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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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DECEMBER 15, 2023

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INTRODUCTION

This is a Trails Act takings case involving private property the Surface Transportation Board (the Board) took from Indiana landowners for a public recreational trail and future railway line. The government took this property in December 2018 when the Board issued an order invoking section 8(d) of the National Trails System Act, 16 U.S.C. §1247(d). The dispositive issue is whether, under Indiana law and the terms of the 1840 and 1850 "Right-of-Way Release" instruments,[1] the railroad corporation was granted an *easement* for a railway line across the owners' land or did the landowners intend to give the railroad title to the *fee simple estate* in the strip of land?

The Court of Federal Claims (the CFC) granted the government's motion for summary judgment because Judge Sweeney concluded pre-printed Releases the railroad created and the landowners signed in the 1840s and 1850s gave the railroad title to the fee estate in a strip of land, and were not, as the text of the document states, a release of claims for damages related to construction of the railway line across a strip of the owner's land. On this basis the CFC denied the landowners claim for compensation. The landowners brought this appeal.

[1] We refer to the instruments as "Right-of-Way Releases" or more concisely as "Releases."

The CFC's fundamental error was failing to certify the CFC's novel view of Indiana law to the Indiana Supreme Court and instead making an "*Erie*-guess" forecasting how the CFC believed Indiana's Supreme Court would resolve this question of Indiana law. Second, the CFC erred by concluding that, under Indiana law, the Releases conveyed title to the fee simple estate in a strip of land to the railroad. The CFC's conclusion is: (a) contrary to the text of the Releases; (b) contrary to principles of Indiana law governing the interpretation of these Release documents; and (c) contrary to Indiana's public policy directing that strips of land used for railroads and other public corridors are easements, not conveyances of the fee estate in the strip of land.

Accordingly, this Court should reverse the CFC's decision and remand these landowners' claims for a determination of that "just compensation" each of these Indiana landowners are due, or instead, certify this question to the Indiana Supreme Court.

ARGUMENT

I. The Court of Federal Claims erred by failing to certify this question of Indiana law to the Indiana Supreme Court.

The CFC disregarded text of the Release instruments and did not follow and apply Indiana precedent and public policy but instead concluded the railroad acquired title to the fee estate in the strip of land because of the railroad's corporate

charter and two pre-Civil War decisions, *Newcastle & Richmond RR Co. v. Peru & Indianapolis RR Co.*, 3 Ind. 464 (1852), and *Indianapolis, Peru & Chicago Ry. Co. v. Rayl*, 69 Ind. 424 (1880).[2] These cases do not stand for the holding for which the CFC cited them, and the railroad's corporate charter does not supervene the text of the Releases, Indiana jurisprudence, and Indiana public policy. In short, Indiana's Supreme Court would not have ruled as the CFC supposed Indiana's Supreme Court would have ruled.

The landowners asked the CFC to certify this question of Indiana law to the Indiana Supreme Court. The CFC denied the owners' motion and, in so doing, denied the Indiana Supreme Court an opportunity to provide guidance on this important question of Indiana law. Rather than certify this question to Indiana's Supreme Court, the CFC looked into its crystal ball and forecast that, in the CFC's opinion, "it seems unlikely that the [Indiana Supreme Court] would have any interest in overturning the holdings of *Newcastle* and *Rayl*." Appx23-25. The CFC presumed to know how the Indiana Supreme Court would interpret and apply the holdings of *Newcastle* and *Rayl* without reconciling the CFC's novel view of these two Civil War era decisions with a wealth of contrary authority and Indiana public policy.

[2] The CFC also cited *Indianapolis, Peru & Chicago Ry. Co. v. Hood*, 66 Ind. 580 (1879).

As we demonstrate below, the explicit text of the Releases and 150 years of Indiana jurisprudence and public policy all direct the Releases to be interpreted as the grant of an easement, not title to the fee estate in a strip of land. Indeed, the government and the CFC in a prior Indiana Trails Act case found that essentially identical releases granted a railroad only an easement. See *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 727 (2011).[3] Yet, here, Judge Sweeney held that materially-identical instruments gave the railroad title to the fee estate in the strip of land.

