind. 1885) (remarking that the PIRC's legislative charter "expressly provided that the right of way, when acquired, should be held in fee-simple by the corporation"). In other words, it concluded that the PIRC obtained fee simple title through the execution of releases and through condemnation. There is nothing in that court's reasoning, and the parties have not offered any

[9] Section 17 of the legislative charter concerns the provision of notice of condemnation proceedings to property owners who are minors, incompetent, or reside in a different county.

other case law, suggesting that section 19 does not also apply to conveyances from county commissioners under section 18. Indeed, the plain language of section 19 indicates that it applies to all prior sections in the legislative charter describing the means by which the PIRC could obtain land for its railroad. Therefore, the PIRC acquired a fee simple estate in the land it acquired via the county resolution.

Almost fifty years after the county commissioners conveyed the land along its public road to the PIRC, one of the PIRC's successors, the Lake Erie and Western Railroad Company, brought suit against the City of Noblesville and a contractor, Michael Holloran, related to this portion of the railroad corridor. Pressly Pls.' Ex. G-4. On May 17, 1897, the United States Circuit Court for the District of Indiana issued an order approving and confirming the parties' settlement agreement. Id. The agreement specified that the City of Noblesville had the right to make planned improvements to a certain portion of the public road at issue, and that the railroad company would lower its tracks to conform to the grade of the road improvement, plank on the outside of the rails, and place ballast between the rails. The parties further agreed that

> the said Lake Erie and Western Railroad Company shall have the right to forever occupy its railroad track, depot and station grounds as now located in the City of Noblesville without interruption on behalf of the said City of Noblesville and without interference on the part of the said contractor Michael Holloran as the said property is now occupied . . . .

Id. Plaintiffs contend that this court decree establishes that the railroad company held only an easement over the public road. They are mistaken. As the court previously concluded, controlling Indiana Supreme Court precedent reflects that the PIRC obtained a fee simple estate in the land underlying the railroad corridor. There is no indication in the court decree that the railroad company intended to convey any property interest to the City of Noblesville, much less a fee simple estate with a retained easement. Rather, the court decree appears to be concerned solely with a dispute over the effects of the City of Noblesville's planned road improvements on the railroad tracks.

The final document at issue—the city ordinance—affects four contiguous parcels owned by one of the plaintiffs in Pressly. These parcels are adjacent to one side of the public road, and the portion of the railroad corridor conveyed via the county resolution is adjacent to the other side of the public road. Although the city ordinance is not included in the record before the court, other evidence in the record indicates that through the city ordinance, the City of Noblesville conveyed a separate corridor to the railroad company over the portion of the four parcels adjacent to the public road. See Pressly Pls.' Exs. B-6, C-2 at 29, G-5.[10] The Pressly plaintiffs acknowledge this conveyance in their summary judgment motion, but make no contentions regarding the property interest conveyed to the railroad company or whether the conveyed corridor was subject to the NITUs. In short, the Pressly plaintiffs do not allege that this conveyance affects their claims. Accordingly, the city ordinance is irrelevant for the purposes of determining their property interest.

[10] For all citations, the court uses the page numbers assigned by its electronic case filing system.

In sum, there are no genuine issues of material fact regarding the claims of the Group 3 plaintiffs who own parcels adjacent to the public road. The PIRC obtained the land for this portion of the railroad corridor from the county in fee simple pursuant to sections 18 and 19 of its legislative charter. Consequently, defendant is entitled to summary judgment with respect to these claims.

### C. Interest Acquired by the Railroad Company Through a Court Decision

Another subset of the Group 3 plaintiffs owns parcels adjacent to a portion of the railroad corridor acquired by the Lake Erie and Western Railroad Company through a decision of the Marion County Circuit Court on June 29, 1907, arising from the railroad company's suit against Noah G. Manship and others.[11] The Circuit Court's decision includes findings of fact, conclusions of law, and a judgment. Pressly Pls.' Ex. E-1. Plaintiffs contend that the Circuit Court's findings of fact indicate that the railroad company acquired a fee simple in a right-of-way easement through adverse possession, rather than a fee simple estate. Of greatest relevance to plaintiffs' position are the following findings:

> 4. [After incorporation in 1846], and prior to the year 1852, said Peru and Indianapolis Railroad Company located and constructed said line of railroad from Peru to Indianapolis, and as so located and constructed the same passed through the northeast quarter of section one, in township seventeen north, range four east, in Hamilton County, Indiana, running in a straight line south 27 degrees west through said entire quarter section.
>
> 5. At the time said railroad was so located and constructed, said quarter section of land was a forest and wholly unimproved, and said railroad company entered upon and cut and removed the timber from a strip of ground forty feet in width on each side of the center line of the railroad track so located entirely across said quarter section, and constructed and maintained a single track railroad in the center of said strip, and the same has ever since been maintained and operated on the same line.
>
> . . . .
>
> 8. On the 2nd day of June 1880, one J.C. Kimberlin was the owner in fee of all the said north east quarter of said section one except such portions thereof and such rights and interests therein as were held by the said Indianapolis, Peru and Chicago Railroad Company for its railroad and right of way aforesaid . . . .
>
> . . . .

[11] The relevant claims are Pressly 1a, 1b, 56, 83, 93, 109a, 109b, 110, 124, 130, 151, 153, 215, 216, 249, 270a, 270b, 270c, 270d, 270e, 278, and 290, and ATS Ford 21.

> 27. That the plaintiff and its predecessor railroad companies ever since the location and construction of said line of railroad as aforesaid by said Peru & Indianapolis Railroad Company have continuously and successively and for more than forty years operated said line of railroad and here had the continuous and uninterrupted use of all the ground on each side thereof through said entire quarter section for right of way between the fences along the boundaries thereof located as in this finding set forth, and have been in the open use and occupancy of the same for railroad purposes to the full width of 39 to 40 feet on each side of the centerline of said main track for more than twenty years prior to the commencement of this suit under claim of right . . . .

Id. at 4-5, 18.

Defendant counters that the controlling language, conveying a fee simple estate, is found in paragraph 2 of the Circuit Court's conclusions of law—"That the plaintiff is the owner in fee simple of, and entitled to a judgement as against the defendant Noah G. Manship, quieting its title to its right of way," id. at 20—and in the Circuit Court's judgment—

> It is therefore considered, adjudged and decreed by the Court that the plaintiff is the owner in fee simple, and its title be and the same is hereby quieted as against the defendant, Noah G. Manship, or any person claiming through, from or under him, to the following described real estate . . . , to wit,—
>
> Its right of way . . . .

Id. at 23. Specifically, defendant argues that the Circuit Court's fact findings cannot be construed to mean that the PIRC did not acquire this portion of the railroad corridor through a written instrument or that its successors acquired it through adverse possession, observing that the Circuit Court made no findings with respect to the existence of a written instrument and did not expressly find that the railroad company acquired its interest through adverse possession. These arguments are unpersuasive.

First, had the railroad company acquired its interest in the corridor through a written instrument, it undoubtedly would have produced it to the Circuit Court as evidence of its interest, and the Circuit Court assuredly would have mentioned it in its findings of fact. Thus, it is reasonable to conclude that a written instrument did not exist.

Second, that the Circuit Court did not use the term "adverse possession" in its fact findings or legal conclusions is of no moment; findings that a railroad company satisfied the elements of adverse possession are sufficient. See Meyer v. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co., 113 N.E. 443, 444 (Ind. App. 1916) (indicating the parties' agreement that a finding of fact addressing the elements of adverse possession "disclose[d] an adverse occupancy of the parcel of land described in the decree"). At the time that the Circuit Court issued its decision, "[a]n entry upon land with the intention of asserting ownership, and continuing in the open and exclusive possession thereof, exercising the usual acts of ownership under such claim, without asking permission and in disregard of all other claims, [was] sufficient to make the

possession adverse," and "[s]uch possession continued uninterruptedly for 20 years or more [established] title to the extent that the possession [was] actual and exclusive."[12] May v. Dobbins, 77 N.E. 353, 354-55 (Ind. 1906); accord Rennert v. Shirk, 72 N.E. 546, 547 (Ind. 1904) ("To be adverse, possession must be actual, open, and notorious, exclusive, continuous, and under a claim of right; that is, an intention to claim adversely."). As noted above, the Circuit Court, in paragraph 27 of its findings of fact, found

> [t]hat the plaintiff and its predecessor railroad companies ever since the location and construction of said line of railroad . . . have continuously and successively and for more than forty years operated said line of railroad and here had the continuous and uninterrupted use of all the ground on each side thereof . . . , and have been in the open use and occupancy of the same for railroad purposes to the full width of 39 to 40 feet on each side of the centerline of said main track for more than twenty years prior to the commencement of this suit under claim of right . . . .

