No. 23-1760

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.

Appeal from the United States Court of Federal Claims
No. 1:19-cv-471 (Hon. Margaret M. Sweeney)

UNITED STATES' RESPONSE BRIEF

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STATEMENT OF RELATED CASES

The case has not previously been before this or any other appellate court. Counsel is unaware of any other proceeding, in any tribunal, that will directly affect this Court's decision. Several cases that remain pending in the Court of Federal Claims involve just compensation claims that turn on the effect of similar conveyances, issued under the same legislative charter, as the claims in this appeal. The holding in this case may thus affect the final disposition of claims in the following cases: *Best Access Solutions, Inc. v. United States*, No. 22-1598L (Fed. Cl.); *Bradley v. United States*, No. 19-400L (Fed. Cl.); *Oldham v. United States*, No. 18-1961L (Fed. Cl.) (consolidated with *Overlook at the Fairgrounds LP v. United States*, No. 18-1962L (Fed. Cl.)); *Pressly v. United States*, No. 18-1964L (Fed. Cl.) (consolidated with *Jones v. United States*, No. 19-1375L (Fed. Cl.)); *Doyle v. United States*, No. 19-882L (Fed. Cl.).

INTRODUCTION

In the mid-1800s, central Indiana landowners in the path of a planned rail line signed similarly worded conveyances (Releases) relinquishing property to the Peru and Indianapolis Railroad Company (Company). In two contemporaneous cases—*Newcastle* and *Rayl*[1]—the Indiana Supreme Court explained that the Company's distinct legislative charter (Charter) defined the effect of the Releases: to convey to the Company fee simple title to the lands comprising the right of way. For generations, properties have been bought, sold, improved, and inherited under the rule of law set forth in those cases and repeatedly reaffirmed by Indiana courts.

The nine Plaintiffs who bring this appeal are successors in interest to landowners who, nearly two centuries ago, signed Releases. After the Surface Transportation Board (Board) in 2018 issued a notice permitting negotiations to convert parts of the rail line into municipally operated recreational trails, Plaintiffs sued to obtain just compensation for alleged takings. But to prevail on their claims, Plaintiffs needed to show, contrary to 150 years of settled law, that they (not the rail owner) owned the fee interests in those parcels. Arguing principally that the effect of the Releases was a novel and unsettled question, Plaintiffs asked the Court of Federal Claims to certify a question of law to the Indiana Supreme Court.

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[1] *Newcastle & Richmond R.R. Co. v. Peru & Indianapolis R.R. Co.*, 3 Ind. 464, 468 (1852); *Indianapolis, Peru & Chicago Ry. Co. v. Rayl*, 69 Ind. 424 (1880).

Rejecting that request, the court below granted summary judgment to the United States, holding that the law was settled long ago by the Indiana Supreme Court's controlling decisions in *Newcastle* and *Rayl*.

This Court should affirm summary judgment and reject Plaintiffs' renewed request to certify a purportedly unsettled question of Indiana law. The Indiana Supreme Court held over 150 years ago that materially identical Releases—granting property to the same Company, operating under the same legislative Charter—conveyed fee simple title. Plaintiffs thus cannot invoke a certification procedure that is available only if "there is no clear controlling Indiana precedent." Ind. R. App. P. 64(A). Nor can Plaintiffs or their supporting Amici (mainly Indiana landowners who are plaintiffs in a related case with similar Releases) muddy the fact that the dispositive question is not an open one. The controlling holdings of *Newcastle* and *Rayl* are not dicta, as is evident from the text of those decisions and as later Indiana cases confirm. Nor does this case raise a question of first impression that might be resolved by applying general presumptions and canons of construction. Such tools cannot supersede the Indiana Supreme Court's specific holdings and none, in any event, conflict with the rationales of *Newcastle* and *Rayl*, where the Indiana Supreme Court held that the Company's Charter, which formed a part of its conveyance contracts, displaces the interpretive presumptions on which Plaintiffs rely.

STATEMENT OF JURISDICTION

The Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491 to hear Plaintiffs' Fifth Amendment claims requesting just compensation for the alleged taking of their property interests by the United States. Appx76. On March 24, 2023, the Court of Federal Claims entered a Rule 54(b) judgment disposing of Plaintiffs' claims and Plaintiffs timely appealed on April 7, 2023. Appx58-59, Appx2041; 28 U.S.C. § 2107(b)(1); Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUE

Whether this Court can disregard 150 years of settled law that the Releases conveyed fee simple interests (not easements) to the Company, either by certifying the issue to the Indiana Supreme Court as a purportedly novel and unsettled question or by reaching a contrary conclusion in the first instance.

STATEMENT OF THE CASE

A. Legal framework

1. Abandonment of Rail Lines and Railbanking under the Trails Act

When a rail carrier obtains necessary Board approval and abandons a rail line, that line is removed from the national transportation system and from federal jurisdiction. 49 U.S.C. §§ 10903; *Preseault v. Interstate Com. Comm'n*, 494 U.S. 1, 5 n.3 (1990). To combat a long-term trend of "shrinking rail trackage,"

Preseault, 494 U.S. at 5-7, Congress in 1983 designed an alternative to abandonment: a mechanism to allow conversion of unused railway rights-of-way into recreational trails. National Trails System Act Amendments, Pub. L. No. 98-11, § 208(2), 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d)) ("Trails Act"); *Chicago Coating Co., LLC v. United States*, 892 F.3d 1164, 1167 (Fed. Cir. 2018). That process, known formally as "railbanking" and informally as "rails to trails," preserves the Board's jurisdiction over a rail corridor and allows the Board—as may be warranted in the future—to reactivate the right-of-way for railroad use. 16 U.S.C. § 1247(d) ("such use shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes"). In the interim, a sponsor, most often a local government, operates the corridor as a recreational trail. *Id.*

To invoke the railbanking procedure and, ultimately, to assume financial and managerial responsibility to operate a converted recreational trail, a locality or other qualified entity files a request with the Board in a railroad abandonment proceeding. 49 C.F.R. § 1152.29(a), (b). If the owner of the railroad agrees to negotiate a railbanking agreement, the Board issues a Notice of Interim Trail Use or Abandonment (NITU),[2] after which the owner can discontinue rail service,

[2] When a railroad seeks to abandon its rail line through an application to abandon or discontinue, rather than through the abandonment exemption process, the Board

cancel tariffs, and salvage track and materials while it negotiates with the potential sponsor. *Id.* § 1152.29(d); *Behrens v. United States*, 59 F.4th 1339, 1342 (Fed. Cir. 2023). The NITU does not itself authorize or establish interim trail use, *see* 49 C.F.R. § 1152.29(d)(2), but if the railroad and potential sponsor reach an interim trail use agreement, the rail line "remains under Board jurisdiction indefinitely while used as a recreational trail" operated by the sponsor. *Caquelin v. United States*, 959 F.3d 1360, 1364 (Fed. Cir. 2020).