The CFC's failure to certify this novel view of Indiana law to Indiana's Supreme Court is precisely the error the Supreme Court counseled federal courts to avoid in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938), and *Arizonians for Official English v. Arizona*, 520

[3] In *Macy Elevator*, the court explained that the Releases conveyed an easement because "under Indiana law right-of-way deeds to railroads generally convey a narrow, rather than broad, set of allowed uses of the right-of-way," because "the words 'relinquish forever' must be read in the context of the earlier phrase, 'for the purpose of facilitating the construction and completion of said work.' Indiana law requires the court to construe the deed in context," and because of the inclusion of the word "road" in the habendum clause. 97 Fed. Cl. at 727 (citing *Cincinnati, Indianapolis, St. Louis & Chicago Ry. v. Geisel*, 21 N.E. 470 (Ind. 1889), and *Ross, Inc. v. Legler*, 199 N.E.2d 346, 347-48 (Ind. 1964)). The Releases in this case are essentially the same as the release in *Macy Elevator*, except that instead of saying "*release, relinquish forever, quit claim and convey*," as does the release in *Macy Elevator*, the Releases in this case merely say, "release and relinquish." See *id.* at 725-26 (emphasis added by the court in *Macy Elevator*).

U.S. 43 (1997). "No matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." *Pullman*, 312 U.S. at 499.

A. Principles of federalism require this issue of Indiana law be certified to the Indiana Supreme Court.

Certification is a matter of federalism. See *Erie*, 304 U.S. at 78-79; *Pullman*, 312 U.S. at 501, and *Arizonians*, 520 U.S. at 78-39. See also our opening brief, pp. 27-32. Federal courts – especially the Court of Federal Claims, which is not an Article III court – should not be declaring novel, or disputed, questions of state law. This is especially so when the dispute concerns an owner's fundamental constitutional right and involves an interpretation of a state's jurisprudence and public policy on a matter that is as important as property law and title to land. The Supreme Court directs federal courts in a situation such as this to certify the question to the state's highest court for resolution and not make an *Erie*-guess about how the state's highest court may decide the issue.

Happily, Indiana welcomes federal courts certifying questions of Indiana law. See Ind. R. App. P. 64 (reproduced in Addendum); Ind. Stat. §33-24-3-6 (reproduced in Addendum); Ind. Const. art. 7 §1. See also *Howard v. United States*, 100 Fed. Cl. 230, 235 (2011), *certified question accepted*, 948 N.E.2d 1179 (Ind. 2011), *and certified question answered*, 964 N.E.2d 779 (Ind. 2012).

These owners' constitutional right to "just compensation" turns upon fundamental principles of Indiana state law defining title to land and upon Indiana's public policy such as the Strip-and-Gore Doctrine and the Centerline Presumption. See *Castillo v. United States*, 952 F.3d 1311, 1320 (Fed. Cir. 2020), and *Behrens v. United States*, 59 F.4th 1339 (Fed. Cir. 2023) (discussed in opening brief, pp. 18, 23, 25, 35-37).

The government doesn't claim that certification of this question of Indiana law is unnecessary or improvident. Rather, the government claims, "Binding Indiana Supreme Court Precedent...Bars Certification." Govt. brief, Doc. No. 32, p. 17. Certification is not *barred*. The government provides no authority for its hyperbolic statement.

The government's opposition to certifying this question of Indiana law to Indiana's Supreme Court is even more remarkable because in three recent Indiana Trails Act cases, <u>*the government*</u> requested the question be certified to Indiana's Supreme Court. In *Howard*, 100 Fed. Cl. at 232, 236-37, the CFC explained:

> The United States also has requested certification of questions to the Indiana Supreme Court in two other Rails to Trails takings cases filed in the United States Court of Federal Claims, *Macy Elevator, Inc. v. United States*...and *Hunneshagen Family Trust v. United States*....
>
> … In *Macy Elevator*...the [United States] had requested that the court certify to the Indiana Supreme Court, among other questions, the question of whether recreational trail use with railbanking is within the scope of a railroad easement under Indiana law.

The government never explains why the government sought certification in these three prior Indiana Trails Act cases but now claims certification is "barred."

