



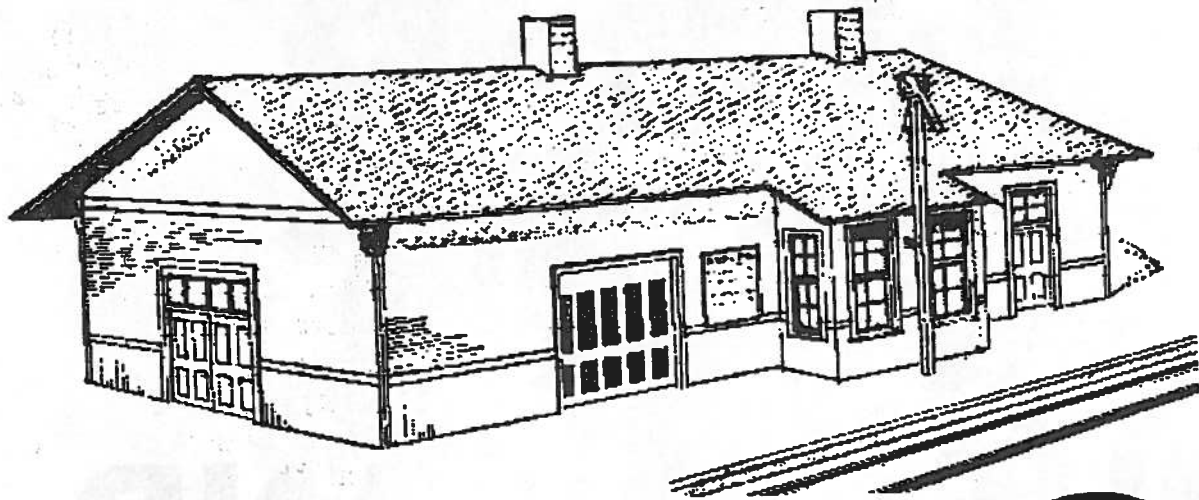
RAILROADS

AND

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BUREAU OF LAND MANAGEMENT
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RAILROAD RIGHTS-OF-WAY

INTRODUCTION:

The intent of this Advisory is to put forth structured information in order that BLM field officials will be able to respond to situations involving railroad rights-of-way with a common approach across the Bureau. For some parts, concepts and positions are in an interpretive phase and have yet to be tested (or are currently undergoing testing) in Federal courts. As I can, I will modify, update or reissue this advisory as concepts are strengthened or require change as the Solicitor or the courts rule on various issues. I would hope that the Bureau would adopt this advisory as a manual or handbook.

This material is advisory only; it comes from my many years of experience, research, discussion with attorneys, etc. It has not had formal review by the Solicitor's Office nor given the blessings of the Director as BLM policy. Comments and suggestions for improving it as a reference base and working tool for BLM employees are desired.

While this advisory is for those railroad rights-of-way granted by the United States, it has some general bearing on railroad rights-of-way acquired from private landowners, especially in relationship to railbanking and what constitutes abandonment.

SUMMARY:

The BLM is faced with three types of railroad rights-of-way - Limited Fee, Exclusive and Common Easements. These are differentiated by the relative control the BLM or the Holder has over the right-of-way and the disposition of the right-of-way strip of land upon forfeiture or abandonment of the right-of-way.

One must have an understanding of what the right-of-way Holder may do, may allow others to do and the controls that BLM may exercise over these activities. An understanding of what may happen to these activities upon cessation of the railroad is also needed.

CLARITY

CONSISTENCY

CERTAINTY

TIMELINESS

The operation of nearly all of the railroads is also subject to certain licensing, permitting, and/or oversight by the Surface Transportation Board under the Interstate Commerce Act, its amendments, and related legislation. A working relationship between the BLM and the Board is a necessity.

“Railbanking” applies to all railroad rights-of-way, whether obtained through a Federal grant of right-of-way or from the private landowner.

“Rails to Trails” applies only to some and then only where action has been taken by the Board and Congress or the Courts in decreeing forfeiture or abandonment.