Pressly Pls.' Ex. E-1 at 15 (emphasis added). These findings are sufficient to establish that the railroad company adversely possessed the corridor.

Plaintiffs, relying primarily on Meyer, argue that the Circuit Court's finding of adverse possession establishes that the railroad company acquired a prescriptive easement and not a fee simple estate. In Meyer, the trial court found that the railroad company adversely possessed a parcel upon which it located and constructed its track and operated its railroad, and concluded that the railroad company owned the parcel in fee simple. 113 N.E. at 443-44. This latter

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[12] More recently, the Indiana Supreme Court described the four elements of adverse possession as:

> (1) Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
>
> (2) Intent—The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
>
> (3) Notice—The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
>
> (4) Duration—the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005).

conclusion was challenged on appeal. Id. at 443. In support of its position that the trial court's judgment should be affirmed, the railroad company relied on section 19 of its predecessor's legislative charter, which, as in the PIRC's legislative charter, provided "[t]hat when [the railroad company] shall have procured the right of way as herein provided, they shall be seised in fee simple of the right to use such land, and shall have the sole use and occupancy of the same . . . ." Id. at 444-45.

After reviewing the relevant case law, the Appellate Court of Indiana stated that section 19 of the legislative charter did "not destroy or prohibit the exercise of the common-law power to contract," id. at 446 (citing Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Coburn, 91 Ind. 557 (1883) (per curiam)), and that the parties to such a contract could agree to "create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire," id. (quoting Cincinnati, Indianapolis, St. Louis, & Chi. Ry. Co. v. Geisel, 21 N.E. 470, 470 (Ind. 1889)). Therefore, the court stated, "while prescription creates the presumption of a grant, a grant of the corpus of the land in fee simple is not necessarily presumed where the holder by grant may legally acquire an estate less in quantity or different in quality." Id. at 446; see also id. (noting that "a fee may exist in an easement"). Thus, the question is "whether from the established prescriptive right a grant of the lands in fee must be presumed, or merely a grant of an estate or interest sufficiently comprehensive to protect the use as it has been exercised." Id. at 447. The court "conclude[d] that [the railroad company's] estate in the lands described in the decree, under the facts found, is an easement to use and occupy such lands for the purpose of maintaining and operating its railroad on and over the same, rather than an estate in fee simple in the land." Id.

There is no material difference between the facts in Meyer and the circumstances described in the Circuit Court's decision in the Manship case. In both cases, the trial court made findings of fact supporting a conclusion of adverse possession and concluded, as a matter of law, that the railroad company obtained fee simple title as a result of such adverse possession. Because the appellate court in Meyer reversed the trial court's decision and found that the railroad company obtained only an easement, it stands to reason that the railroad company in the Manship case also obtained an easement.

Having determined that the railroad company held an easement over this portion of the railroad corridor, the final issue to be addressed is whether the adjoining landowners own the fee simple estate underlying the easement. In Indiana, it was an "established principal of common law," since codified, that "where there is no language in any of the relevant deeds describing real property that includes the right-of-way, the title of the owners of land abutting railroad rights-of-way runs to the center of the right-of-way." Calumet Nat'l Bank as Tr. Under Tr. No. P-3362, Dated Sept. 1, 1986 v. Am. Tel. & Tel. Co., 682 N.E.2d 785, 790 (Ind. 1997); accord Swaim v. City of Indianapolis, 171 N.E. 871, 876 & n.1 (Ind. 1930); Cox v. Louisville, New Albany, & Chi. R.R. Co., 48 Ind. 178, 188 (1874); see also Ind. Code § 32-23-11-10 (2021) (codifying the common law). Plaintiffs in Pressly and ATS Ford have produced the deeds by which they acquired parcels adjacent to these portions of the railroad corridor. See generally Pressly Pls.' Ex. F-6; ATS Ford Pls.' Ex. E-3. The descriptions of the parcels in these deeds do not include the railroad corridor, but instead provide either (1) an indication that one of the parcel's boundaries runs along the corridor or (2) a reference to a specified lot on a recorded plat. See

Pressly Pls.' Ex. F-6 at 9, 34, 49, 73, 78, 82, 86, 111, 116, 145, 150, 170, 365, 374; ATS Ford Pls.' Ex. E-3 at 19. Accordingly, it would appear that all of these plaintiffs own a fee simple estate to the centerline of the railroad corridor.

However, the court cannot reach this conclusion with respect to the claim of two of the plaintiffs in this subset of the Group 3 plaintiffs. By way of background, the railroad corridor is adjacent to five parcels that are part of The Enclave of Fishers Pointe Horizontal Property Regime ("Regime"). Pressly Pls.' Ex. F-6 at 188-92. There is one multiunit condominium building on each parcel. Id. According to the Regime's "Declaration of Horizontal Property Ownership," id. at 193, each condominium unit owner owns an undivided interest as a tenant in common in the common areas, which includes the real estate, yards, and parks situated between the buildings and the railroad corridor, id. at 201-02; see also ATS Ford Pls.' Ex. E-3 at 14 (depicting the location of the relevant building, the building's units, and the railroad corridor). This document further provides that The Enclave of Fishers Pointe Co-Owners Association Inc. ("Association"), which consists of the owners of all of the condominium units, is responsible for the "maintenance, repair, upkeep, replacement, administration and operation of the Property," Pressly Pls.' Ex. F-6 at 203-04, and "the maintenance, repair, decoration, restoration, and replacement of the Common Areas," id. at 206. Additionally, the Association is required to elect a board of managers, id. at 204, which is responsible for "representing all the Owners in providing for the management, administration, operation, maintenance, repair, replacement and upkeep of the Property exclusive of Condominium Units," id. at 205. In fact, "[i]n the event of condemnation of all or any part of the Common Areas . . . , the Board of Managers is . . . authorized to negotiate with the condemning authority and/or contest an award made for the appropriation of such Common Areas." Id. at 219. Moreover, pursuant to the Regime's "Code of By-Laws," which enumerates in greater detail the duties and powers of the board of managers, id. at 238-41, the board of managers is empowered "to employ legal counsel . . . in connection with the business and affairs" of the Regime, id. at 241. Finally, the Regime's declaration and bylaws both provide that all owners and future owners of the condominium units are "subject to" their provisions. Id. at 225-26, 232; accord id. at 225 ("The acceptance of a deed of conveyance . . . shall constitute an agreement that the provisions of this Declaration [and] the By-Laws . . . are accepted and ratified by each such Owner . . . , and all such provisions shall be covenants running with the land and shall bind any person having at any time any interest or estate in a Condominium Unit or the Property as though such provisions were recited and stipulated at length in each and every deed . . . ."); Ind. Code § 32-25-9-1(a) ("Each condominium unit owner shall comply with . . . (1) the articles of incorporation or association; (2) the bylaws; . . . and (4) the covenants, conditions, and restrictions set forth in . . . the declaration[.]").

The Association asserts claims related to all five parcels adjacent to the railroad corridor that are part of the Regime (parcel numbers 15-14-01-00-04-999.999, 15-14-01-02-20-999.999, 15-14-01-02-19-999.999, 15-14-01-02-18-999.999, and 15-14-01-02-17-999.999). Pressly Fourth Am. Compl. ¶ 200. Elizabeth Reid and Margaret F. Reid jointly own a condominium unit in a building situated on one of the five parcels, ATS Ford Pls.' Ex. E-3 at 19, and assert a claim related to the parcel specifically associated with their unit (parcel number 15-14-01-00-04-005.000), ATS Ford Third Am. Compl. ¶ 29. Because the parties, in their initial summary judgment briefing, did not address whether both the Association and the Reids can recover just

compensation for the taking of the common area adjacent to the railroad corridor, the court requested supplemental briefing on this issue.

In their supplemental briefs, plaintiffs assert that both the Association and the Reids could recover just compensation, but rather than supply a legal basis for that conclusion, presented the following stipulation:

> In Pressly, the Association will seek just compensation for the same land as the Reids in ATS Ford, but the Association will limit their monetary demand by not including the percentage of the Reids' undivided interest in the common area in their damage calculation. In ATS Ford, the Reids will seek just compensation for the same land as the Association in Pressly, but the Reids will limit their demand to their percentage interest in the common area in their damage calculation.

Pressly Pls.' Suppl. Br. 2; ATS Ford Pls.' Suppl. Br. 2. Defendant, in its initial supplemental brief, argues that because individual condominium unit owners are bound by the Regime's declaration and bylaws, and because those documents provide that the Association acts on behalf of the owners of the condominium units with respect to the common areas, the Reids cannot individually pursue a claim that the government took a portion of a common area without paying just compensation. Defendant did not address plaintiffs' stipulation in its supplemental response brief.