B. Because state law defines private property, federal courts must afford great deference to state property law.

The CFC should have certified this question to Indiana's Supreme Court for another significant constitutional reason. These Indiana landowners seek to vindicate their self-executing constitutional right to be justly compensated for private property the federal government took from them. The Fifth Amendment provides, "No person shall…be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." This is a "self-executing" constitutional guarantee and right. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) ("As noted in Justice Brennan's dissent in *San Diego Gas* [ ], it has been established...that claims for just compensation are grounded in the Constitution itself...."); *Knick v. Township of Scott*, 139 S.Ct. 2162, 2172 (2019) ("because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time"). As the Supreme Court recently emphasized in *Cedar Point Nursery v. Hassid*, "when the government physically takes possession of property

without acquiring title to it.... we assess [these sorts of takings] using a simple, *per se* rule: The government must pay for what it takes." 141 S.Ct. 2063, 2071 (2021).

The owner's private property interest is defined and established by *state law*. In *Preseault v. Interstate Commerce Commission*, Justice O'Conner wrote a concurring opinion to emphasize that "[a]lthough the [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." 494 U.S. at 22 (O'Connor, Scalia, and Kennedy, JJ., concurring) (emphasis added) (*Preseault I*).[4] The Board's actions delaying the landowner's reversionary interest, Justice O'Connor continued, "burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id.* "Any other conclusion," she said, "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." *Id.* Inherent in the Fifth Amendment protection of an owner's private property is the principle that an

[4] Citations omitted; citing and quoting, among other authorities, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 1010-12 (1984) ("If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. [A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'").

owner's private property is defined and its dimensions are defined according to state law. See *id.*[5]

An owner's constitutional right to private property is not protected when a non-Article III tribunal sitting in Washington DC defines (or redefines) the owner's state-law property interest by forecasting how the federal tribunal believes a state's highest court may decide disputed questions of state law and public policy. As well-intentioned, well-meaning, and well-seasoned as a judge on the Court of Federal Claims may be, a federal tribunal making an *Erie*-guess about state law is in no way equivalent to having the state's highest court (or even a federal district court with an Article III judge sitting in the state) declare and apply state law.

The government says this question of Indiana law should not be certified to the Indiana Supreme Court because "the narrow issue here applies only to ownership of the Peru-to-Indianapolis rail corridor...." Govt. brief, Doc. No. 32, p. 33. The government claims the question of Indiana law is "too particularized" and only concerns a handful of landowners. The government is wrong. The significance of

[5] See also *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023) ("The Takings Clause does not itself define property. For that, the Court draws on 'existing rules or understandings' about property rights. State law is one important source.") (citations omitted); *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (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).

this question of Indiana law is demonstrated by the interest of the *amici curiae* and the *dozens* of parties listed in the opening brief. See *Amici Curiae* Brief of Indiana Landowners, *et al.*, Doc. No. 31; Plaintiffs-Appellants' opening brief, Doc. No. 16 (Statement of Related Cases), pp. xi-xv.

Furthermore, the significance of this question of Indiana law and public policy should be determined by the Indiana Supreme Court, not the Court of Federal Claims. Should the Indiana Supreme Court believe this question of Indiana law and public policy is inconsequential, the Indiana Supreme Court is free to decline to answer the certified question.

The CFC erred by denying the owners' request to have this question of Indiana state law certified to the Indiana Supreme Court, and this Court should certify this question to Indiana's Supreme Court.

II. The CFC erred when it held the Releases gave the railroad title to the fee estate in the strip of land.

A. The text of the Releases explicitly grants the railroad only a "right of way" easement, not title to the fee estate in the strip of land.

We begin with the text of these documents created in the 1840s and 1850s. The CFC describes these instruments as containing "identical preprinted language." Appx3. The instruments are typeset forms the railroad printed and presented to the landowners for signature. "In some of the releases minor handwritten additions and deletions were made to the preprinted language. Those alterations do not affect the

[CFC's] construction of the releases." Appx3. "Two releases are entirely handwritten." Appx5.

The Releases state the owner does "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." Appx3-5 (capitalization in original; emphasis added). The Releases do not state the landowner "grants, bargains, sells and conveys" any interest in the land, nor do the Releases describe the interest conveyed as a "fee simple interest." And the Releases do not contain any warranty of title by the landowner. The Releases state the purpose of the release is for the "construction of the [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." Appx3. The Releases state the signatory does "release and relinquish [the railroad] 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." Appx3 (capitalization and underline in original). The preprinted Releases at issue here are in every material respect identical to the instruments at issue in *Macy Elevator*. See *Macy Elevator*, 97 Fed. Cl. at 725-26.