LAND STATUS

With most any railroad case, you will be working with a situation that started at least 150 years ago. It is **most important** that one of the first steps you take is to review the historical land status - land patented (entered) prior to the RR, the RR grant provisions, and land status since. Depending on the situation it may be appropriate to review county records to identify areas of claimed ownership of all or portions of the RR ROW that exists or existed on public lands.

Ted Bingham
Senior Lands Officer
602-417-9301

TABLE OF CONTENTS

- A. **Class or Type of Railroad Right-of-way**
 - 1. Limited Fee
 - 2. Exclusive Easement
 - 3. Common Easement
 - 4. Comparative Chart

- B. **Uses Authorized by Railroad Holder**
 - 1. While Railroad is operational
 - 2. When Railroad is abandoned

- C. **Interstate Commerce Act.**
 - 1. Surface Transportation Board
 - 2. Part of Interstate Rail Network
 - 3. Intrastate only

- D. **Abandonment, Forfeiture and Relinquishment**
 - 1. Approval of Surface Transportation Board
 - 2. Forfeiture
 - 3. Relinquishment
 - 4. Abandonment
 - 5. Act of Congress or Finding by Court of Competent Jurisdiction

- E. **Congressional Acts of the 1920's**
 - 1. The 1920 Act for Streets and Highways
 - 2. Federal Aid Highways
 - 3. The 1922 Act
 - 4. Public Highways

- F. **The Move to Trails**
 - 1. Railbanking
 - 2. Rails to Trails

- G. **Indian Territory - Oklahoma**

- H. **Other**
 - 1. Material - Construction and/or Maintenance
 - 2. Timber on Mineral Land
 - 3. Disclaimers

Appendix

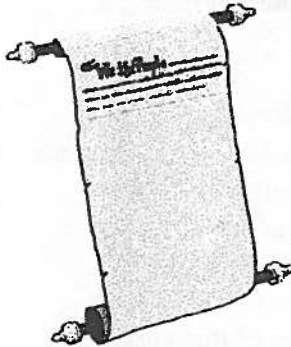
- 1 Congressional Grants of Railroad ROWs by State**
- 2 Court Decisions**
- 3 Abandonments & Alternatives to Abandonment**
- 4 Abandonment Notices and Petitions - STB
CY 1997 on by year and State**

Illustrations

- 1 A Grant to States for Railroad Purposes**
- 2 A Land Grant for Railroads**
- 3 The 1875 Railroad Act**
- 4 A Validation of Railroad Conveyances**
- 5 STB Conditioned Abandonment Notice**
- 6 Abandonment Issues - Short Line Case**
- 7 M-36064, "MCI" Opinion, 96 I.D. 439 (Dec. 1989)**
- 8 AD's July 7, 1999, e-mail: "BLM Policy & M-36064"**

CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

A. CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY



Railroad rights-of-way were first granted by Congress in the late 1820's and early 1830's over a few Federal enclaves within the original thirteen States. Following the assisted development of public lands in the Northwest Territory through public land grants for canals, bridges and post roads, Congress made various railroad grants in the southern and midwestern States. In 1852, Congress passed a short-lived Rail and Plank Roads and Macadamized Turnpikes Act granting a right-of-way (ROW) upon survey and construction. Then, looking to the expansion of the western territories, the transcontinental railroad grants were made for the Southern, Central and Northern routes to the Pacific Coast and for other associated railroads.

As a result of a change in concept within the Congress in 1871, Congress passed the General Railroad Act of 1875. Yet Congress continued to pass individual railroad grant acts, a few each year, until the turn of the century. Little changed after that until the Federal Land Policy and Management Act of 1976 (FLPMA) which, among other conditions, repealed the 1875 Act and provided for the issuance of ROW grants across public and National Forest lands for most types of transportation, including railroads.