2. Analyzing Rails-to-Trails Takings Claims

Depending on the nature of the property interests held by the owner of the rail line, railbanking can result in a taking of private property and require payment of just compensation. *See Preseault*, 494 U.S. at 16; U.S. Const., 5th Amendment ("Nor shall private property be taken for public use, without just compensation."). On the one hand, issuing a NITU that facilitates recreational trail use on a parcel of land that a railroad acquired and owns in fee simple will not infringe any third party's property interests. *Chicago Coating*, 892 F.3d at 1170. On the other hand, this Court has held that issuing a NITU for a parcel over which a railroad acquired only an easement—meaning another landowner still owns the fee interest in the

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issues a Certificate of Interim Trail Use or Abandonment (CITU) instead of a NITU. *See* 49 U.S.C. §§ 10502, 10903; 49 C.F.R. § 1152.29 (b)(2)

underlying land—may result in a taking of the fee owner's property rights if recreational trail usage falls "outside the scope of the [railroad's] easement." *Id.*

Many rails-to-trails takings cases before this Court thus turn on the validity of a claimant's assertion that a railroad owner holds only an easement—rather than fee simple title—over a railbanked parcel that the claimant purports to own. Resolving that issue in each case "depend[s] on state law and the facts of the particular land grants" that conveyed the right of way to the railroad—grants commonly made in or around the mid-1800s. *Behrens*, 59 F.4th at 1343; *see Rogers v. United States*, 814 F.3d 1299, 1305 (Fed. Cir. 2015) ("state law" governs "the property rights of the parties in a rails-to-trails case").

Usually, this Court itself identifies and applies the law of the state where the rail corridor is located to determine whether a particular conveyance granted an easement or a fee simple interest. *See, e.g.*, *Hardy v. United States*, 965 F.3d 1338, 1344-48 (Fed. Cir. 2020) (applying Georgia law); *Loveridge v. United States*, 838 Fed. App'x 512, 516-21 (Fed. Cir. 2020) (applying Oregon law); *Chicago Coating Co.,* 892 F.3d at 1171-74 (applying Illinois law). More rarely, when it has found a "dearth of [state] case law" on a difficult and dispositive interpretive issue, this Court has certified a question of law to the high court of the relevant state. *Rogers*, 814 F.3d at 1307.

3. Certifying Questions to the Indiana Supreme Court

Indiana, like some other states, allows federal courts to certify a question to its state Supreme Court if (1) an "issue of state law [] is determinative of the case" and (2) "there is no clear controlling Indiana precedent." Ind. R. App. P. 64(A); *see Cedar Farm v. Louisville Gas & Elec. Co.*, 658 F.3d 807, 813 (7th Cir. 2011) (explaining that rule's "two requirements" must each be satisfied).[3] When a federal court determines that the preconditions to certify are met, the choice of whether to seek certification "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (discussing general principles for certifying questions to state courts).

B. Historical Background

1. The Peru and Indianapolis Railroad Company's Charter

Before Indiana adopted a general statute in 1852 governing the incorporation of railroad companies, railroads were created—and their specific powers defined—through individualized legislative enactments, known as charters. *Louisville & Ind. R.R. Co. v. Ind. Gas Co.*, 829 N.E.2d 7, 9 & n.1 (Ind. 2005); *see Vandalia R.R. Co.*

[3] Most other states embracing the certification procedure similarly require a "determinative" question of state law for which "no controlling precedent" exists. *E.g.*, Ariz. Rev. Stat. § 12-1861; Conn. Gen. Stat. § 51-199b(d); Md. Cts. & Jud. Proceedings Code Ann. § 12-603; 22 N.Y. Ct. R. of Practice § 500.27(a); Oreg. Rev. Stat. § 28.200; W. Va. Code § 51-1A-3.

v. Topping, 113 N.E. 421, 423 (Ind. Ct. App. 1916) (general railroad incorporation statute was "approved May 11, 1852"). A consequence of this ad hoc approach to incorporation was that the Indiana Legislature invested different railroads with different powers—including, for example, distinct powers to acquire, take, or hold the real property necessary to construct rail lines. *Water Works Co. v. Burkhart*, 41 Ind. 364, 375 (1872) (appropriations under "some railroad charters" took land "in fee simple, whilst in others only an easement [was] granted").

In 1846, the Indiana General Assembly chartered the Peru and Indianapolis Railroad Company and tasked it with building a railroad between its namesake cities of Peru and Indianapolis. Charter, 1846 Ind. Acts ch. CLXXXVI (Appx378). Sections 15 and 16 of the Charter, respectively, authorized the Company to acquire the lands necessary for its rail line either (1) voluntarily—through a donation, contract, or other "relinquishment of so much of the land as may be necessary for the construction and location of the road," or (2) by eminent domain, if a landowner "shall refuse to relinquish" the necessary land. Charter §§ 15, 16 (Appx381-382, Defendants' Addendum (Add) 2). When acquiring land through either method, section 19 specified "[t]hat when said corporation shall have procured the right of way, as hereinbefore 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." Charter § 19 (Appx382-383, Add3).[4] As the Indiana Supreme Court explained in *Newcastle*, section 19 addressed whether "the 15th and 16th sections" of the Charter, when invoked by the Company to acquire a right of way, operated "to convey [1] an easement, a right of way merely, or [2] a fee-simple title," with the provision "declaring it should be the latter." 3 Ind. at 468.