In *Macy Elevator*, the preprinted form releases were held to be easements, and *the government* admitted the releases in *Macy Elevator* granted the railroad only an

easement (but then argued the easement was broad enough to encompass public trail use). The court in *Macy Elevator* explained,

> [T]he most common form of deed at issue in this case includes language indicating the conveyor does "release, relinquish forever, quit claim and convey...the Right of Way...to [the railroad]."
>
> *The government contends that these deeds create an easement for all travel through the servient estates*. Def.'s Mot. Summ. J. 33, ECF No. 33-1 (citing *Cincinnati, Indianapolis, St. Louis & Chicago Ry. Co. v. Geisel*, 119 Ind. 77, 21 N.E. 470 (1889)). The government notes that these deeds state that the easement is granted for the "purpose of facilitating the construction and completion of" a railroad, but argues that because the deeds place no restriction on the use of the "road" once constructed and contain no language restricting transportation on the right-of-way to rail travel, the easements should be construed as allowing recreational trail use.[6]

The government never explains why the government "contend[ed]," and the CFC found, the Releases granted only an easement in *Macy Elevator*, but now the government argues that essentially-identical instruments at issue here are conveyances of title to the fee estate in the strip of land.[7]

[6] 97 Fed. Cl. at 725 (paragraph break and emphasis added).

[7] To the extent there is any difference in the text of the Releases in *Macy Elevator* and those here, the instruments in *Macy Elevator* provided a stronger basis to argue they were a conveyance of the fee estate because the *Macy Elevator* instruments included the phrase "release, relinquish *forever*, quit claim *and convey*." 97 Fed. Cl. at 725 (emphasis added).

1. This Court's *en banc* decision in *Preseault II* provides the paradigm for interpreting railroad conveyances.

It seems that for so long as there have been railroads, landowners and railroads (or those claiming an interest in land under the railroad), have been arguing about the nature and extent of the railroad's interest in the land across which the railroad built a railway line. See, *e.g.*, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942).

This Court, sitting *en banc* in *Preseault II*, provided the analytical paradigm to interpret instruments granting a railroad an interest in strips of land used for a railway line. While *Preseault II* arose in Vermont, the principles of property law and deed construction this Court applied in *Preseault II* are common to almost all states, including Indiana. This Court explained,

> With few exceptions 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, and *that typically means an easement, not a fee simple estate*."

Preseault II, 100 F.3d at 1535 (emphasis added).

The Vermont Supreme Court's 1887 decision in *Robinson v. Missisquoi R. Co.*, 10 A. 522 (Vt. 1887), provides a good exposition of these tenants common to Vermont and Indiana. *Robinson* noted the following principles guiding courts in the interpretation of railroad conveyances.

(1) "[A]n important rule of construction, applicable to all written instruments, [is] that every word and every clause shall, so far as possible, be given some force and meaning. [And]…the construction which gives force and meaning to all the language used is, as a rule, to prevail." *Id.* at 524.

(2) "[T]he presumption [is] that the party making the instrument did not use any language except what was necessary to make it [the instrument] speak the intention of the parties thereto." *Id.*

(3) "[W]hen it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used." *Id.*

(4) The consideration for the interest conveyed provides an indication of the interest sought to be conveyed. "The consideration of…$40, [in the 1880s] is quite inadequate for the absolute grant of three acres so situated as to sever [an owner's] farm. Under these circumstances, we should naturally expect to find an easement rather than a fee granted." *Id*.

(5) The addition of a "clause" describing the purpose of the instrument as was "intended as a limitation upon the grant, reducing it from the grant of the fee to a grant of an easement for the use of a plankroad...." *Id*.

(6) "[A]ll that the grantee cared to acquire, and all that the grantor would be likely to desire to part with" was an easement for the specific purpose identified in the instrument considering the circumstances for which the instrument was created. *Id*.

These tenets applicable to the interpretation of conveyances to railroads in the late 1800s and early 1900s are noteworthy because *Robinson* summarizes the prevailing jurisprudence governing conveyances to railroads during the late 1800s and early 1900s when these instruments were drafted and executed. See also Jon W. Bruce & James W. Ely, Jr., in THE LAW OF EASEMENTS & LICENSES IN LAND (2021-22) §1:22; 1 Isaac F. Redfield, THE LAW OF RAILWAYS (1869), p. 255; Leonard A. Jones, A TREATISE ON THE LAW OF EASEMENTS §211 (1898), p. 178; Edward L. Pierce, PIERCE ON RAILROADS (1881); James W. Ely, Jr., RAILROADS & AMERICAN LAW (2001), pp. 197-98 (citing Simeon F. Baldwin, AMERICAN RAILROAD LAW (1904), p. 77); THOMPSON ON REAL PROPERTY (2nd ed. 1998), §§60.02(c), 60.03(a)(7)(ii).