Because the authority behind the railroad ROW establishes different conditions affecting the public land and the operation and maintenance activity on the ROW, the Bureau recognizes three different classes or types of railroad ROWs:

LIMITED FEE; EXCLUSIVE EASEMENT; COMMON EASEMENT

Each class or type has distinctive differences and pose different considerations for the remaining interest or servient estate held by the United States.

A. 1. LIMITED FEE RAILROAD RIGHTS-OF-WAY



Railroad ROWs made during the 1850-1870's, in some cases into the 1890's, fall into this type or class. The grant under the 1852 Rail and Plank Roads and Macadamized Turnpikes Act is a limited fee ROW. Those ROWs made by Congress prior to 1850 likely fall into this type, however, the specific granting statute should be reviewed as a few only granted the right to use and may fall into

CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

the Exclusive Easement class. It is doubtful that any of these early grants would be considered Common Easements. Appendix I lists many of these limited fee grants by State and Act.

The term "Pre-1871 grants" is used to describe this class of railroad grants. Although grants of this class are normally limited to those prior to 1875, Congress continued to issue a few limited fee grants to specific railroads and has more recently passed specific railroad granting acts that may also be of the nature of a limited fee (f1).

On a number of occasions, the Supreme Court considered cases of this class involving the issue of whether the railroads received a fee interest or a mere right of passage. In the case of Northern Pacific Railway v. Townsend, 190 U.S. 267(1903), the Court gave the following description (paraphrased)(f2):

The fee passed by the grant made in §2 of the Act of July 2, 1864. Yet it was subject to conditions expressly stated and also to those necessarily implied, such as that the road shall be used for the purposes designed.

The land forming the ROW was not granted with the intent that it might be absolutely disposed of at the volition of the company; contrarily, it was for a specifically stated purpose which negated the ability to voluntarily alienate the ROW or any portion thereof.

The substantial consideration inducing the grant was the perpetual use as though the land had been conveyed in terms 'to have and to hold' the same so long as it was used for the railroad ROW. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.

Thus the use of the term "LIMITED FEE" meaning that the railroad has "fee" title to the ROW but upon ceasing to use the ROW for railroad purposes the "fee" reverts to the original grantor, usually the United States. In some cases involving Indian Territory or Indian Reservations, the "fee" may revert to the appropriate Indian Tribe or to the Indian Allottee.

For ROWs of this class the Solicitor has defined the scope(f3):

- To including the surface, subsurface (excluding minerals) and airspace.
- That the duration of the ROW is perpetual, subject to a possibility of reverter.

CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

- That the holder may authorize third parties to utilize the ROW for activities and structures not inconsistent with the holder's operation of a railroad. [*It does not appear that the use needs to be related to railroad use of the ROW.* tgb]
- That the land within the ROW is not subject to the administrative jurisdiction of the Department or BLM. (f4)

"Realignment" ROWs issued pursuant to § 509(b) of FLPMA (43 U.S.C. 1769(b)) may remain in this class of railroad ROWs.

A. 2. EXCLUSIVE EASEMENT RAILROAD RIGHTS-OF-WAY



These consist of the ROWs obtained under the General Railroad Act of 1875. It may contain some of the individual railroad grants made by Congress before 1875. This class is often cited as "Post-1871" grants.

In a 1915 decision the Supreme Court considered the ROW under the 1875 Grant Act a Limited Fee. In 1942 (f5) the Supreme Court specifically overruled the earlier 1915 decision and now holds that

- 1) the 1875 Act grant did not include the right to oil & gas and minerals and
- 2) such grants are distinguishable from the Pre-1871 grants in that 1875 Act grants are "easements" and not fee title.

A Federal District Court (f6) further interpreted the 1875 Act as granting an interest suitable for railroad purposes - a right-of-way, which, by definition, carried with it the right to exclusive use and occupancy of the land.

Here the Solicitor has defined the scope of this class (f7) as:

- Having an interest tantamount to fee ownership.
- To include the right to allow others to use, where not inconsistent with railroad operations, the surface, subsurface, and airspace. [*In recognition of the difference with a Limited Fee ROW, it may be that such use must be a use that relates to railroad use of the ROW. However see Assistant Director's note of July 1999, Illustration 8.* tgb]
- The duration of the ROW is perpetual, subject to a possibility of reverter.

CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

- The Department and BLM have some administrative jurisdiction in the subsurface (including minerals therein) and airspace. (f8)

"Realignment" ROWs issued pursuant to § 509(b) of FLPMA (43 U.S.C. 1769(b)) may remain in this class of railroad ROWs

Besides the serial page, a good source of information on these ROWs is the microfilm of the National Archives Cartographic Card Files that should be available in each State Office. These are index cards that were maintained by the General Land Office in Washington, DC, until sometime prior to merging into the BLM.

A. 3. COMMON EASEMENT RAILROAD RIGHTS-OF-WAY



This class consists of those ROWs issued pursuant to Title V of FLPMA (43 U.S.C. 1761 et seq.). Under the authority of this act the BLM could issue a ROW that would be more similar to the Exclusive Easement Railroad ROW.

Such ROWs are subject to the conditions expressed in FLPMA and to the specific terms and conditions listed in the granting document.

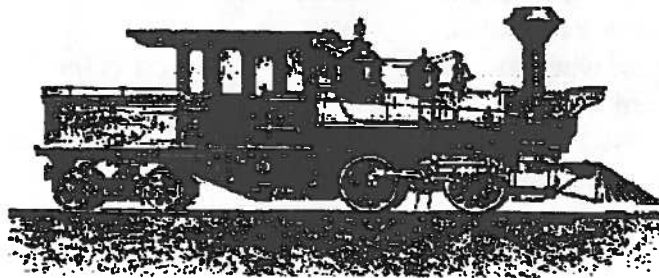
The ROW holder generally does not have the authority to allow others to use the ROW; whereas the BLM retains authority to allow other uses of the ROW that are not incompatible with the holder's use for railroad purposes.

ROWs issued pursuant to § 509(b) of FLPMA (43 U.S.C. 1769(b)) as "realignment" ROWs may remain in the class of the original ROW or are of this class.

CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

Footnotes:

- (f1) See, for instance, the Act of July 8, 1952, 66 Stat A129. All acts of Congress that apply to a specific railroad should be reviewed to determine whether they are in the nature of a limited fee or one of the other classes.
- (f2) Also see Missouri, Kansas & Texas Railway v. Roberts, 152 U.S. 114 (1893); New Mexico v. United States Trust Co., 172 U.S. 171 (1898); and Northern Pacific Railway v. Townsend, 190 U.S. 267 (1903).
- (f3) M-36964, January 5, 1989, 96 I.D. 439, 447.
- (f4) Lands subject to pre-1871 grants are not subject to BLM's FLPMA permitting authority because they are not public lands within the meaning of FLPMA. 96 I.D. 439, 450
- (f5) See Rio Grande Western v Stringham, 239 US 44, November 1, 1915, where the ROW was considered a Limited Fee and Great Northern Railway Co. v. U.S., 315 U.S. 262 (1942), when the Court reversed and found that the ROW was only an Exclusive Easement..
- (f6) See Idaho v. Oregon Short Line Railroad Co., 617 F.Supp. 207, D. Idaho (1985).
- (f7) M-36064, 96 I.D. 439, 450.
- (f8) The estate retained by the Government (where the right-of-way crosses public land) consists of the remaining subsurface (including the minerals therein) and airspace. 96 I.D. 450, 451.