2. The Company's Acquisition of Lands

By the early 1850s, the Company had persuaded many landowners along the rail corridor, including Plaintiffs' predecessors-in-interest, to sign written Releases[5] relinquishing the lands necessary for the railroad. Some Releases were on

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[4] In using "they" to refer to the Company, the Charter employed a figure of speech common to the mid-1800s, where "plural pronouns and verbs" were paired "with collective nouns such as 'corporation' and 'company.'" Appx29 (citing Bryan A. Garner, A Dictionary of Modern Legal Usage 170-71 (2d ed. 1995)).

[5] This brief uses a capitalized form of "Release" or "Releases" to refer to any of the substantially similar written conveyances to the Company with the quoted granting language. "Releases" thus includes all conveyances now before the Court as well as the materially identical conveyance in *Rayl*; it is not intended to include other conveyances to the Company that may have taken different forms or used different operative language. Beyond the same granting language, the Releases in this case vary from each other in ways not material to the issues on appeal: most waived the landowner's right to damages arising from construction of the railroad (*e.g.*, Appx230, Appx259); most granted the Company the rights to stone, timber, and other materials from the surrounding land (*e.g.*, Appx259, Appx263); some described additional monetary or other consideration paid to the grantor (*e.g.*, Appx221-22, Appx226, Appx293); and some had additional provisions describing, for example, special damage waivers (Appx230) or maintenance obligations (*e.g.*, Appx221-22, Appx226).

preprinted forms (*e.g.*, Appx230, Appx263) and some were entirely handwritten (*e.g.*, Appx221-22, Appx226). All Releases, in language tracking section 15 of the Charter, stated that—in consideration for the benefits the railroad would bring to the public and to the landowner—the owner agreed to "release and relinquish"[6] to the Company "the right of way for so much of said road as may pass through or cut" a designated parcel. Appx221-22, Appx226, Appx230, Appx259, Appx263, Appx285, Appx289, Appx293; *see* Charter § 15 (authorizing Company to acquire property through "relinquishment of so much of the land as may be necessary").

In 1880, a successor railroad asked the Indiana Supreme Court to consider the effect of one of the Releases. The Court in *Rayl* held that, because "section 19" of the Charter declared that a "right of way, when acquired, should be held by the company in fee-simple," the Release "convey[ed] to the company an estate in fee-simple to so much of the land described in it as constituted the right of way." 69 Ind. at 430; *see id.* at 429 (Charter "form[ed] a part of the contract of relinquishment" between Company and landowner).

[6] For ease of the reader, words capitalized in the Releases are reproduced in lowercase text here and throughout the brief.

C. Procedural History

1. Railbanking the Parcels at Issue

In 2018, more than 150 years after the Company acquired the lands for its railway, three Indiana cities—Fishers, Noblesville, and Indianapolis (collectively, "Localities")—sought to convert parts of the former Peru and Indianapolis rail line into recreational trails. The Localities requested that the Board issue NITUs for three contiguous segments of the line that together stretched for over 20 miles between Indianapolis and Noblesville. Appx125-26, Appx139. Appx373-75 (maps of segments).[7] On December 21, 2018, the Board issued three NITUs, thus allowing each Locality to negotiate an interim trail use agreement for its requested segment. Appx140. The following December, the Localities finalized agreements with the line owners and became trail sponsors. Appx371.

2. This Lawsuit

Various individuals asserting ownership of lands in the rail corridor filed just compensation claims, alleging that the trail conversion effected a taking of their

[7] The proceeding was somewhat unusual, first in that several public entities, including two of the proposed sponsors, already held ownership interests in the line. Appx129. Second, the Board's predecessor had authorized the former rail operator, Norfolk and Western Railway, to abandon the line, but because that abandonment had not been consummated, the line remained within the Board's jurisdiction. Appx117-118, Appx121, Appx129. These distinctions did not alter the Board's treatment of the railbanking requests and do not affect the analysis of the issues under review.

property interests by the United States. Appx73-100. Among those claimants were Plaintiffs in this appeal, all nine of whom are successors-in-interest to mid-nineteenth century landowners who negotiated Releases that, using the above-described form and language, conveyed portions of their property to the Company.

The question of whether the United States was liable to Plaintiffs focused on a single dispute in the Court of Federal Claims: whether the Releases conveyed easements or fee simple interests. If the latter, then Plaintiffs would not have owned the property interests they alleged were taken and could not be entitled to just compensation. The United States asserted that it has been long settled under Indiana law that the same Releases, granting property to the same Company, under the same legislative Charter, conveyed fee simple interests. *See* Appx322-26. Disagreeing, Plaintiffs argued principally that the question was not settled. Characterizing the relevant holdings as non-binding dicta and positing that the Indiana Supreme Court would have "a sound basis to 'overrule'" its prior statements, Plaintiffs "request[ed] that, rather than ruling on the summary judgment motions, the Court certify the issue to the Indiana Supreme Court." Appx177, Appx181-87, Appx208, Appx215.

The court rejected Plaintiffs' certification request and granted the United States summary judgment on the claims now on appeal.[8] The court explained that the Indiana Supreme Court's decisions in *Newcastle* and *Rayl* controlled: the former held that "releases executed pursuant to the [Company's] legislative charter conveyed fee simple title," and the latter confirmed that a Release using the same granting language as here conveyed "a fee simple interest" to the Company. Appx12, Appx14. The court recounted the Indiana appellate decisions treating those holdings "as settled law," explained that the presence of "clear controlling Indiana precedent" foreclosed it from certifying the issue to state court, and noted that, in any event, "the Indiana Supreme Court's reluctance to disturb established rules of property and contractual relationships" made it "unlikely that the [Indiana Supreme Court] would have any interest in overturning its" precedents even if certification were available. Appx14, Appx20, Appx24 (quotation marks omitted).