Third, a railroad vested with eminent domain power (or acting under the threat of eminent domain) acquiring an interest in a strip of land acquires only the interest necessary to accomplish the public purpose for which the entity was granted the power of eminent domain. This is a principle common to Indiana and every other state we have surveyed. See *Preseault II*, 100 F.3d at 1537 ("the proceeding retained

its eminent domain flavor, and the railroad acquired only that which it needed, an easement for its roadway"); *Behrens v. United States*, 59 F.4th 1339, 1345 (Fed. Cir. 2023) (discussing Missouri law); *Penn Central v. U.S. R.R. Vest Corp*., 955 F.2d 1158, 1160 (7th Cir. 1992) ("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").

In *Preseault II*, this Court considered the railroad's interest in land conveyed to the railroad by the Manwell deed. This Court explained that the Manwell deed appeared to be an unrestricted 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).

This Court continued, "In 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." *Id.* at 1536. This Court held that, "despite the apparent terms of the deed indicating a transfer in fee, the legal effect was to convey only an easement." *Id.* After citing *Hill v. Western Vermont Railroad*, 32 Vt. 68, 73 (1859), and *Troy & Boston Railroad v. Potter*, 42 Vt. 265, 274 (1869), 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.
>
> *Preseault II*, at 100 F.3d at 1537.

The Releases at issue here present a much more obvious (indeed an explicit) grant of an easement than did the Manwell deed in *Preseault II*. The Releases in this case do not contain any language indicating a "transfer in fee." The Releases do not describe the interest granted the railroad as "fee simple title." The Releases do not contain phrases common to a conveyance of a fee estate such as "grant, bargain, and sell," nor do the Releases contain any warranty of title. In short, the Releases bear *no indicia* demonstrating the grantor intended to convey title to the fee estate in land.

A fair reading of the Releases supports the unremarkable conclusion that these instruments were drafted and executed to accomplish exactly what the text of the

document states, to wit: the owner agreed to release any claim against the railroad for damages related to the construction of the railway line "through" the owner's land. See Appx3 ("RELEASE and RELINQUISH...the right of way for so much of said road as may pass through or cut the following piece, parcel or lot of land"); cf. *Macy Elevator*, 97 Fed. Cl. at 725 ("*release, relinquish forever, quit claim and convey*...the *Right of Way*...of said road as passes through or over the following real estate") (emphasis added by the court).

2. A description of the railroad's interest as a "right-of-way" means the railroad acquired only an easement.

A description of an interest in property as a "right-of-way" is an easement. The term "right-of-way" means exactly what it says – a "right" to use another's land for "a way." A landowner granting a "right-of-way" does not convey title to the fee simple estate in a strip of land. See *Brandt*, 572 U.S. at 110; *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1845 (2020); *Mills v. United States*, 147 Fed. Cl. 339, 347 (2020); Bruce & Ely, THE LAW OF EASEMENTS §1:22; THOMPSON ON REAL ESTATE (2nd ed.) §60.03(a)(7)(ii); BLACK'S LAW DICTIONARY (11th ed.) (Bryan A. Garner, ed.), p. 1587.

In *Cowpasture*, 140 S.Ct. at 1844-45, a case arising under the Trails Act, the Supreme Court unanimously held that a "right-of-way" is an easement. The Court noted, "The 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." *Id.* at 1845. The Court continued,

> When 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. … Accordingly, as would be the case with private or state property owners, a right-of-way between two agencies grants only an easement across the land, not jurisdiction over the land itself.
>
> *Id.*

The Supreme Court explained the term "right-of-way" means an easement:

> A right-of-way is a type of easement. In 1968, as now, principles of property law defined a right-of-way easement as granting a nonowner a limited privilege to "use the lands of another." Specifically, a right-of-way grants the limited "right to pass...through the estate of another." Courts at the time of the Trails Act's enactment acknowledged that easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement. And because an easement does not dispossess the original owner, "a possessor and an easement holder can simultaneously utilize the same parcel of land." Thus, it was, and is, elementary that the grantor of the easement retains ownership over "*the land itself*." Stated more plainly, easements are not land, they merely burden land that continues to be owned by another.
>
> If analyzed as a right-of-way between two private landowners, determining whether any land had been transferred would be simple. If a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land. Nor would anyone think that the rancher had ceded his own right to use his land in other ways, including by running a water line underneath the trail that connects to his house. He could, however, make the easement grantee responsible for administering the easement apart from the land. Likewise, when a company obtains a right-of-way to lay a segment of pipeline through a private owner's land, no one

> would think that the company had obtained ownership over the land through which the pipeline passes.

Cowpasture, 140 S.Ct. at 1844-45.[8]

The government cites *Joy v. St. Louis*, 138 U.S. 1 (1891), for the proposition that 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 the strip of land which railroad companies take upon which to construct their road-bed.'" Govt. brief, Doc. No. 32, pp. 26-27. The government contends the term "right-of-way" as used in the Releases means title to the fee estate in the strip of land across which the railroad built and operated a railway line. *Joy* does not stand for this proposition.

The Missouri legislature passed legislation to create Forest Park on the western edge of the City of St. Louis for the 1904 World's Fair. A number of the then-existing railway lines needed to be relocated and a common railway line through Forest Park with shared access by competing railroads was established. This

[8] Internal citations omitted; emphasis in original; citing and quoting, *inter alia*, *Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606, 613 (W.V. 1951); *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 192 S.E.2d 449, 453 (N.C. 1972); R. Powell & P. Rohan, REAL PROPERTY (1968) §405; RESTATEMENT (FIRST) OF PROPERTY (1944) §450; *Bunn v. Offutt*, 222 S.E.2d 522, 525 (Va. 1976); *Barnard v. Gaumer*, 361 P.2d 778, 780 (Colo. 1961), Bruce & Ely, THE LAW OF EASEMENTS §1:1, pp. 1-5; *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970); BLACK'S LAW DICTIONARY (4th ed. 1968), p. 1489.

common shared railway line was established in a multi-party agreement governing the various railroads' right to operate across this common corridor. The language the government quotes does not describe what "right-of-way" means generally. Rather, the quoted language describes how the parties used the term "right-of-way" *as this term was used in this multi-party agreement*. See *Joy*, 138 U.S. at 3-28.

In *Barlow v. United States*, 86 F.4th 1347 (Fed. Cir. 2023), this Court recently considered three categories of conveyances to a railroad. One category concerned conveyances that included to term "right-of-way" to describe the railroad company's interest in a strip of land. Looking to Illinois law, this Court held the term "right-of-way" is synonymous with an easement and demonstrates the grantor's intention to grant an easement, not title to the fee simple estate. The *Barlow* court wrote:

> Such a reference to a right of way, specifically in the granting clause, conveys an easement rather than a fee simple.
>
> Outside the granting clause, other express words in the ROW Agreements also rebut the presumption. First, the ROW Agreements' "RIGHT OF WAY" title demonstrates an intention to convey easements. Second, the "over or across" and "on or across" language in the ROW Agreements is consistent with the description of the right of way and shows an intent to convey an easement.

Id. at 1355 (internal citations omitted).

This Court held, "we are not persuaded by the government's argument that the use of the term 'right-of-way' in the [Right-of-Way] Agreements refers to the land conveyed, not a limitation on the interest conveyed." *Barlow*, 86 F.4th at 1355.

Returning to this case, the CFC concluded what is an otherwise obvious release of claims for damages related to construction of a railway line was nevertheless transmogrified by the railroad's corporate charter into a conveyance of title to the fee simple estate in the land. This was error.

The railroad's charter defines the corporate powers granted the railroad company necessary to accomplish the public purpose for which the railroad was incorporated – building and operating a railway line between Peru and Indianapolis, Indiana. The fact that the charter granted the railroad corporation *legal authority* to acquire and hold fee title to land does not mean that every instrument granting the railroad corporation an interest in land must be interpretated as the conveyance of fee estate in the land. In other words, simply because a corporation has the legal authority to acquire fee simple title to land does not mean that every conveyance of an interest in land is a conveyance of title to the fee simple estate.