Nevertheless, the court agrees with defendant that only the Association can pursue a claim for just compensation with respect to the common areas owned jointly by the condominium unit owners as tenants in common. According to the Regime's declaration and bylaws, to which the Reids and the other condominium unit owners are legally bound, the Association, through the board of managers, represents the owners in managing and administering the common areas. Such representation includes maintaining the common areas, handling matters related to condemnation proceedings,[13] and retaining legal counsel. Given the broad authority granted to the Association to act on behalf of the condominium unit owners with respect to the common areas, there is no basis to conclude that the owners retained the ability to seek just compensation for the taking of a common area. Thus, although plaintiffs' proposed approach would ultimately lead the parties to the correct result, it is legally untenable. Accordingly, there being no genuine issues of material fact, the court grants summary judgment to defendant with respect to the Reids' claim.

There are also no genuine issues of material fact concerning the claims of the Association and the other plaintiffs who own parcels affected by the Manship case. However, unlike the Reids, these plaintiffs are entitled to summary judgment on the threshold issue of whether they own fee simple title to the centerline of the portion of the railroad corridor adjacent to their parcels.

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[13] Although the Regime's declaration appears to concern the government's exercise of eminent domain, or direct condemnation, there is no reason to suspect that the Association would be responsible for handling direct condemnation negotiations and lawsuits, but not for handling inverse condemnation suits like this one.

### D. Interest Acquired by the Railroad Company Through Purportedly Lost Conveyance Instruments

A third subset of the Group 3 plaintiffs owns parcels adjacent to portions of the railroad corridor acquired by the railroad company through conveyance instruments that were either characterized as lost, or for which recording information was not provided, on the valuation schedules and maps prepared for the Interstate Commerce Commission ("ICC") in 1918. Three of these instruments relate to one portion of the railroad corridor: (1) an instrument, type unknown, executed by Carlisle Vanlaningham in 1849 ("Vanlaningham instrument"); (2) an agreement executed by L.D. Moody and his wife in 1897 ("Moody agreement"); and (3) an agreement executed by Lyman W. Curtis, a tenant, in 1897 ("Curtis agreement").[14] A fourth relates to a separate portion of the railroad corridor: an instrument, type unknown, executed by Elizabeth Seerley on April 21, 1849 ("Seerley instrument").[15] Plaintiffs contend that because the ICC valuation schedules and maps lack recording information for these instruments or indicate that these instruments were lost, and because the trail operators and the railroad company did not produce these instruments in response to their subpoenas, they established that the instruments were lost and the burden to prove otherwise shifted to defendant. Plaintiffs further contend that because these instruments have not been produced, the railroad company has only a railroad purposes easement over this portion of its corridor. Defendant, in contrast, asserts that because the ICC valuation schedules and maps identify specific conveyance instruments, plaintiffs have the burden to produce either those instruments or other evidence regarding the interest acquired by the railroad company. Defendant argues that plaintiffs' failure to marshal such evidence results in their inability to satisfy their burden of establishing a cognizable property interest.

#### 1. ICC Valuation Schedules and Maps

To properly address the parties' arguments, an examination of the purpose and contents of the ICC valuation documents is necessary. On March 1, 1913, Congress enacted a statute, commonly referred to as the Valuation Act, requiring the ICC to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the Act's provisions, including "the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier," as well as "the amount and value of any . . . grant of right of way" and "the grants of land to any such common carrier." Act of March 1, 1913, ch. 92, 37 Stat. 701, 701-02. To implement the requirements of the Act, the ICC issued a series of orders in which it directed railroad companies to provide the necessary information on prescribed forms (valuation schedules) and standardized maps (valuation maps). See, e.g., Interstate Com. Comm'n, Specifications for Maps and Profiles (Jan. 12, 1914) (commonly referred to as the "Map Order," and subsequently revised by Valuation Order Number 5, dated November 21,

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[14] The relevant claims are Pressly 41, 64a, 64b, 78, 95, 150a, 150b, 162, 284, 292a, 292b, and 298, and ATS Ford 32.

[15] The Seerley instrument affects two claims: Pressly 137 and 217. Another instrument—executed by Powell Howland on April 25, 1849—affects a portion of Pressly 137; defendant does not seek summary judgment with respect to this portion of that claim.

1914; Valuation Order Number 6, dated November 21, 1914; and Valuation Order Number 23, dated March 9, 1920); Interstate Com. Comm'n, Orders, Instructions and Forms Pertaining to Schedules of Land (Nov. 21, 1914) (commonly referred to as Valuation Order Number 7 and modified with supplemental instructions dated November 1, 1916).[16] As set forth in these orders—in particular the instructions for preparing valuation schedules described in Valuation Order Number 7—railroad company custodians maintained numbered files containing "each instrument conveying title to or interest in each parcel of land . . . ." Valuation Order Number 7 at 5. The supplemental instructions for preparing valuation schedules provided that (1) "[i]n the absence of deeds to lands owned," the railroad company should refer to "county, parish, or other properly authenticated records" to provide the required information; (2) for any parcels held by the railroad company through adverse possession, an "adverse possession" notation should be included in the "Remarks" column of the valuation schedule; and (3) for any parcels used but not owned by the railroad company, a "not owned" notation should be included in the "Remarks" column of the valuation schedule. Supplemental Instructions ¶¶ 2-4.

For the Vanlaningham instrument, the valuation schedule indicates that the recording information was "Not Known"; that the grantee was the PIRC; that the land area was 3.008 acres; that for consideration, the railroad company was to build and maintain an undercrossing; and that the deed "has been lost but mention is made of it in" a complaint included in "Gen. Atty. file 3025." Pressly Def.'s Ex. 6 at 6. For the Moody agreement, the valuation schedule does not identify any recording information or consideration, but indicates that the grantee was one of the PIRC's successors and that the agreement was "[t]o settle suit for damages because of filling cattle pass by [railroad] company," as reflected in "Genl. Atty. file 3025." Id. The information on the valuation schedule for the Curtis agreement is substantially identical to what is provided for the Moody agreement, except for the notation that Mr. Curtis held a leasehold on the affected parcel, as reflected in "Genl. Atty. file 3441." Id. For the Seerley instrument, the valuation schedule indicates that no instrument was "found," that the grantee was the PIRC; that the land area was 9.312 acres, that the consideration paid was $20, and that the instrument was referred to in "correspondence file No. 20217." Pressly Pls.' Ex. C-1 at 32. The information included on the relevant valuation maps for all four instruments does not materially contradict the information included on the valuation schedules. See Pressly Pls.' Exs. B-1, B-2.

**2. Allocation of the Burdens of Proof**

As noted above, plaintiffs bear the burden of establishing a cognizable property interest that was taken by the government. Klamath Irrigation Dist., 635 F.3d at 520 n.12. And, to satisfy that burden, plaintiffs must prove that the railroad company acquired an easement for railroad purposes. Preseault II, 100 F.3d at 1533. Plaintiffs assert in their initial summary judgment briefs that they satisfied their burden because the valuation schedules, valuation maps, and responses to their subpoenas demonstrate that the relevant conveyance instruments have been lost, resulting in prescriptive easements under Indiana law. Then, in their supplemental briefs, responding to questions posed by the court regarding Indiana's standard for declaring deeds lost, plaintiffs assert that defendant, as the party seeking to demonstrate that the

[16] These orders, as amended, were subsequently codified in parts 151 and 152 of title 49 of the 1938—and first—edition of the Code of Federal Regulations.

purportedly lost instruments conveyed fee simple estates to the railroad company, bears the burden of establishing that those instruments were lost and did, in fact, convey a fee simple interest. Defendant, in contrast, contends that plaintiffs bear the burden of demonstrating both that the instruments have been lost and the property interest conveyed by the instruments. The unique posture of the parties in Trails Act cases leads to the conclusion that neither party has properly allocated the burdens of proof with respect to lost conveyance instruments.

In Indiana, when a party wants to establish ownership of property through an instrument that has been lost,

> the party is required to give some evidence that such a paper once existed—though slight evidence is sufficient for this purpose—and that a bona fide and diligent search has been unsuccessfully made for it, in the place where it was most likely to be found, if the nature of the case admits of such proof; after which, his own affidavit is admissible to the fact of its loss.

Thompson v. Thompson, 9 Ind. 323, 333 (1857) (per curiam) (quoting 1 Simon Greenleaf, A Treatise on the Law of Evidence § 558). Only after establishing that the instrument is lost may the party introduce secondary evidence of the instrument's contents. Meek v. Spencer, 8 Ind. 118, 119 (1856) (per curiam). This standard presumes that the party averring that a conveyance instrument has been lost is doing so to establish that an interest had in fact been conveyed, see, e.g., Thompson, 9 Ind. at 325; Armstrong v. Azimow, 76 N.E.2d 692, 693 (Ind. App. 1948) (en banc), or to establish the type of interest that was conveyed, see, e.g., Speer v. Speer, 7 Ind. 178, 178-79 (1855). See generally Howe v. Fleming, 24 N.E. 238, 238 (Ind. 1890) ("To entitle a party to give parol evidence of the contents of a paper alleged to be lost, it is incumbent upon him to show that a diligent and careful search was made at the proper places, and by the proper persons, and that it could not be found.").