On March 24, 2023, the court entered a Rule 54(b) judgment for the United States, and Plaintiffs timely appealed on April 7, 2023. Appx58, Appx2041.

SUMMARY OF ARGUMENT

This Court should affirm summary judgment because Plaintiffs did not own land in the rail corridor and thus are not entitled to just compensation for alleged

[8] The court resolved the bulk of Plaintiffs' claims in a December 3, 2021 opinion and order; it later applied the reasoning of that decision to grant summary judgment against another Plaintiff on April 1, 2022. Appx51-52, Appx57.

takings of interests in those lands. Under long-settled Indiana law, when Plaintiffs' predecessors signed Releases conveying property for the rail line, the Company acquired those lands in fee simple; the Company and its successors have owned those lands ever since.

The Indiana Supreme Court's holdings in *Newcastle* and *Rayl* are controlling and dispositive. The Court held in the former that, per the Charter, voluntarily conveying a right of way would convey fee simple to the Company, and it confirmed in the latter that a Release—with the same granting language as the Releases here—conveyed in fee simple. Appellate courts in Indiana have repeatedly reaffirmed those holdings, explaining that the interest conveyed by the Releases under the Charter is settled law.

Because the question of whether the Releases conveyed fee simple or easements is squarely governed by "clear controlling Indiana precedent," Ind. R. App. P. 64(A), this Court lacks authority to certify the question to the Indiana Supreme Court. Federal courts can invoke certification to refer novel and unsettled questions of state law to state courts; they cannot use the procedure to request that state courts reconsider their own controlling precedents.

Nor can Plaintiffs (or their supporting Amici) undermine the plain import of *Newcastle* and *Rayl*. The controlling passages in those cases formed the essential rationales for the Indiana Supreme Court's holdings and are neither distinguishable

nor dicta. And Plaintiffs cannot prevail by treating this case as if it raises a question of first impression to be resolved by applying background principles of law. The general presumptions and canons of construction that Plaintiffs cite cannot supersede the Indiana Supreme Court's specific holdings about the effect of these Releases, to this Company, under this Charter.

In any event, none of those tools of construction conflict with the rationales of *Newcastle* and *Rayl*. For example, while instruments granting a right of way are commonly presumed to convey an easement, *Newcastle* and *Rayl* explain that the Charter—which forms a part of the Release contracts—displaces any such presumption by specifying that the Company acquires rights of way in fee simple. Nor is the Charter's operation, as construed by *Newcastle* and *Rayl*, inconsistent with a railroad's right to contract for lesser interests. Although the Charter requires construing the stock language in these Releases as conveying fee simple interests, the Charter did not abridge the Company's right to acquire lesser interests through instruments explicitly conveying such interests.

Finally, even if the disputed issue in this appeal were an unsettled question, various factors would weigh against certification. The Indiana Supreme Court is exceedingly unlikely to upend an allocation of property rights that has been settled for over 150 years. And the issues in this case are narrow and fact-specific, without the type of broader implications that can warrant certification.

STANDARD OF REVIEW

Analyzing "whether a specific deed conveys a fee simple interest or an easement is a question of law that [this Court] review[s] de novo under the law of the state in which the property interest arises." *Anderson v. United States*, 23 F.4th 1357, 1361 (Fed. Cir. 2022). More generally, this Court reviews a grant of summary judgment by the Court of Federal Claims de novo and should affirm when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Ladd v. United States*, 713 F.3d 648, 651 (Fed. Cir. 2013) (quotation marks omitted).

ARGUMENT

I. Summary Judgment Should Be Affirmed and Certification Denied Because Controlling Indiana Precedent Dictates that the Releases Conveyed Fee Simple Interests to the Company.

This Court should affirm summary judgment and deny Plaintiffs' requests for certification or reversal. Under long-settled Indiana law, Plaintiffs did not own the railbanked lands—and are thus not entitled to just compensation for the alleged taking of recreational trail easements—because the Company acquired fee simple title to those lands from Plaintiffs' predecessors.

A. Binding Indiana Supreme Court Precedent Forecloses Plaintiffs' Construction of the Releases and Bars Certification.

The holdings of *Newcastle* and *Rayl* compel this Court to affirm that the Releases, as construed under the Charter, conveyed title to the Company in fee simple. Those cases likewise bar Plaintiffs' principal request for relief—to refer the question to the Indiana Supreme Court—as certification is available only to resolve novel or unsettled questions of state law.

1. The Holdings of *Newcastle* and *Rayl* Confirm that the Releases, Construed in Light of the Charter, Conveyed Fee Simple Interests.

For well over a century, it has been settled law that the Company obtained fee simple interests in the lands underlying its rail corridor when landowners, including Plaintiffs' predecessors, signed Releases conveying rights of way to the Company. The reason is that when the Company acquired property in the mid-1800s, it did so pursuant to its legislative Charter. And the Charter stated that when the Company obtained "a relinquishment of so much of the land" as required for its railway, it "shall have procured the right of way . . . in fee simple" and "shall have the sole use and occupancy of the same." Charter §§ 15, 19. Accordingly, when a landowner executed a Release using stock language to "release and relinquish" to the Company "the right of way for so much of said road" as needed, *e.g.*,

Appx230, Appx263, the Company "procured the right of way . . . in fee simple," gaining "sole use and occupancy" of the land, Charter § 19.

Two Indiana Supreme Court cases confirm that operation of Indiana law. First, in 1852, the Court in *Newcastle* interpreted section 19 of the Company's Charter—the provision that, as the Court explained, defined "the effect which the releases and condemnations of land spoken of in the 15th and 16th sections [of the Charter] should have." 3 Ind. at 467-68. The Company claimed that section 19 granted it rights in acquired lands beyond those a typical fee owner would possess. *Id.* at 468. Rejecting that construction, the Court explained that section 19 was instead designed to resolve the more basic question of whether the Company, when it "shall have procured the right of way," had acquired "[1] an easement, a right of way merely, or [2] a fee-simple title." *Id.* at 468-69. And on that score, the Court held that the Charter "declar[ed] it should be the latter." *Id.* at 469.