CLASS OR TYPE OF RAILROAD RIGHT-OF-WAY

A. 4. Comparative Chart

Condition	Limited Fee	Exclusive Easement	Common Easement
Holder has exclusive use of ROW	yes	yes	no *
Holder may allow others to use the ROW without the BLM's permission	yes	yes	no
BLM may allow others to use the ROW	no	limited	yes
The aliquot part of public land crossed by the ROW includes the ROW strip as public land	no	probably	yes
US may have retainable interest in ROW although the aliquot part of public land has been patented	yes	maybe	no **
Servient estate is considered FLPMA public land	no	limited	yes
Holder has/had right to use construction material from adjacent land	yes	yes	no
Transfer of ownership must be approved by BLM	no	no	yes
Holder may be held to undue and unnecessary degradation within ROW	no ***	limited	yes

- An exclusive easement could be issued under authority of FLPMA, but this is not usual.
- ** Except where the patent reserved an interest in the ROW to the United States.
- *** This is not to say that damage to adjacent public lands may not be addressed through appropriate complaint action.

USES AUTHORIZED BY RAILROAD HOLDER

B. USES AUTHORIZED BY RAILROAD HOLDER

B. 1. While Railroad is operational

May other uses of the railroad ROW be authorized by the railroad holder?

For Limited Fee ROWs the answer is a definite yes and for any and all uses so long as the ability to use the ROW for railroad purposes is not compromised. A qualified yes goes with Exclusive Easement ROWs and a qualified no to Common Easement ROWs.

In discussing whether uses by others could be made of a railroad ROW, the Supreme Court had the following to say in 1875 relative to a privately granted railroad ROW (f1):

The railroad could erect buildings adjacent to the tracks which would be convenient for the receipt and delivery of freight on its railroad.

As such we are not in a position to assert that the railroad may not license others to erect such buildings, even though they may also be useful for the convenience of others.



In 1900, concerning a ROW grant over Indian Land, the Secretary agreed with the Supreme Court in a favorable finding for the erection of suitable buildings to facilitate the convenient receipt and delivery of freight, so long as full exercise of the franchises granted is not interfered with and a free and safe passage is left for the carriage of freight and passengers. (f2)



The Public Land Law Review Commission in its 1970 Report (f3) included the following as part of its Recommendation 100

The Secretary of the Interior should be authorized to approve other uses of railroad rights-of-way with the consent of the affected railroad.
after finding that

USES AUTHORIZED BY RAILROAD HOLDER

"over the years railroad rights-of-way have been occupied and used with and without the permission of the railroads . . . to protect their perpetual right to use the right-of-way for railroad purposes, [railroads] have often issued leases, licenses, and permits for indefinite periods, . . ."

Further the Commission stated

". . . it is not expedient to permit the present confusion as to the limits of the rights of the railroads and the United States to continue."

Unfortunately, Congress has taken no action relative to this recommendation.

B. 1. a. Limited Fee ROWs



The Solicitor has held (f4) that the owners of such ROWs may allow any use not inconsistent with continued use of the ROW for railroad purposes.

In those cases where the railroad may legally allow others to use the ROW, the 'granting' document must be limited. It may either be tied to

- the time limit on the railroad ROW itself, i.e., shall expire upon relinquishment, forfeiture or abandonment of the railroad ROW, or
- it must contain provisions for cancellation upon notice.

Otherwise such a document is considered an alienation of the RR grant and may become grounds for forfeiture of the grant. When this occurs, the BLM Field Official should issue a "show cause" notice to the holder of the ROW.

A granting of the outer limits of the railroad ROW to a State, County or Municipality for a public highway or street may be made by the railroad holder (f5) under the Act of May 25, 1920. See Part E.1. for more detail.

USES AUTHORIZED BY RAILROAD HOLDER

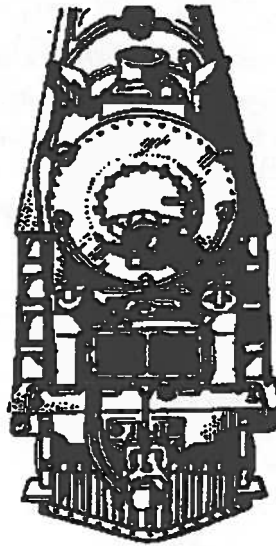
A granting of all or any part of the railroad ROW to a State Highway may be made for Federal Highway purposes (f6), Act of November 9, 1921. See Part E.2. for more detail.