In a Trails Act case, however, the party averring that a deed has been lost—a present-day landowner—is typically doing so not to establish that the grantee—a long-since-defunct railroad company—acquired a particular property interest through that deed, but instead to establish that the grantee acquired through prescription only what it used. To prove, as plaintiffs allege here, that the railroad company acquired an easement through prescription, a landowner must demonstrate that all of the elements of prescription have been satisfied. And if, as here, a landowner's invocation of prescription is predicated upon the loss of the conveyance instrument, the landowner necessarily must establish that the conveyance instrument has been lost.[17] Upon doing so, the landowner need not marshal proof of the instrument's contents because such proof is not necessary to establish prescription. Consequently, the burden to demonstrate the

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[17] The court recognizes that, "in general, the loss of [a paper] must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced, if that person be living." Murray v. Buchanan, 7 Blackf. 549, 550-51 (Ind. 1845) (per curiam). However, this case, in which a present-day landowner is attempting to establish the property interest acquired by a railroad company in the nineteenth century, presents a scenario that cannot, as a factual matter, be subject to this general rule.

instrument's contents and, in particular, that the instrument did not convey an easement to the railroad company, falls on defendant.[18]

Having determined how the burdens of proof should be allocated, the first question to be answered is whether plaintiffs have established that the four purportedly missing instruments are, in fact, lost.

### 3. Are the Instruments Lost?

There is no dispute that the four purportedly missing instruments once existed. Thus, to establish that these instruments are lost, plaintiffs must demonstrate only "that a bona fide and diligent search has been unsuccessfully made for" the instruments "in the place where [they were] most likely to be found . . . ." Thompson, 9 Ind. at 325. To satisfy this requirement,

> [i]t is not enough to give some evidence of its loss, but [the party seeking to establish that a paper is lost] must give such evidence as will satisfy the court that the proper foundation for the admission of secondary evidence has been laid. Where a paper which the law requires to be filed and kept by a public officer as part of the records or papers of his office is alleged to be lost, the court has a right to require, before receiving parol evidence of its contents, that careful and diligent search was made in the office, and by one so fully acquainted with the office, records, and papers as to make it probable that, if the paper was in the office, he would find it.

Howe, 24 N.E. at 238. Under the law in effect in Indiana when the Vanlaningham and Seerley instruments were executed, "[e]very conveyance of any real estate" was required to be recorded in the county recorder's office, and a failure to record a conveyance instrument within ninety days would render the conveyance void as against subsequent good-faith purchasers of the real estate. Ind. Rev. Stat. ch. 28, § 25 (1843); see also id. §§ 46, 48 (requiring county recorders to keep a book listing the conveyance instruments presented for recording and to record such instruments, and providing that if a certificate of acknowledgment or proof is not recorded with a conveyance instrument, the instrument cannot be "read or received in evidence"); id. ch. 8, §§ 6, 9-10 (requiring county recorders to keep a book listing the conveyance instruments presented for recording, to record all conveyance instruments, and to make an index of recorded conveyance instruments). The same requirement applied when the Moody and Curtis agreements were executed, except that the deadline to record a conveyance instrument was forty-five days. Ind. Rev. Stat. § 2931 (1881); see also id. §§ 2951-2952 (requiring county recorders to keep a book listing the conveyance instruments presented for recording and to record such instruments, and providing that if a certificate of acknowledgment or proof is not recorded with an instrument, the

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[18] Defendant's position—that so long as it can be established that a written conveyance instrument existed at one point in time, there can be no adverse possession, and thus the only way to establish ownership of a parcel conveyed by that instrument is to prove the instrument's contents—could lead to the unacceptable situation in which it would be impossible to prove the ownership of parcels that include ancient lost or destroyed conveyance instruments in their chains of title.

instrument cannot be "read or received in evidence"); id. §§ 5930-5931 (requiring county recorders to keep a book listing the conveyance instruments presented for recording, to record all conveyance instruments, and to make an index of recorded conveyance instruments).

Defendant argues that plaintiffs have not satisfied these legal requirements because they have not demonstrated that they conducted "a bona fide and diligent search" of the relevant county recorder's office for the purportedly missing instruments. Plaintiffs respond that although one would expect that these instruments would have been recorded at the time of execution, the railroad company did not provide recording information for the instruments on the valuation schedules and maps it prepared in 1918, and therefore it would be incorrect to assume that the instruments were, in fact, recorded.[19] Instead, they contend that the instruments were most likely in the possession of the railroad company, and that they satisfied the "bona fide and diligent search" requirement by seeking the instruments from the railroad company through a subpoena.

The valuation schedules and maps in the record before the court reflect that the railroad company acquired the pertinent portions of the corridor through written instruments. These valuation schedules and maps further reflect that the railroad company maintained copies of most of the written instruments it identified on those documents, as indicated by the assignment of a custodian number for those instruments. See generally Pressly Pls.' Exs. C-1, C-2. No custodian number was assigned to the four instruments at issue, indicating that the railroad company did not possess them at the time it prepared the valuation schedules and maps in 1918. Consequently, pursuant to Valuation Order Number 7, the railroad company was obligated in 1918 to refer to county records to provide the information required on the valuation schedules.

Presumably, the railroad company searched the county records for the instruments not in its possession; there is no evidence in the record before the court that it did not. See also United States v. Norton, 97 U.S. 164, 168-69 (1877) ("It is a presumption of law that officials and citizens obey the law and do their duty; and although it cannot supply the place of proof of a substantive fact, he who disputes it must furnish the requisite evidence to overcome its effect."); President of the Bank of the U.S. v. Dandridge, 25 U.S. 64, 69 (1827) ("[The law] presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption . . . ."); cf. 37 Stat. at 703 (imposing a penalty of $500 per offense per day against carriers that failed or refused to comply with the requirements of the Valuation Act or the ICC's implementing orders).

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[19] In their opening supplemental briefs, plaintiffs suggest that because they were not parties to the purportedly missing instruments, they could only speculate as to the location of the instruments. This contention is not well taken. The mandate that conveyance instruments be recorded is not a recent development in the law. See, e.g., 2 Lewis N. Dembitz, A Treatise on Land Titles in the United States § 126 (1895) ("The recording of deeds affecting land, or, as the English prefer to call it, the 'registry of assurances,' is the universal law and custom throughout the United States, and has been such almost from the first settlement of each of the colonies."). Consequently, the most obvious place to locate the four purportedly missing instruments is the relevant county recorder's office.

Although plaintiffs do not offer evidence that they conducted "a bona fide and diligent search" for the four purportedly missing instruments in the county records, they did not need to do so for three reasons. First, there is no requirement that the "bona fide and diligent search" be performed by the party seeking to have a conveyance instrument declared lost. Thus, plaintiffs are entitled to rely on searches performed by others. Second, the railroad company is deemed to have performed a search for the instruments in 1918 when preparing its valuation schedules and maps, and it would be duplicative to require plaintiffs to perform that same search in the county's pre-1918 property records. Third, in response to plaintiffs' subpoenas, the railroad company produced all of the conveyance instruments identified by plaintiffs that were in its possession, including instruments executed before 1918 but recorded after 1918. Because the uncontroverted evidence shows that the railroad company retained copies of conveyance instruments it recorded after 1918, and that the four purportedly missing instruments are not in the railroad company's possession, a search of the post-1918 county property records for these instruments is unlikely be fruitful. Indeed, because timely recording would have protected the railroad company against claims by subsequent good-faith purchasers of the land described in the purportedly missing instruments, it is reasonable to presume that the instruments would not have been discovered in county records decades after they were executed.[20] Consequently, the Vanlaningham instrument, the Moody agreement, the Curtis agreement, and the Seerley instrument are, under Indiana law, lost instruments.