The Indiana Supreme Court reaffirmed that conclusion in 1880, when it addressed in *Rayl* the effect of a Release granting the Company a right of way. *Rayl*, 69 Ind. at 424-25. Rejecting the plaintiffs' claim that a successor railroad had illegally built a rail structure on a purportedly public street, the Court held that an 1847 Release—a materially identical conveyance with the same granting language as the Releases here—had conveyed the disputed land to the Company in fee simple. *Id.* at 424-25, 429. Echoing *Newcastle*, the Court explained that the

Release had to be read together with "section 19[] of the act of incorporation," which specified that "the right of way, when acquired, should be held by the company in fee-simple." *Id.* at 429; *see id.* (Charter's provisions "form[ed] a part of the contract of relinquishment"). When the original grantor relinquished the "right of way" to the Company, he thus "convey[ed] to the company an estate in fee-simple to so much of the land described in [the Release] as constituted the right of way." *Id.* For that reason, the railroad owner could not be liable for building a structure on land that "was not, and had never been, a public street," but that was instead "the property of the [] Company." *Id.* at 430.

In the years after the Indiana Supreme Court decided *Newcastle* and *Rayl*, Indiana courts repeatedly cited the cases as conclusively resolving whether Releases under the Charter conveyed fee simple interests. *See, e.g.*, *Douglass v. Thomas*, 103 Ind. 187, 190 (1885) ("It was held [in *Rayl*] that an instrument conveying the right of way to the railroad company there concerned, supplemented by the 19th section of the act under which it was incorporated, did have that effect" of "convey[ing] a fee simple."); *Cleveland, C.C. & I.R. Co. v. Coburn*, 91 Ind. 557, 559-60 (1883) (in confronting charter with "very same language" as Company's, adhering to prior "judicial construction" in *Newcastle* that "an unconditional relinquishment of land"—i.e., a grant not contingent on a condition subsequent—conveys "the absolute fee simple of the land"); *Meyer v. Pittsburgh, C.C. & S.L.R.*

Co., 113 N.E. 443, 445-46 (Ind. App. 1916) (in addressing railroad with "practically the same" legislative charter as Company, explaining that "the question of the title acquired by relinquishment" under such language "is not an open one," because "it was held" in *Rayl* that the Company "acquired the lands by title in fee simple").

2. The Presence of Clear Controlling Indiana Precedent Forecloses Certification.

The same case law that controls interpretation of the Releases forecloses Plaintiffs' certification request. Contrary to Plaintiffs' assertion that this case presents a "novel" and "unsettled question" eligible for certification to the Indiana Supreme Court, the law has been settled for well over a century. Br. of Plaintiffs-Appellants (Br.) at 6, 31; *see Arizonans for Off. English v. Arizona*, 520 U.S. 43, 79 (1997) ("Novel, unsettled questions of state law . . . are necessary before federal courts may avail themselves of state certification procedures."). As described above, the Indiana Supreme Court has held, and a subsequent chain of appellate case law has reaffirmed, that a materially identical Release—using the same language, authorized by the same Charter, and granting land to the same Company as the Releases here—conveyed a fee simple interest. *See, e.g.*, *Rayl*, 69 Ind. at 429; *Douglass*, 103 Ind. at 190. That case law plainly qualifies as "clear

controlling Indiana precedent" that, under Rule 64(A) of Indiana Appellate Procedure, bars certification.[9]

At heart, Plaintiffs' certification request is an attempt to relitigate a long-settled question, in the hope that the Indiana Supreme Court might be convinced to revisit and ultimately reverse its prior decisions. But "[t]he purpose of certification is to ascertain what state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else." *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976); *accord* Wright & Miller, 17A Fed. Practice & Proc. § 4248 (2023) ("If the state court has already said what the law is, a federal court . . . should not certify a question in the hope of persuading the state court to change its mind."). Indeed, the United States is not aware of any case where this Court has certified a question on the possibility that a state court might overrule its own squarely controlling precedents. *Cf. Rogers*, 814 F.3d at 1307 (certification available when there is a "dearth of [state] case law" on

[9] Plaintiffs do not argue that the age of the governing precedents affects this court's authority to certify a question. Nor could they, given that Indiana's certification rule forecloses certification whenever "clear controlling Indiana precedent" exists—no matter whether the disputed question of state law was settled only recently or, as here, was settled long ago. Ind. R. App. P. 64(a); *see Union County v. Merscorp, Inc.*, 735 F.3d 730, 734-35 (7th Cir. 2013) (Posner, J.) (in declining to certify question that had been resolved in "cases decided more than a century ago," explaining that "[w]e can't do that," because cases remained "controlling precedents" under Illinois' similar certification rule).

an issue); *Toews v. United States*, 376 F.3d 1371, 1380 (Fed. Cir. 2004) (admonishing against certification absent "real doubt about the state's law").

B. Plaintiffs and Amici Fail to Distinguish or Undermine the Indiana Supreme Court's Controlling Holdings.

In contending that certification is not barred by the controlling holdings of *Newcastle* and *Rayl*, Plaintiffs and their supporting Amici raise arguments that fall into two general categories. First, they misread *Newcastle* and *Rayl* in contending that those decisions, on their face, did not conclusively determine the effect of the Releases. Second, they wrongly assert that an array of background presumptions and interpretive principles—none of which undermine the logic of *Newcastle* and *Rayl*—should supplant the holdings of those cases. No argument in either category withstands scrutiny or comes close to establishing that the property interest conveyed by the Releases is a "[n]ovel, unsettled question[] of state law" eligible for certification. *Arizonans for Off. English*, 520 U.S. at 79.