In the event that damage is occurring (has occurred) to public land or resources due to activities within the ROW, we would look to the railroad holder, not the holder's tenant, for any recourse BLM wished to pursue. For example, a warehouse catches fire due to, say, faulty electric components and the fire escapes the ROW and burns resources on public lands. BLM would have recourse to seek recovery of damages, including any fire suppression costs, from the railroad holder.

B. 1. b. Exclusive Easement ROWs

Essentially the same conditions apply to Exclusive Easement ROWs as to Limited Fee ROWs - the holder may allow others to use the ROW.

[It is my opinion, however, that the use must relate to the railroad use of the ROW. Allowing others to erect buildings to facilitate freight handling is a related use. Allowing use for the transport of a chemical slurry by pipeline does not appear to me to be an allowable use on an Exclusive Easement. The BLM's position is given in Illustration 8. tgb.]



The holder may convey the outer portion of the ROW under the 1920 Act or any or all of the ROW for Federal highway purposes under the 1921 Act.

Under certain circumstances the United States may also allow a party to use a portion of the ROW:

"If BLM were approached directly by a third party seeking authorization to utilize the Government's retained subsurface or airspace interests in an 1875 Act grant, a FLPMA permit would be required and . . . could be issued if its grant would be consistent with the rights of the railroad (and its existing authorized users) as specified herein" (f7)

USES AUTHORIZED BY RAILROAD HOLDER

A good example of a non-interfering ROW use of the Railroad ROW is contained in the case of a gas company placing pipelines under the railroad in which the gas company was sued for trespass by the railroads. (f8) The court held for the gas company, saying:

By its possession of right-of-way over and through lands of another, railroad is not entitled to deprive the owner of the servient estate or those claiming through such owner from making use of the land in strata below the surface and below substrata which are used or needed by the railroad company and which does not interfere with the construction, maintenance and operation of the railroad.

Also, similar to Limited Fee ROWs, BLM would look to the railroad holder, not the holder's tenant for satisfaction in the event damage to public land or resources is occurring (has occurred). The difference here is that public lands and resources may include certain interests, other than minerals, within the ROW itself; for Limited Fee ROWs the public land resources, other than minerals, are outside the ROW.

B. 1. c. Common Easement ROWs

Generally, railroad ROWs issued pursuant to FLPMA do not allow the holder to permit others to use the ROW other than as agents or users, i.e., passengers. A communication site use granted to the railroad holder as part of the railroad ROW could allow tenants.

B. 2. When Railroad is abandoned



In cases where the legal subdivision containing the railroad ROW remains public lands or, regardless of legal subdivision ownership, the ROW is a Limited Fee railroad grant, title to the ROW vests with the United States upon abandonment (with two exceptions). The exceptions are

- 1) where a public highway exists or is timely established or
- 2) the grant was made on Indian Territory.

In the highway case, title may not necessarily immediately re-vest with the United States (see Part E.4. Public Highways, for more detail). For Indian Territory, title may re-vest in the United States, may re-vest in the

USES AUTHORIZED BY RAILROAD HOLDER

United States as trustee, may vest in a municipality, or may vest in an individual allottee.

As owners of the abandoned railroad ROW, the United States becomes faced with the issue of those subgrants - uses of the ROW created by the railroad owner, if any, prior to abandonment.

These interests amount to no more than "permission to use" and **the legal right of the third party to utilize the ROW lands ceases** with the relinquishment, forfeiture or abandonment of the ROW by the railroad owner.

As to these uses, BLM may take the following actions:

- ◆ Collect a fee for use and occupancy of the ROW from date of the railroad abandonment to cessation of use, regardless of any prior fee agreement with the railroad owner; and
- ◆ Cessation - require the owner of the subgrant to:
 - cease use and occupancy by a date certain;
 - remove any and all improvements, equipment, facilities, etc.;
 - restore or rehabilitate the property to a reasonable condition; or



- ◆ Continuance - require the owner of the subgrant to:
 - file an application, or other appropriate documentation, under appropriate authority to continue the use;
 - may require modification of use as appropriate to BLM's management prescriptions;
 - reimburse the BLM for its reasonable costs.