**4. Contents of the Lost Instruments**

Because plaintiffs have demonstrated that the four instruments at issue are lost, the burden of demonstrating that the instruments conveyed fee simple estates to the railroad company shifts to defendant. As noted above, secondary evidence can be used to establish the contents of the lost instruments, including the interests they conveyed. The relevant secondary evidence discussed in Indiana case law consists of copies of the lost instrument and testimony from witnesses able to describe the instrument's contents. See, e.g., McCormick Harvesting-Mach. Co. v. Gray, 16 N.E. 787, 790 (Ind. 1888) (holding that "true and correct copies of the original instruments" could be admitted as evidence of the original instruments); Thompson, 9 Ind. at 334 ("The property conveyed, the estate created, the conditions annexed, the signing, sealing, and delivery, are required to be proved with reasonable certainty, by witnesses who can

[20] Plaintiffs assert that the railroad company recorded at least one conveyance instrument in 1927 that it executed, but did not record, decades earlier. The conveyance instrument upon which they rely does not support their assertion, since it indicates on its face that it was first recorded in 1901. See Pressly Pls.' Ex. F-2 at 5. However, the record submitted in support of the Group 2 summary judgment motions did include two conveyance instruments, produced by the railroad company pursuant to a subpoena, that appear to have been first recorded in 1927. See Pls.' Grp. 2 Summ. J. Exs. E (release executed on March 25, 1851, and recorded on March 14, 1927), S (release executed in the 1840s and recorded on March 14, 1927). It is, therefore, possible that the railroad company recorded other documents decades late. Nevertheless, the court is unwilling to presume that the railroad company recorded other conveyance instruments in a grossly untimely manner, especially since the railroad company did not produce copies of such instruments in response to plaintiffs' subpoenas.

testify clearly to its tenor and contents."); Willis v. Knauth, 137 N.E. 557, 558-59 (Ind. App. 1922) ("Where an instrument is shown to be lost, its contents may be established by parol proof, or the introduction of an exact copy thereof. . . . [S]uch contents may be established partly by one of such methods and partly by the other." (citations omitted)); Hagey v. Schroeder, 65 N.E. 598, 599 (Ind. App. 1902) ("The original contract had been lost, and, after the proper foundation was laid, appellee testified, without objection, as to the contents of the contract. Afterwards a witness testified that he had made an exact copy of the contract before the original was lost. There was no reversible error in admitting this copy in evidence. It did not differ in any material respect from the contents of the contract as testified to by the former witness."). It is undisputed that no such evidence is available here.

Nor has defendant offered any other evidence regarding the interest conveyed by the lost instruments.[21] Instead, defendant argues that the information provided on—and absent from—the relevant valuation schedules suggests that the Vanlaningham and Seerley instruments most likely conveyed fee simple estates to the railroad company, and that the information on the valuation schedules regarding the Moody and Curtis agreements indicates that those agreements did not convey any interest in the land previously conveyed by the Vanlaningham instrument. The former contention is unpersuasive; that the valuation schedules indicate that the railroad company was the grantee, reflect that the instruments were executed around the same time that the PIRC executed releases by which it obtained fee simple interests in the railroad corridor, and lack any notation that the railroad company adversely possessed or did not own the pertinent portions of the railroad corridor does not mean that the Vanlaningham and Seerley instruments conveyed fee simple estates rather than easements. Similarly, the court rejects the latter contention because the fact that the Moody and Curtis agreements were executed to settle suits for damages does not mean that no interests in the railroad corridor were conveyed through the agreements.[22] At bottom, defendant's arguments regarding the contents of the lost instruments are mere conjecture, falling well short of what is necessary to meet its burden. Accord Armstrong, 76 N.E.2d at 693 ("[T]he contents and execution of [a lost] deed must be proven with reasonable certainty.").

When an instrument conveying a portion of a railroad corridor has been lost and secondary evidence of its contents does not exist, Indiana law provides that, in general, the railroad company does not acquire fee simple title. See Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964) ("Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation."). Rather, the presumption is that the railroad company acquires, by prescription, only as much as it uses. Consumers' Gas Tr. Co. v. Am. Plate Glass Co., 68 N.E. 1020, 1021 (Ind. 1903). Consequently, when a railroad company "enters without title and constructs its main line, . . . nothing more than an easement is acquired." Id.; see also Faukboner v. Corder, 26 N.E. 766, 767 (Ind. 1891) ("One

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[21] Such evidence might include other documents with a description of the lost conveyance instrument (for example, wills, other deeds, railroad company correspondence, or newspaper articles).

[22] Of course, because Mr. Curtis is described as a "tenant," Pressly Def.'s Ex. 6 at 6, it is unlikely that the Curtis agreement conveyed a fee simple estate to the railroad company.

may acquire an easement in the lands of another by prescription. To establish the existence of such easement he must show continuous, uninterrupted, adverse use, under claim of right, and with the knowledge and acquiescence of the owner of the land. . . . If there has been the use of an easement for 20 years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained."); Hoffman v. Zollman, 97 N.E. 1015, 1017-18 (Ind. App. 1912) (holding, where the evidence reflected that the railroad company "continuously and adversely used and occupied [the] strip of land" for more than twenty years without color of title and was "in complete possession, occupancy, and control" of the strip of land, that the railroad company acquired a prescriptive easement).

In this case, there is no dispute that the PIRC and its successors operated a railroad through the corridor at issue continuously for more than twenty years. The evidence in the record reflects that the PIRC "located and constructed" a railroad line between Indianapolis and Peru, Indiana, prior to 1852, and that the PIRC and its successors operated a railroad on that line until at least 1907. Pressly Pls.' Ex. E-1 at 4-5, 22. Accordingly, the PIRC and its successors possess a prescriptive easement over the portions of the corridor the PIRC originally obtained in 1849 via the now-lost Vanlaningham and Seerley instruments. Furthermore, there is no indication that the railroad company acquired any rights greater than an easement when it executed the now-lost Moody and Curtis agreements in 1897. Had such agreements resulted in the acquisition of fee simple title in that portion of the railroad corridor, the railroad company would have described a deed reflecting such a conveyance on the valuation schedule.

Having determined that the railroad company possesses a prescriptive easement over the portions of the railroad corridor at issue, the final issue to address is whether the adjoining landowners own the fee simple estate underlying the easement. As noted above, "where there is no language in any of the relevant deeds describing real property that includes the right-of-way, the title of the owners of land abutting railroad rights-of-way runs to the center of the right-of-way." Calumet Nat'l Bank, 682 N.E.2d at 790 (Ind. 1997). Plaintiffs in Pressly and ATS Ford have produced the deeds by which they acquired parcels adjacent to these portions of the railroad corridor. See generally Pressly Pls.' Ex. F-6; ATS Ford Pls.' Ex. F-5. The descriptions of the parcels in these deeds do not include the railroad corridor, but instead provide either (1) an indication that one of the parcel's boundaries runs along the corridor or (2) a reference to a specified lot on a recorded plat. See Pressly Pls.' Ex. F-6 at 30, 41, 45, 58, 90, 106, 121, 156, 369, 384, 389; ATS Ford Pls.' Ex. F-5 at 169. Accordingly, these plaintiffs own a fee simple estate to the centerline of the railroad corridor. There being no genuine issues of material fact, these plaintiffs are entitled to summary judgment on the threshold issue of whether they own fee simple title to the centerline of the portion of the railroad corridor adjacent to their parcels.

**E. Interest Acquired by the Railroad Company Through Other Conveyance Instruments**

A fourth subset of the Group 3 plaintiffs owns parcels adjacent to portions of the railroad corridor acquired by the railroad company through four other conveyance instruments: a warranty deed executed by John L. Wild and his wife on October 11, 1877 ("Wild deed"); a quitclaim deed executed by James M. Culbertson and his wife on February 19, 1910 ("Culbertson deed"); a release executed by Willis Threlkell on February 12, 1849 ("Threlkell

release"); and a release executed by James T. Wright on an unspecified date in the 1840s ("undated Wright release").[23] These instruments will be addressed in turn.

**1. The Wild Deed**

The first instrument at issue is the Wild deed. Plaintiffs did not produce a copy of this deed, and argue that because recording information was not provided on the valuation schedules and maps, the deed should be declared lost in the same way that the Vanlaningham instrument, the Moody and Curtis agreements, and the Seerley instrument have been declared lost. Defendant counters with the same arguments it previously advanced.

The relevant valuation schedule does not include any recording information for the Wild deed, but did set forth a custodian number. It also indicates that the grantee was a successor of the PIRC, that the deed was for a crossing at Chestnut Street, that the land area was 9882 square feet, and that the consideration paid was $185.29 (with the railroad company to maintain the crossing). Pressly Pls.' Ex. C-2 at 25. The information on the associated valuation map does not contradict the information included on the valuation schedule. See ATS Ford Pls.' Ex. B-5.

As discussed above, before a conveyance instrument can be declared lost, the party asserting that the deed is lost must "give some evidence that such a paper once existed—though slight evidence is sufficient for this purpose—and that a bona fide and diligent search has been unsuccessfully made for it, in the place where it was most likely to be found . . . ." Thompson, 9 Ind. at 333. Unlike with the Vanlaningham and Seerley instruments, the aforementioned valuation schedule and map reflect that the railroad company acquired the pertinent portion of the railroad corridor via a warranty deed and assigned a custodian number to the deed. It is therefore likely that the Wild deed was in the railroad company's possession at the time it prepared the valuation schedule and map, which would have relieved the railroad company of the obligation imposed by Valuation Order Number 7 to refer to county records to provide the information required by the ICC. Consequently, the court cannot presume that the railroad company searched the relevant county records for the Wild deed.