1. The Holdings of *Newcastle* and *Rayl* Are Neither Distinguishable Nor Dicta.

Plaintiffs and Amici fail to show that the disputed issue in this case falls outside the holdings of *Newcastle* and *Rayl,* as would be necessary to allow certification. In attempting to distinguish those cases (as opposed to arguing that they were wrongly decided, *see infra* Section I.B.2), Plaintiffs raise only one argument: that *Newcastle* addressed the Charter's general operation, but not the

effect of any specific conveyance under the Charter. Br. at 48, 50. Whatever ambiguity may have persisted after the 1852 *Newcastle* ruling, however, was eliminated by the 1880 *Rayl* decision, where the Indiana Supreme Court applied the reasoning from *Newcastle* to confirm that a Release issued under the Charter—with the same granting language as the Releases here—conveyed fee simple title. Plaintiffs simply ignore the relevant passages of *Rayl*, offering no explanation for why they do not control interpretation of the materially identical Releases here. That absence is particularly striking given the Court of Federal Claims' explicit and detailed reliance on *Rayl*. *See* Appx12-14, Appx17-18.

Nor can Amici fill this fatal gap in Plaintiffs' argument, Brief of Amici Indiana Landowners (Amicus Br.) at 9, by focusing on language in *Rayl* that the Release "*purported to* convey to the company an estate in fee-simple." *Rayl*, 69 Ind. at 429 (emphasis added). Noting that "purported" commonly means "alleged," Amici contend that *Rayl* merely "*suggests*," and does not hold, that "fee simple was conveyed." Amicus Br. at 9. But in stating that the Release "purported to" convey fee title, the Indiana Supreme Court was not casting doubt on the interpretation it had just articulated. *Rayl*, 69 Ind. at 429 (explaining that Release, construed together with Charter, establishes that "right of way, when acquired, should be held by the company in fee-simple"). Rather, the Court was acknowledging a dispute about whether the original grantor, at the time he signed

the Release, had yet acquired the fee interest he "purported to" then convey to the Company. *Id.* As the Court then explained, even if the grantor only later acquired fee title, "whatever title [he] subsequently acquired to the land relinquished by him enured to the benefit of the company" via the Release. *Id*. In other words, though the timing was uncertain, the Release's effect was clear: to "convey to the company an estate in fee-simple." *Id.*; *see id.* at 429-30 (parcel "was at the time . . . and has since continued to be, the property of the [] Company").

Unable to distinguish the language and logic of *Newcastle* and *Rayl*, Amici suggest that those cases' controlling passages might be disregarded as non-binding dicta.[10] Amicus Br. at 3 ("statements are arguably *dicta*"), 6 (language in *Newcastle* is "likely *dicta*"), 10 (analysis in *Newcastle* "should be treated like *dicta*"). But the relevant passages in each case are "essential to the decision[s] in question" and thus "not dicta." *King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996), *rev'd on other grounds*, 522 U.S. 262 (1998); *see Evansville v. Nelson*, 199 N.E.2d 703, 706 (Ind. 1964) (dicta are statements "unnecessary to the decision of the case"). The Indiana Supreme Court in *Newcastle* rejected the Company's

[10] The Indiana Supreme Court has cautioned that characterizing its statements as dicta "does not give [a] court license to ignore the clear import of the language in its interpretation of the law in th[e] area." *Horner v. Curry*, 125 N.E.3d 584, 594 n.11 (Ind. 2019) (quotation marks omitted). In other words, even if the relevant passages were dicta, the Court's analysis—which has been followed for over 150 years—leaves no "real doubt about the state's law." *See Toews*, 376 F.3d at 1380.

interpretation of section 19 precisely because it contradicted the proper interpretation—that conveying a right of way "should be taken to convey . . . a fee simple title." 3 Ind. at 467-68. Likewise, the Court in *Rayl* held that a successor railroad could not be liable for work on a disputed parcel precisely because an earlier Release had "conveyed to the company an estate in fee simple." 69 Ind. at 429. Far from dicta, these statements were the "rationale[s] upon which the Court" ruled. *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996). And given the Court's actual reasoning, it is of no moment whether *Newcastle* or *Rayl* could have been resolved on other grounds that would not have been precedential on the "fee versus easement" question. *See* Amicus Br. at 6, 9.

The suggestion that *Newcastle* and *Rayl* can be disregarded is further barred by the Indiana Supreme Court's own recognition that those prior decisions are binding precedent on whether the Releases conveyed fee simple interests. *Douglass*, 103 Ind. at 190 (1885) ("It was held [in *Rayl*] that an instrument conveying the right of way to the railroad company there concerned, supplemented by the 19th section of the act under which it was incorporated, did have that effect" of "convey[ing] a fee simple."); *Coburn*, 91 Ind. at 559-60 (adhering to "judicial construction" in *Newcastle* that "an unconditional relinquishment of land" under same Charter language conveys "absolute fee simple"). Neither Amici nor this

Court can second-guess the Indiana Supreme Court's conclusions on the precedential nature of its own prior holdings.

2. Background Principles of Law Cannot Override the Express Holdings of *Newcastle* and *Rayl* and, in Any Event, No Such Principle Conflicts with those Cases.

Devoting little space in their brief to distinguishing *Newcastle* and *Rayl*, Plaintiffs treat this case as if it raises a question of first impression. Relying on a set of "[b]ackground principles" of property law, Plaintiffs argue, in effect, that if a court applied the correct canons and presumptions today, it would construe the Releases as conveying easements. Br. at 33-47. But there is no cause to employ those generalized interpretive tools when the Indiana Supreme Court has already construed this specific Charter and these specific Releases, necessarily rejecting—either explicitly or implicitly—Plaintiffs' arguments. As Indiana courts have repeatedly noted, the exact legal issue that Plaintiffs would certify is simply "not an open one" to be resolved by resort to first principles. *Meyer*, 113 N.E. at 445-46; *accord Douglass*, 103 Ind. at 190; *Coburn*, 91 Ind. at 559-60.