B. *Newcastle* and *Rayl* do not support the CFC's holding.

The government argues, "*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." Govt. brief, Doc. No. 32,

p. 15. The CFC's notion that "the Indiana Supreme Court's holdings in *Newcastle*, *Hood*, and *Rayl* compel the conclusion that [the releases] conveyed fee simple title to the [railroad] in the railroad corridor" is simply wrong. See Appx23. Neither *Newcastle*, *Hood*, or *Rayl*, nor any subsequent decision of the Indiana Supreme Court, "compel" this conclusion.

The CFC proceeds from the question-begging false premise that it is necessary for the Indiana Supreme Court to overturn *Newcastle* and *Rayl* in order to conclude the Releases granted the railroad only an easement. See Appx24 ("it seems unlikely that the [Indiana Supreme Court] would have any interest in overturning the holdings of *Newcastle* and *Rayl*"). The more fundamental question is to whether the Indiana Supreme Court would interpret *Newcastle* and *Rayl* as "compelling" the conclusion the CFC reached.

First, and fundamentally, the Civil War era decisions in *Newcastle*, *Hood*, and *Rayl* do not hold that the railroad's legislative charter compels these Release instruments to be interpreted as conveyances of title to the fee simple estate in the land. *Newcastle* concerned whether a competing railroad company could cross Peru & Indianapolis Railroad's right-of-way. The CFC acknowledged that *Newcastle* "was concerned only with the [railroad's] legislative charter and not any specific conveyances made." Appx12. *Newcastle* did not consider whether a railroad acquired an easement or fee estate in land. The CFC acknowledges this limited

holding of the court in *Newcastle*, but proceeded to, nonetheless, read *Newcastle* much more broadly for the proposition that Release instruments such as those at issue here, conveyed title to the fee estate in land. The CFC extended *Newcastle* in this manner relying upon *Hood*, 66 Ind. at 583. The problem with the CFC's resort to *Newcastle, Hood*, and *Rayl* to define the nature of the railroad's title to a strip of land is that none of these cases considered this question.

As the CFC acknowledged, *Newcastle* did not involve conveyances to the land but considered whether one railroad could cross a competing railroad's right-of-way. See Appx12. As the CFC also acknowledged, "[i]n *Rayl* the plaintiffs owned *lots adjoining a strip of land*" and the railroad's construction of a sidetrack in a street adjoining these lots. Appx12 (emphasis added). *Hood* similarly considered "*lots for a depot* in 1869 [for which] the landowner's heirs had sued to quiet title in the lots." Appx12 (emphasis added). Title to *lots or parcels of land* adjoining a railroad line is quite a different matter than title to the *strip of land* across which the railroad had built a railway line.

While the CFC noted this factual context of *Newcastle*, *Hood*, and *Rayl*, the CFC did not appreciate the significance of this distinction. None of these three cases involved the interpretation of a Release document such as is at issue here. *Rayl* and *Hood* involve title to *lots* adjoining a railway line, not title to the *strip of land* across which the railway line was built. This is important because a lot or parcel of land

used for a depot is quite different than a strip of land across which a railway line is built. For one thing, a lot of land used for a depot does not implicate Indiana's public policy in the Strip-and-Gore Rule or the Centerline Presumption.

In analyzing *Rayl*, the West Virginia Supreme Court explained that *Rayl* did not hold that a railway acquired title to the fee estate. See *Uhl v. Ohio River R. Co.*, 41 S.E. 340, 342 (W.V. 1902). The West Virginia Supreme Court also noted that, in *Geisel*, 21 N.E. at 470, the Indiana Supreme Court held a "deed granting to a railroad company 'the right of way for so much of said railroad, being 80 feet wide, as may pass through the following land,' was held to convey merely an easement, an incorporeal hereditament, the fee remaining in the grantor." *Uhl*, 41 S.E. at 342. The West Virginia Supreme Court continued:

> "A grant of a 'way' or the privilege of a highway does not convey the soil or any interest in it." [Leonard A.] Jones, [A TREATISE ON THE LAW OF EASEMENTS] §208 [(1898)]. "A grant of right of way to a railroad company is the grant of an easement merely, and the fee remains in the grantor." *Id.* §211. "The grant of a right of way does not convey the soil." *Home v. Richards*, [8 Va. 441 (1798)]. "If the deed does not in terms convey the land or soil covered by the way, but merely a way in connection with the land conveyed, the grantee takes no interest or estate in the soil of such way." Jones, Easem. §207. "The conveyance of a right of way conveys an easement only." 2 [John] Lewis, [A TREATISE ON THE LAW OF EMINENT DOMAIN] §291 [(1888)].
>
> ...[T]he words "right of way"...are cited [in] the cases of *Railway Co. v. Rayl*, 69 Ind. 429, and [two other cases]. *These cases do not apply. No question arose in them as to the real title conferred, or the right to take minerals.* In [*Rayl*] the question was the width of the right of way...."