To satisfy the "bona fide and diligent search" requirement for the Wild deed, the county recorder's office must have been searched. Howe, 24 N.E. at 238; see also Ind. Rev. Stat. ch. 82, § 16 (1876) (requiring the recording of conveyance instruments within forty-five days for the instruments to be valid against good-faith purchasers), id. §§ 29-30 (requiring county recorders to keep a book listing the conveyance instruments presented for recording and to record such instruments, and providing that if a certificate of acknowledgment or proof is not recorded with a conveyance instrument, the instrument cannot be "read or received in evidence"); id. ch. 233, §§ 2-3 (requiring county recorders to keep a book listing the conveyance instruments presented for recording, to record all conveyance instruments, and to make an index of recorded conveyance instruments). Plaintiffs, however, present no evidence that a search for the Wild deed in the relevant county recorder's office was performed. Rather, they rely on the fact that

[23] These conveyance instruments affect four claims in ATS Ford: claims 9 (the Wild deed), 27 (the undated Wright release), 34 (the Culbertson deed and the Threlkell release), and 35 (the Culbertson deed).

they requested the Wild deed from the railroad company by subpoena as their sole evidence of a "bona fide and diligent search." In the face of the requirement that a search for a conveyance instrument should be performed at the county recorder's office, plaintiffs' search efforts are insufficient.

In the absence of "a bona fide and diligent search," the Wild deed cannot be declared lost. Consequently, plaintiffs cannot establish, as a matter of law, that the railroad company acquired an easement over the relevant portion of the railroad corridor, a prerequisite to establishing a cognizable property interest. There being no genuine issues of material fact related to the search for the Wild deed, defendant is entitled to summary judgment with respect to the claim of the Group 3 plaintiff who owns a parcel adjacent to the portion of the corridor that the railroad company acquired via the Wild deed.

**2. The Culbertson Deed**

The second instrument at issue is the deed in which the Culbertsons quitclaimed all of their "interest right and title" in a forty-foot strip of land to the railroad company. ATS Ford Pls.' Ex. H-2. Specifically, the Culbertson deed provides:

> This Indenture Witnesseth, That James M. Culbertson and Mary R. Culbertson, his wife, of Marion County in the State of Indiana,
>
> Release and Quit Claim
>
> to The Lake Erie & Western Railroad Company, for the sum of One ($1.00) Dollar, the following Real Estate in Marion County in the State of Indiana, to wit:
>
> All our interest right and title in and to all that part of the East half of the South East Quarter of Section five (5) Township sixteen (16) North, Range four (4) East, lying within forty (40) feet of the center line of Grantee's main track on the Southeasterly side thereof containing one and forty seven one hundredths (1.47) acres more or less.

Id. Plaintiffs contend that this deed conveys an easement because it does not specify the granting of a fee simple estate, it describes only nominal consideration, and public policy in Indiana disfavors the conveyance of fee simple title to strips of land. Defendant, in turn, argues that this deed conveys fee simple title to the strip of land because there is no reference to a "right of way," no indication of the purpose for which the land would be used, and quitclaim deeds convey everything possessed by the grantor (which defendant assumes is a fee simple estate).

As defendant observes, when the Culbertsons executed this deed, Indiana law provided that "[a] deed of release or quitclaim shall pass all the estate which the grantor could convey by a deed of bargain and sale." Ind. Rev. Stat. § 2924 (1881); see also Deed, Black's Law Dictionary (11th ed. 2019) (indicating that a "bargain-and-sale deed" is "[a] deed that lacks an express covenant about the validity of the title but implies that the grantor holds title to the property and

conveys it to a buyer for valuable consideration"). Defendant errs, however, in contending that a quitclaim deed that conveys land without limitation must convey a fee simple estate. Rather,

> [t]he general principle is well settled, that a grantor, conveying by deed of bargain and sale and by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed; and that a deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence.

Nicholson v. Caress, 45 Ind. 479, 485 (1874); accord Habig v. Dodge, 25 N.E. 182, 185 (Ind. 1890) ("The general proposition is abundantly maintained that a deed of release or quitclaim, or a conveyance of the 'right, title, and interest' of the grantor, even though it be with full covenants of warranty, without designating in the instrument any particular estate, either as owned by the grantor or as conveyed by the deed, operates simply to transfer whatever interest the grantor may have had at the time."). The record before the court lacks any direct evidence of the interest or title owned by the Culbertsons in the strip of land. It is possible that they owned the strip of land in fee simple, but it is also possible that they held only a life estate, a future interest in an unspecified estate, or an easement.

The identity of the property interest possessed by the Culbertsons is a genuine issue of material fact. Accordingly, the court declines to enter summary judgment to any party with respect to whether the affected plaintiffs own fee simple title to the centerline of the portion of the railroad corridor adjacent to their parcels by virtue of the Culbertson deed.[24]

#### 3. The Threlkell Release and the Undated Wright Release

The final two instruments at issue are the Threlkell release and the undated Wright release. The court addressed both of these releases in its Group 2 summary judgment decisions, concluding that they conveyed a fee simple estate to the railroad company. See, e.g., ATS Ford, 156 Fed. Cl. at 414-15. The court finds no reason to revisit this conclusion and, in fact, the

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[24] To the extent that the Culbertsons possessed fee simple title to the strip of land, the Culbertson deed conveys a fee simple estate to the railroad company. Unlike in Vandalia Railroad Co. v. Topping, 113 N.E. 421 (Ind. App. 1916), relied upon by plaintiffs, the Culbertson deed does not use the term "right of way" or indicate the purpose of the conveyance. See also Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 782 (Ind. 1997) ("The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to right of way in such a conveyance generally leads to its construction as conveying only an easement" (quoting Brown v. Penn Cent. Corp., 510 N.E.2d 641, 644 (Ind. 1987))). A separate distinguishing factor is that the railroad company in Vandalia Railroad Co. was organized under the 1852 law for the incorporation of railroad companies rather than by a pre-1952 legislative charter, as in this case. See 113 N.E. at 423.

parties do not request that it do so.[25] Therefore, in the absence of any genuine issues of material fact, defendant is entitled to summary judgment with respect to the claims of the Group 3 plaintiffs who own parcels adjacent to the portion of the corridor that the railroad company acquired via the Threlkell release and the undated Wright release.[26]

**F. Intervening Strips of Land**

The final subset of the Group 3 plaintiffs owns parcels in the Northeast Commerce Park subdivision of the City of Fishers.[27] Northeast Commerce Park was established by local ordinance in January 1986 as a planned development district. Pressly Pls.' Suppl. Ex. H. Pursuant to that ordinance, which amended the then-Town of Fishers zoning code,[28] id. at 1, the subdivision could be developed in phases, id. at 5. The ordinance also required that the subdivision have (1) covenants that "set forth in detail provisions for the ownership and maintenance of facilities held in common so as to reasonably insure their continuity and [conservation]," id. at 6, and (2) "[a]dequate provision . . . for [a] private organization with direct responsibility to, and control by, the property owners involved to provide for the operation and maintenance of all common facilities such as the retention pond," id. at 7; accord Pressly Pls.' Suppl. Ex. J at 323 (indicating, in the then-Town of Fishers zoning code, that "[w]here a Common Area is designated on the plat . . . of a commercial or residential project, a Property Owner's Association shall be formed and be required to provide necessary maintenance to the common area"), 460-61 (providing, in the "Platting of Multi-Family, Commercial, and Industrial Subdivisions" section of the then-Town of Fishers subdivision control regulations, that subdivision plats "shall include covenants"; that "those covenants shall explicitly establish the ownership, assessments, dues and programs which will insure the future maintenance of . . . on-

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[25] Plaintiffs initially contended that the Threlkell release had been lost, but conceded that it was not lost after defendant observed that it had been produced as an exhibit to plaintiffs' motion for summary judgment regarding the claims of the Group 2 plaintiffs.

[26] Defendant contends that the claim affected by both the Culbertson deed and the Threlkell release, ATS Ford 34, must fail because the land conveyed by the Culbertson deed lies between the relevant parcel and the railroad corridor, cutting off any interest the parcel owner might possess in the railroad corridor. Plaintiffs disagree, asserting that the Culbertson deed and the Threlkell release affect different portions of the parcel. However, plaintiffs have not produced evidence demonstrating where the parcel is situated in relation to the land conveyed by the Culbertson deed and the Threlkell release, and the court is unable to discern this information from the evidence in the record.