In any event, none of the principles on which Plaintiffs rely are even arguably inconsistent with *Newcastle* and *Rayl*. For example, Plaintiffs note that an instrument conveying a "right of way" is "generally" construed "as conveying only an easement" under Indiana law. Br. at 38-40 (quoting *Brown*, 510 N.E.2d 641, 644 (Ind. 1987)); *see* Amicus Br. at 15. To be sure, the term "right of way" can

have either of two meanings: "It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed." *Joy v. St. Louis*, 138 U.S. 1, 44 (1981). And Plaintiffs are correct that Indiana law "generally" presumes that conveying a "right of way," absent contrary indication, adopts the term's former definition—i.e., "right of way" as an easement. *See, e.g.*, *Brown*, 510 N.E.2d at 644; *Ingalls v. Byers*, 94 Ind. 134, 136 (1883). But as the Indiana Supreme Court held in *Newcastle* and *Rayl*, the state Legislature, when incorporating the Company, directed that conveyances under the Charter would not conform to that general rule and would instead invoke the term's latter definition—i.e., "right of way" as a fee title. In other words, it is settled under Indiana law that the Charter, which "form[s] a part of the contract of relinquishment," displaces the interpretive presumption on which Plaintiffs' rely. *Rayl*, 69 Ind. at 429.

Plaintiffs similarly fail to recognize the Charter's import in arguing that the Releases fall within an interpretive presumption under Indiana law that grants to railroads, *when ambiguous*, should be construed as easements. Br. at 34-37, 41; Amicus Br. at 20-21; *see Brown*, 510 N.E.2d at 644. Because the Charter, as set out in *Newcastle* and *Rayl*, specified that relinquishing a right of way to the Company would transfer a fee simple interest, there is no ambiguity requiring resort to that presumption.

Plaintiffs, joined by Amici, fare no better in asserting that a straightforward application of *Newcastle* and *Rayl* would conflict with caselaw upholding a railroad's right to contract for lesser property interests. The argument erects a straw man, incorrectly presuming that the United States believes, or the court below held, that *Newcastle* and *Rayl* mean that any "transfer[] to the railroad *must be read*" to convey "fee simple absolute no matter what the actual language in the Release document states." Br. at 50; *see also* Amicus Br. at 11, 13 (characterizing ruling below as holding that any grant "*always* convey[s] the fee simple . . . regardless of whatever language used"). Not so. Those cases establish only the much narrower rule that, pursuant to the Charter, a Release using standard language granting a "right of way" to the Company conveyed such "right of way . . . in fee simple." Charter § 19. While the Releases at issue here and in *Rayl* fall within that rule of construction, the court below correctly recognized that if a landowner contracted to transfer a different interest to the Company—through an instrument using the term "easement" or other explicit language not present here or in *Rayl*—the Charter would not bar the transaction. Appx17 (railroad "retained the right to contract for a greater or lesser estate than what was described in its legislative charter").

Indeed, three years after deciding *Rayl*, the Indiana Supreme Court explained the interplay between a railroad's charter and its right to acquire lesser property interests. The Court in *Coburn* first reaffirmed *Newcastle* and *Rayl*,

quoting the former and confirming that a standard Release, issued under a charter with identical provisions as here, would "vest[] in the railroad company the absolute fee simple of the land." 91 Ind. at 559-60. The Court then explained that such a charter nonetheless "can not be held to impair the right to make contracts," and thus does not preclude a railroad from negotiating for and obtaining other interests—such as conditional fee interests or easements. *Id.* at 560; *accord Meyer*, 113 N.E. at 446 (charter "provid[ing] that lands acquired by [specified] methods shall be held and owned in fee simple" does "not destroy or prohibit the common-law power to contract" for other interests). Doing so, however, requires the parties to contract in ways not controlled by the Charter's rules of construction; here, by contrast, the parties used form language to convey a "right of way" that, construed under Charter section 19, "vested in the [C]ompany the absolute fee simple of the land." *Coburn*, 91 Ind. at 559; *Rayl*, 69 Ind. at 429.

Looking beyond Indiana law, Plaintiffs argue that interpreting the Releases as conveying fee simple interests clashes with this Court's application of Vermont law in *Preseault v. United States (Preseault II),* 100 F.3d 1525 (Fed. Cir. 1996). Br. at 42-47. That argument hinges entirely on Plaintiffs' incorrect assertion—at odds with their request to certify a purportedly novel and unsettled question of Indiana law—that "[t]he relevant law[s] in both Vermont and Indiana (and for that matter in every other state) were identical." Br. at 45. Plainly, however, *Newcastle*

and *Rayl* turned on the specifics of Indiana law, notably the distinct Charter provisions crafted by the Indiana legislature. Out-of-state cases like *Preseault II*—that address other conveyances, to railroads incorporated under other authorities, construed under the law of other States—thus shed no light on the specific Indiana law that governs here. *See Anderson* 23 F.4th at 1361 (assessing "whether a specific deed conveys a fee simple interest or an easement" requires analyzing and applying "the law of the state in which the property interest arises").

Plaintiffs are equally mistaken in arguing that the Releases could not have conveyed fee simple interests because they do not conform to certain formalities identified in an 1852 Indiana general law. Br. at 48-49. To begin, all but one of the Releases here were signed in the late 1840s, and Plaintiffs cannot explain how an 1852 statute could change the nature of property transfers predating its enactment. More fundamentally, Plaintiffs are incorrect that the statute described the singular form by which a landowner could convey fee simple title; rather, it described one form sufficient for an instrument to be "held to be a conveyance in fee simple." *Id.* The Charter itself provides an example of another form of conveyance that transfers property in "fee simple." Charter § 19. And at bottom, this argument, like most of Plaintiffs' brief, wishes away the existence of *Newcastle* and *Rayl*, which held that the Releases validly conveyed fee simple interests to the Company.

Finally, in an argument that Plaintiffs do not join, Amici suggest that by authorizing the Company to obtain "fee simple, of the *right* of such land," section 19 of the Charter could have been referring to "a fee . . . in an easement," rather than "the fee simple *in the land*." Amicus Br. at 3, 5, 17-18. But the Charter used the term "fee simple," not merely "fee," and further reiterated that the Company would obtain "sole use and occupancy" of the land, not just an easement. Charter § 19. In any event, Amici concede that the relevant passages in *Newcastle* and *Rayl* (that Amici wrongly characterize as dicta, *supra* at 24-26) refute the "fee as easement" argument, Amicus Br. at 3; they also concede that the court in *Meyer* found that the argument cannot be squared with *Newcastle*, Amicus Br. at 17-18.