Id. (emphasis added).

In sum, the text of the Release instruments, the tenets of Indiana property law, and Indiana's public policy concerning strips of land used for railway lines all compel the conclusion that the interest granted the railroad by these Release instruments is a right-of-way easement for a railway line, not title to the fee estate in the strip of land, regardless of a provision in the railroad's corporate charter.

C. The CFC's conclusion is contrary to all authority.

The Supreme Court recently explained that the "Takings Clause does not itself define property. For that, the Court draws on 'existing rules or understandings' about property rights. State law is one important source." *Tyler*, 598 U.S. at 638 (citations omitted). The CFC's conclusion that these railroad right-of-way Releases conveyed title to the fee estate in the strip of land is contrary to Indiana's law and public policy and is contrary to the overwhelming weight of authority, including the Supreme Court's holdings in *Great Northern Railway*, 315 U.S. 262, 279 (railroad's "right of way is but an easement"), *Brandt*, 572 U.S. at 110, *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979), and this Court's *en banc* decision in *Preseault II*, *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004) *Behrens*, 59 F.4th at 1345, and most recently, *Barlow*, 86 F.4th at 1355.

The CFC's interpretation of these Releases as fee simple conveyances is also contrary to the overwhelming number of scholars and authorities on property law.

See, *e.g.*, *Amici Curiae* Brief of Indiana Landowners, *et al.*, Doc. No. 31, pp. 12-24 (reviewing Indiana cases); RESTATEMENT (THIRD): SERVITUDES §2.2, Comment g ("The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only. ... The superior sophistication and drafting opportunity of the railroad vis-à-vis the grantor may buttress this conclusion.").

The government and the CFC are sailing too close to the wind when they claim the railroad's corporate charter overrides contrary Indiana precedent and principles of property law. See Govt. brief, Doc. No. 32, pp. 26-31.

CONCLUSION

This tension and conflict between Indiana's public policy and precedent, holding the Releases granted an easement on one hand, and the CFC's contrary conclusion that the Releases must be construed as conveyances of a fee simple estate in the strip of land because of the railroad's corporate charter is precisely the situation the Supreme Court says should be certified to the state supreme court to resolve.

This Court should reverse the decision of the CFC and hold, consistent with Indiana's jurisprudence and public policy and this Court's jurisprudence (most recently in *Barlow*), that the Releases granted the railroad only an easement, not title

to the fee estate, or this Court should certify this question to the Indiana Supreme Court.

Respectfully submitted,

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ADDENDUM

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.

B. Procedure. The federal court shall certify the question of Indiana law and transmit the following to the Clerk:

(1) a copy of the certification of the question;

(2) a copy of the case docket, including the names of the parties and their counsel; and

(3) appropriate supporting materials.

Federal courts certifying questions to the Supreme Court are exempt from the requirements of Rule 68(C)(1); however, federal courts wishing to submit certified questions and attendant materials electronically rather than conventionally may contact the Clerk. The Supreme Court will issue an order either accepting or refusing the question. If accepted, the Supreme Court may establish by order a briefing schedule on the certified question.

IC 33-24-3-6 Certification of questions to court by federal appellate courts

Sec. 6. The supreme court may, by rule of court, provide that if:

(1) the Supreme Court of the United States, a circuit court of appeals of the United States, or the court of appeals of the District of Columbia determines that there are involved in any proceeding before the federal appellate court questions or propositions of the laws of Indiana that are determinative of the proceeding; and

(2) there are no clear controlling precedents in the decisions of the supreme court;

the federal appellate court may certify the questions or propositions of the laws of Indiana to the supreme court for instructions concerning the questions or propositions of state law, and the supreme court, by written opinion, may answer.

[Pre-2004 Recodification Citation: 33-2-4-1.]

As added by P.L.98-2004, SEC.3.

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

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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