[27] The relevant claims are Pressly 32, 39, and 265. A fourth claim, ATS Ford 20, was initially part of this subset, but defendant conceded liability on this claim and does not object to it being placed in Group 1.

[28] The zoning code is one chapter of the comprehensive plan adopted by the then-Town of Fishers in 1980. Pressly Pls.' Suppl. Ex. J at 40-41. As relevant here, the 1980 comprehensive plan also included a chapter titled "Subdivision Control." Id. at 40, 417-65.

site, nondedicated, development entities" such as "open spaces"; and that such "open spaces . . . are frequently referred to as 'common areas'").

In accordance with the 1986 ordinance, the owner of the subdivision, Northeast Commerce Park, an Indiana Limited Partnership ("Partnership"), recorded a "Declaration of Protective Covenants" ("Declaration"). See Pressly Pls.' Ex. D-5. The Declaration did not address ownership of common areas, but did provide for the creation of a property owners association, id. at 9, and did specify, in a section titled "Common Area Maintenance Expenses," that each lot owner was responsible for a "pro-rata share of all expenses associated with adequately maintaining and preserving the retention pond and all swales located in Northeast Commerce Park," id. at 38.

Thereafter, the Partnership, as permitted, developed the subdivision in phases. Pressly Pls.' Exs. D-1 at 2, D-2 at 3, D-3 at 2. The parcels owned by plaintiffs appear on the recorded plats of the first, seventh, and eighth phases, Pressly Pls.' Ex. F-6 at 21, 25, 175, and are separated from the railroad corridor by two parallel, contiguous strips of land: a road identified on the subdivision plats as "Technology Drive" (immediately adjacent to the parcels) and a strip of land identified on the subdivision plats as "common property (Block 'A')" (between Technology Drive and the railroad corridor), Pressly Pls.' Exs. D-1 at 2, D-2 at 3, D-3 at 2.[29] Plaintiffs contend that on the date that the NITUs were issued, the owners of these parcels possessed a fee interest in both the common property and the land underlying Technology Drive, and therefore owned to the centerline of the railroad corridor.[30] Defendant responds that the City of Fishers, and not the parcel owners, owned the common property on the date that the NITUs were issued, therefore blocking any interest the parcel owners could claim in the railroad corridor. In support of this contention, defendant observes that the Partnership dedicated the common property identified on the three plats to the City of Fishers on June 8, 2017, Pressly Pls.' Exs. D-6, D-7 at 4-7, D-8 at 4-7, and that the City of Fishers accepted the dedications on June 26, 2017, Pressly Pls.' Ex. D-7 at 2-3. Defendant also argues that, in any event, the Partnership owns the reversionary interest in Technology Drive, further blocking any interest that the parcel owners could claim in the railroad corridor. Given these arguments, there are two controlling questions: (1) Who owned Technology Drive on the date of the taking? (2) Who owned the common property on the date of the taking? If the relevant parcel owners did not own either strip of land on the date of the taking, then their claims must fail.

**1. Technology Drive**

Turning first to the ownership of the fee estate underlying Technology Drive, each of the plats includes the following statement, or a substantially similar statement, dedicating the platted streets to public use:

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[29] The road is identified as "Technology Drive" on the subdivision plats but as "Technology Lane" on current maps.

[30] There is no dispute that the railroad company possesses an easement over this portion of the railroad corridor.

> ALL STREETS SHOWN ON THE WITHIN PLAT ARE HEREBY DEDICATED TO THE PERPETUAL USE OF THE PUBLIC FOR PROPER PURPOSES, RESERVING TO THE DEDICATORS, THEIR SUCCESSORS OR ASSIGNS THE REVERSION OR REVERSIONS THEREOF, WHENEVER DISCONTINUED BY LAW.

Pressly Pls.' Ex. D-1 at 2; accord Pressly Pls.' Exs. D-2 at 3, D-3 at 2. In Indiana, "one who dedicates a street, retaining the adjoining lots, retains the fee in the street, which fee will pass from him by a conveyance of the lots." Erwin v. Cent. Union Tel. Co., 46 N.E. 667, 669 (Ind. 1897). In particular,

> a conveyance of land bounded on a highway carries with it the fee to the center of the road, as part and parcel of the grant, unless such inference shall be expressly excluded, and . . . this rule is applicable where the land conveyed is a lot or part of a lot in a town or city, designated on the plat by its number, or ascertained by its appropriate description, and abutting on a public street, lane, or alley.

Cox, 48 Ind. at 188; accord Swaim, 171 N.E. at 876 n.1 ("Where land has been dedicated by its owner for a street or highway, a subsequent conveyance of the abutting land by such owner carries with it the fee to the center of the street or highway, as it will not be presumed that a grantor who parts with all his right and title to the adjoining land intends to withhold his interest in the road to the middle of it."). Thus, "when streets are vacated the fee thereof to the center of the street continues in the owner of the abutting land; in other words, it goes back to the grantee, immediate or remote, of the owner who dedicated it to public use." Brackney v. Boyd, 125 N.E. 238, 238 (Ind. App. 1919); accord AmRhein v. Eden, 779 N.E.2d 1197, 1209 (Ind. Ct. App. 2002) ("'Generally speaking when a street or highway is vacated or abandoned the title to the land reverts to the abutting property owners.' This rule is based upon the presumption that the abutting landowners own to the center of the street or highway subject only to an easement of the public to use the street or highway." (quoting Gorby v. McEndarfer, 191 N.E.2d 786, 791 (Ind. App. 1963))); cf. Kosciusko Cnty. Cmty. Fair, Inc. v. Clemens, 116 N.E.3d 1131, 1136-37 (Ind. Ct. App. 2018) (holding, where a restrictive covenant provided that it was enforceable by the homeowner's "successors and assigns," that a homeowner's "successor in title" to the affected property could enforce the restrictive covenant).

It is readily apparent that the statement on the Northeast Commerce Park plats dedicating the platted streets to public use is merely a restatement of the common law in Indiana. Consistent with the common law, the Partnership (1) dedicated the platted streets to public use; (2) retained the right to recover the streets if they were vacated or abandoned; and (3) noted that the right to recover the streets belonged to it and its immediate or remote grantees. The plaintiffs who own the parcels at issue are remote grantees of the Partnership. See Pressly Pls.' Ex. F-6 at 18-21, 25-26, 175. Accordingly, under the centerline presumption, they own a fee simple interest to the centerline of Technology Drive subject to the public use easement.

**2. The Common Property**

To establish that they own a fee simple interest in the other half of Technology Drive, these parcel owners must also possess a fee simple interest in the common property situated between Technology Drive and the railroad corridor (since the fee owner of the common property owns to the centerline of Technology Drive). Each plat identifies the strip of land between Technology Drive and the railroad corridor as "common property," and indicates that the subdivision phase consists of the lots, "together with common property ('Block A'), streets and easements" as therein depicted. Pressly Pls.' Exs. D-1 at 2, D-2 at 3; accord Pressly Pls.' Ex. D-3 at 2; see also Pressly Pls.' Suppl. Ex. J at 425-26 (requiring, in the "Subdivision Control" chapter of the then-Town of Fishers comprehensive plan, that plats "indicate and show . . . [a]ccurate outlines . . . of any area to be reserved by deed or covenant for common use by owners of land obtained in the plat"). The plats do not, however, indicate who would own the common property upon the conveyance of the platted lots. See Pressly Pls.' Exs. D-1 at 2, D-2 at 3, D-3 at 2. And, notwithstanding the requirements of the 1986 ordinance, the Declaration is similarly silent on this issue, see Pressly Pls.' Ex. D-5, and there is no evidence that the property owners association described in the Declaration was ever constituted, Pressly Pls.' Suppl. Ex. K ¶ 24. Moreover, the applicable local ordinances, the Indiana Code, and Indiana case law provide practically no guidance regarding the ownership of land designated on a plat as common property.[31] See, e.g., Pressly Pls.' Suppl. Ex. H (1986 ordinance); Pressly Pls.' Suppl. Ex. J (then-Town of Fishers comprehensive plan).

Given this lack of guidance, plaintiffs turn to the definitions of "common property" ("1. Real property that is held by two or more persons with no right of survivorship." or "2. Common area.") and "common area" ("1. . . . The realty that all tenants may use though the landlord retains control and responsibility over it." or "2. An area owned and used in common by the residents of a condominium, subdivision, or planned-unit development.") set forth in Black's Law Dictionary, and argue that "[b]ecause the Declaration identifies that expenses associated with Common Areas are to be split based upon a pro-rata share of the areas of the owners' lots, the intent of the dedicators was to vest ownership of the common property, including Block A, with the lot owners." Pressly Pls.' Mot. 8-9. Plaintiffs further contend that because the Partnership did not expressly reserve the reversion in the common property, as it did with the streets, it intended that title to the common property be held by the lot owners. Defendant, in contrast, argues that the plats reflect that the Partnership did not intend to convey ownership in the common property to the lot owners, remarking that the plats identify the common property and lots as distinct elements, and that the Partnership later represented to the City of Fishers that it owned the common property when it dedicated it to the City of Fishers in 2017 for use as a public right of way.