C. Even if this Court Had Discretion to Certify, Many Factors Weigh Against Certification.

As described above, the law is settled and this Court lacks the power to certify Plaintiffs' proposed question to the Indiana Supreme Court. But even if this Court had discretion, there would be no serious basis for certification. Given the "special need for certainty and predictability where land titles are concerned," it is highly unlikely that the Indiana Supreme Court would accept Plaintiffs' invitation to unsettle legal rules that, for over 150 years, have defined the property rights of railroads, governments, and private landowners. *See Leo Sheep Co. v. United*

States, 440 U.S. 668, 687 (1979).[11] Changing the law now would flout the shared understandings of generations of landowners in the Peru-to-Indianapolis corridor—who have used their land, structured their operations, and acquired or relinquished their property interests in reliance on the clear rule established in *Newcastle* and affirmed in *Rayl*. *See, e.g.*, *Rayl*, 69 Ind. at 429-30 (confirming successor railroad's understanding that it owned land in fee simple and could thus build additional structures in corridor).[12]

More generally, this Court has admonished that certification should be invoked sparingly, as "courts have a duty to decide the cases before them whenever it reasonably can be done." *Toews*, 376 F.3d 1380. Because certification burdens "judicial resources," causes "delay," and imposes "additional costs on the parties," courts should certify questions only when there is "real doubt about the

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[11] *Accord Nash Eng'g Co. v. Marcy Realty Corp.*, 54 N.E.2d 263, 268 (Ind. 1944) (noting special force of stare decisis where "disturb[ing] the prior ruling would probably affect real property and vested rights"); *Haskett v. Maxey*, 33 N.E. 358, 359 (Ind. 1893) ("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."); *see also Prudential Ins. Co. of Am. v. Smith*, 108 N.E.2d 61, 63 (Ind. 1952) (noting that Indiana Supreme Court is generally "reluctant to overrule its own precedents if there is any justification . . . by which they can be sustained").

[12] In the years and decades following the 1852 *Newcastle* decision, the Company would have drafted conveyance forms and negotiated transfers on the understanding that, when it "procured the right of way" through a form Release, it acquired "a fee-simple title." *Newcastle*, 3 Ind. at 468-69.

state's law." *Id.* Abundant precedent on the question that Plaintiffs would certify, *supra* section I.A.1, removes any "real doubt" here.

Other factors that have guided judicial discretion in considering whether to invoke Indiana's certification procedure (when it has been available) also weigh against Plaintiffs' request. First, the interplay between the Company's distinct Charter and these specific Releases is the type of "fact specific, particularized decision[] that lack[s] broad, general significance" and is thus "not suitable for certification." *Woodbridge Pl. Apts. v. Washington Sq. Cap.*, 965 F.2d 1429, 1434 (7th Cir. 1992). Second, because the narrow issue here applies only to ownership of land in the Peru-to-Indianapolis rail corridor, where the municipal trail sponsors have already completed their railbanking efforts, the issue is not one that "will likely recur" in the future. *Cedar Farm*, 658 F.3d at 813. And third, Plaintiffs cannot credibly argue that reversing nearly two centuries of precedent in a case about monetary compensation awards (of likely modest sums), within one rail corridor, has far-reaching impacts rising to the level of a "vital public concern." *Id.*

CONCLUSION

For all the reasons above, the Indiana Supreme Court's longstanding precedents control the outcome of this appeal. Plaintiffs' request for certification should be denied and the judgment of the Court of Federal Claims affirmed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

16 U.S.C. § 1247(d)

§ 1247. State and local area recreation and historic trails

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 801 et seq.) and chapter 224 of Title 49, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Indiana Rule of Appellate Procedure 64(A)

Rule 64. Certified questions of state law from federal courts.

A. Applicability. The United States Supreme Court, any federal circuit court of appeals, or any federal district court 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 determinative of the case and on which there is no clear controlling Indiana precedent.

Charter of the Peru & Indianapolis R.R. Co., 1846 Ind. Acts ch. CLXXXVI

Section 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; also, such contracts, relinquishments, donations, gifts, grants or bequests, made and entered into in writing by any person or persons capable in law to contract, made in consideration of such location, for the benefit of said corporation, shall be binding and obligatory, and the corporation may have their action at law in any court having competent jurisdiction, to compel the observance of the same: *Provided*, That all such contracts, relinquishments, donations, gifts, grants and bequests, shall be fully and plainly made in writing, and signed by the party making the same.

Section 16. That in al 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 give notice to some justice of the peace in the county where such difficulty exists, that such facts do exist, and such justice shall thereupon summon the owner of such land to appear before him on a particular day, within ten days thereafter, and shall appoint twelve disinterested persons of the neighborhood who shall, after taking an oath faithfully and impartially to assess the damages, if any, view the lands or materials, and after having taken into consideration the advantages as well as disadvantages the road may be to the same, and shall report thereon whether such person is entitled to damages or not, and if so, how much, and shall file such report with such justice: whereupon such justice shall enter judgment thereon, unless for good cause shown; and in case either party should show sufficient cause why judgment should not be rendered, the justice may grant a re-view of the premises, either with or without the costs: *Provided*, That either party may, at any stage of the proceedings, appeal to the circuit court of the proper county, as in other cases, and such court shall appoint viewers, as above directed, who may report at that or the succeeding term, in the discretion of the court; and the judgment of the circuit court shall be final.

Section 19. That when said corporation shall have procured the right of way, as hereinbefore 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; 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.

CERTIFICATE OF SERVICE

I certify that I filed the foregoing with the United States Court of Appeals for the Federal Circuit through the CM/ECF system on November 1, 2023. All case participants are registered CM/ECF users, and the Notice of Docketing Activity generated by this filing constitutes service under Fed. Cir. R. 25(e)(1).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. Cir. R. 32(b)(1). Excluding the items exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b), this brief contains 8069 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared using Microsoft Word (Version 2308) in 14-point Times New Roman, a proportionally spaced font.

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