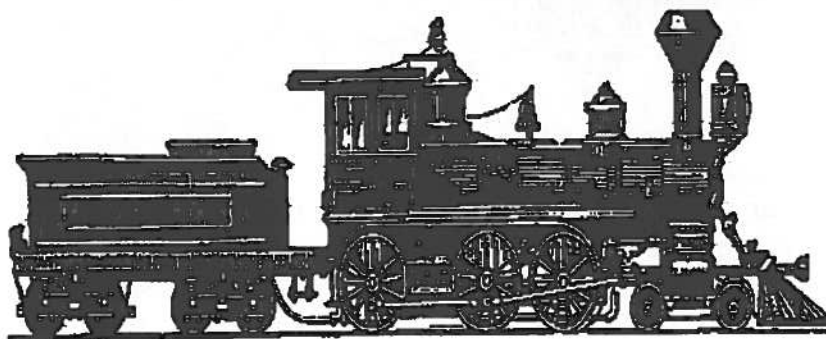
It should also be noted that the 1988 amendment of the National Trails Act (f9) requires certain management considerations for abandoned railroad ROWs. (See 16 U.S.C. 1248.)

Conveyances for streets and highways under the 1920 and 1921 Acts are not considered subgrants.

USES AUTHORIZED BY RAILROAD HOLDER

Footnotes:

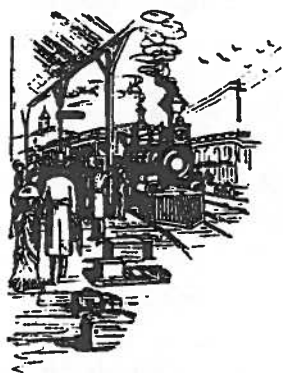
- (f1) Grand Trunk Railway Co. v. Richardson, SC, 1 Otto 454, 91 U.S. 454 (1875), 23 L.Ed 356; also see Northern Pacific Railroad Co. v. Smith, 171 U.S. 260, 275-6, where the Court inferred that tenant owned businesses that are consistent with the public duties and purposes of the railroad company are allowable.
- (f2) Clearwater Shortline Railroad, 29 LD 569, Mar. 3, 1900.
- (f3) One Third of the Nation's Land, PLLRC, June 1970, pp 230-231.
- (f4) M-36064, 96 I.D. 439.
- (f5) Act of May 25, 1920; 43 U.S.C. 913. "...are authorized to convey . . . to be used as a public highway or street; . . . [not to] diminish the right of way . . . to a less width than 50 feet on each side . . .".
- (f6) Act of November 9, 1921; 23 U.S.C. 316. "... the consent of the United States is given . . . to convey to the State highway department . . . any part of its right-of-way . . .".
- (f7) M-36064, 96 I.D, 439, 451 footnote.
- (f8) Kansas City Southern Railway Co. & Fort Smith & Van Buren Railway Co. V. Arkansas Louisiana Gas Co., 476 F2d. 829 (10th Cir, 1973).
- (f9) Pub. L. 100-470, §3, Oct. 4, 1988, 102 Stat. 2281.



INTERSTATE COMMERCE ACT

C. Interstate Commerce Act.

In 1887 (f1) Congress brought rail and water carriers (or combination thereof) that transported between states, including the District of Columbia, or a state and a foreign country under the oversight of a Commission to both promote transportation and to protect the public interest - the Interstate Commerce Act (ICA). (f2) It was later amended to include interstate transportation by motor truck.



Transportation companies subject to the ICA receive certificates of convenience to operate in interstate commerce and must publish acceptable tariffs for the transportation of freight or passengers. When a rail company wishes to change the conditions under which it operates in interstate commerce, it must seek approval from the Surface Transportation Board (STB), formerly called the Interstate Commerce Commission.