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[31] Notably, section 8.4.3 of the current zoning code of the City of Fishers provides that "[a]ll open space, common area and amenities shall be owned, operated and maintained in perpetuity by an owners' association, condominium association, or similar legal entity." Fishers, Ind., Unified Development Ordinance (July 20, 2018), http://online.encodeplus.com/regs/fishers-in/doc-viewer.aspx#secid-266.

As the parties observe, the three plats at issue do not include any language affirmatively declaring what interest, if any, the Partnership was retaining in the common property. However, the lack of such language on the plats does not mean that the Partnership intended to convey a fee simple interest in the common property to the adjacent lot owners. In fact, the opposite conclusion must be drawn. The relevant local and state legal authorities do not provide any rules or presumptions governing the ownership of land designated as "common property," "common ground," or "common area" on a plat. Thus, absent any evidence on the plats that the Partnership intended to relinquish fee ownership of the common property to the adjacent lot owners,[32] the court must conclude that the Partnership continued to own the common property after it recorded the plats.

Other evidence in the record before the court supports this conclusion. The Declaration does not indicate who owns the common property, but merely provides that all of the lot owners (regardless of their adjacency to the common property) must pay to maintain and preserve a retention pond and swales. Further, each of the deeds through which the relevant plaintiffs acquired their parcels describes the property being conveyed as a numbered lot in the subdivision, and lacks any reference to the common property.[33] Finally, the Partnership represented to the City of Fishers that it owned the common property when it dedicated the same for use as a public right of way, and the record before the court contains no evidence that any of the subdivision's lot owners objected to the dedication as an infringement of their property rights.

In short, based on the evidence before the court, plaintiffs have not established, as a matter of law, that the Group 3 plaintiffs who own parcels in the Northeast Commerce Park subdivision held a fee simple interest in the common property at the time that the NITUs were issued. Accordingly, those plaintiffs do not have a fee simple interest in the land underlying the railroad corridor. There being no genuine issues of material fact, defendant is entitled to summary judgment with respect to the claims of these plaintiffs.

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[32] Plaintiffs' reliance on the dictionary definitions of "common property" and "common area" is unavailing. In Indiana, residents of a condominium, subdivision, or planned unit development do not necessarily own the associated common areas. See, e.g., City of Indianapolis v. Towne & Terrace Corp., 106 N.E.3d 507, 509 (Ind. Ct. App. 2018) ("Unlike more recent condominium developments, Towne & Terrace homeowners are members of Towne & Terrace and do not own any interest in its common areas."); Pulte Homes of Ind., LLC v. Hendricks Cnty. Assessor, 42 N.E.3d 590, 592 (Ind. T.C. 2015) (remarking that the developer "owns a substantial number of common area parcels of land that are within several residential neighborhoods").

[33] To the extent that the "non-exclusive easements" conveyed by one of the deeds, Pressly Pls.' Ex. F-6 at 21, included the common property, the common property necessarily was not being conveyed in fee simple.

## IV. CONCLUSION

For the reasons set forth above, the court **GRANTS** the Pressly and ATS Ford plaintiffs' motions for summary judgment—and **DENIES** defendant's cross-motions for summary judgment—with respect to the following claims:

- Pressly: 1a, 1b, 41, 56, 64a, 64b, 78, 83, 93, 95, 109a, 109b, 110, 124, 130, 137, 150a, 150b, 151, 153, 162, 215, 216, 217, 249, 270a, 270b, 270c, 270d, 270e, 278, 284, 290, 292a, 292b, and 298.

- ATS Ford: 20 and 32.

These claims shall be transferred to Group 1 for the determination of just compensation.

In addition, the court **GRANTS** defendant's cross-motions for summary judgment—and **DENIES** plaintiffs' motions for summary judgment—with respect to the following claims:

- Pressly: 16, 32, 39, 103, 147a, 147b, 204a, 204b, 204c, 204d, 211, 247a, 247b, 265, 268a, 268b, 268c, and 268d.

- ATS Ford: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 21, 27, and 34 (the portion affected the Threlkell release).

These claims are **DISMISSED WITH PREJUDICE**.

Finally, the court **DENIES** all summary judgment motions with respect to the following claims:

- ATS Ford: 34 (the portion affected only by the Culbertson deed), and 35.

By **no later than Friday, April 15, 2022**, the parties shall file a joint status report suggesting further proceedings on these claims, as well as on the claims transferred to Group 1. In addition, by that **same deadline**, plaintiffs in Pressly and ATS Ford shall file updated notices identifying the claims assigned to Group 1 and Group 3.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Senior Judge

# In the United States Court of Federal Claims

**No. 19-471 L**
**Filed: March 24, 2023**

**ATS FORD DRIVE INVESTMENT, LLC et al.**
**Plaintiffs**

**v.**

**THE UNITED STATES**
**Defendant**

**RULE 54(b) JUDGMENT**

Pursuant to the court's Opinion and Order, filed December 3, 2021, *nunc pro tunc*, March 23, 2021; Opinion and Order, filed April 1, 2022, and Order, filed March 22, 2023, 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 the twenty-six claims, and one partial claim, as identified in the attached exhibit, are dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

**Exhibit**

List of Group 2 Claims Dismissed (March 23, 2021)

| Claim No. | Plaintiff Name | Parcel No. |
|---|---|---|
| 1 | Godby Properties, LP | 11-06-36-04-03-020.001 |
| 26 | Rezin Family Investments LLS c/o Greenstone Asset Management | 49-02-14-113-007.000-400 |
| 28 | Thomas E. Gilkison | 49-02-27-113-024.000-400 |
| 30 | Mays Property Management Company LLP | 49-02-33-115-127.000-800 |
| 31 | Mays Property Management Company LLP | 49-02-33-115-126.000-800 |
| 33 | Julia Ann McKim | 49-07-04-112-014.000-800 |
| 36 | Kimberly A. Jones | 49-07-05-111-003.000-800 |
| 37 | Caesar B. Doyle | 49-07-05-104-005.000-800 |
| 41 | Vasco Walton | 49-07-07-139-906.000-801 |
| 42 | Vasco Walton | 49-07-07-139-905.000-801 |
| 43 | Brinkley Investment Group, LLC | 49-07-07-139-911-801 |
| 44 | Brinkley Investment Group, LLC | 49-07-07-139-917.000-801 |
| 45 | Brinkley Investment Group, LLC | 49-07-07-139-918.000-801 |

List of Group 3 Claims Dismissed (April 1, 2022)

| Claim No. | Plaintiff Name(s) | Parcel No. |
|---|---|---|
| 2 | GG Properties, LLC | 11-10-01-02-02-015.000 |
| 3 | TSM Property Group, LLC | 11-10-01-02-02-016.000 |
| 4 | Alexander Auto & Radiator Repair, LLC | 11-11-06-05-01-022.000 |
| 5 | TSM Property Group, LLC | 11-10-01-02-02-017.000 |
| 6 | Noblesville Township Trustee | 11-11-06-05-01-019.000 |
| 7 | Noblesville Township Trustee | 11-11-06-05-01-018.000 |
| 8 | Noblesville Township Trustee | 11-11-06-05-01-017.001 |
| 9 | Concepcion M. Hiatt | 11-10-01-04-02-018.000 |
| 10 | Russell L. and Christy Campbell | 11-11-06-03-15-001.000 |
| 11 | Russell L. Campbell, Jr. | 11-11-06-03-15-056.000 |
| 12 | Anthony S. Zambrano and Ellen Smith King | 11-11-06-03-15-053.001 |
| 21 | Elizabeth Reid and Margaret F. Reid | 15-14-01-00-04-005.000 |
| 27 | Brian L. and Grace L. Schoonveld, Co-Trustees of the Brian L. Schoonveld and Grace L. Schoonveld Revocable Trust, UTA 6/13/00 | 49-02-23-112-022.000-400 |
| 34 (the portion affected by the Threlkell release) | Amanda L. Louden | 49-07-05-103-011.000-800 |

**FORM 19. Certificate of Compliance with Type-Volume Limitations** **Form 19**
**July 2020**

# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

**Case Number:** 23-1760

**Short Case Caption:** ATS Ford Drive Investment, LLC v. United States

**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- [x] the filing has been prepared using a proportionally-spaced typeface and includes 13,774 words.
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- [ ] the filing contains __________ pages / __________ words / __________ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. __________).

Date: 08/11/2023

Signature: /s/ Stephen S. Davis

Name: Stephen S. Davis