C. 1. Surface Transportation Board

The STB consists of three people appointed by the President with advice and consent of the Senate. An individual can serve up to two 5-year terms and can have no interest in any regulated carrier.

The STB has jurisdiction (f3):

Over transportation by rail in the United States between -

A State and a place in the same or another State as part of the interstate rail network;

A State and a place in a territory or possession of the United States;

A territory or possession and a place in the same or another territory or possession;

The United States and another place in the United States through a foreign Country;

INTERSTATE COMMERCE ACT

The United States and a place in a foreign Country.

That involves (f4):

Rates, classification, rules, practices, routes, services, and facilities of such carrier; and

Construction, acquisition, operation, abandonment, and discontinuance of spur, industrial, switching, or side tracks or facilities.

C. 2. Part of Interstate Rail Network

At this time, I have been unable to find a "Congressional" or "regulatory" approved definition of what constitutes the "Interstate Rail Network."



It appears to entail any and all rail facilities that interconnect on an interstate or national trackage system and, in some manner, is utilized, or could be utilized, in interstate commerce.

A spur from a coal mine to a main line and then on to a user in another state would appear to qualify as part of the 'network'.

A spur from a coal mine to a processing station at the main line within the same state would not appear to qualify as part of the 'network'.

In Wisconsin Central Ltd. v. Surface Transportation Board; No. 95-3728; 7th Cir; April 30, 1997, the court held that a Company that purchased a STB approved abandoned railroad that did not participate as a common carrier was not subject to STB control. In addition the court continued with that position even though the Company leased out part of the railroad to another company that participated in common carrier activities and was controlled by the STB.

Where there is a question, BLM should seek a ruling from the STB as to the specific rail line.

Since railroads, under STB rules, are required to file, annually, maps of their rail system and identify those to be abandoned, these maps might be

INTERSTATE COMMERCE ACT

used to determine whether the specific line in question is part of the 'network.' These maps are filed with the STB and with the agency of the State in which the railroad is located, that performs the duties of regulating public utilities.

[In Arizona, the maps are filed with the Pipeline & Railroad Safety Section, Utilities Division, State Corporate Commission. tgb]

C. 3. Intrastate only



Rail facilities that are intrastate only and not part of the 'network' are probably not subject to the jurisdiction of the STB.

In one case (f5), the Supreme Court has said that ICC's (STB's) powers are so broad that it extends even to approval of abandonment of purely local lines operated by regulated carriers.

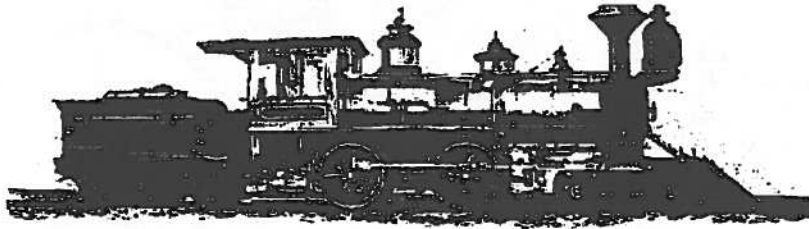
When in doubt, check with the STB as to whether they wish to exert initial jurisdiction over abandonment.



INTERSTATE COMMERCE ACT

Footnotes:

- (f1) Act Feb. 4, 1887, 24 Stat. 379
- (f2) The Interstate Commerce Act, as it now exists, is found at 49 U.S.C. 10101 et seq., the component parts of this part of Title 49 are:
- | | |
|-----------------------------------|-----------------------------------|
| 10100 - Policy | 11100 - Operation of Carriers |
| 10300 - The Commission, now Board | 11300 - |
| 10500 - Jurisdiction | 11500 - Federal - State Relations |
| 10700 - Rates, Tariffs, etc. | 11700 - Enforcement |
| 10900 - Licensing | 11900 - Penalties |
- (f3) 49 USC 1501(a)
- (f4) 49 USC 1501(b)
- (f5) See *Chicago & Northwestern Transportation Co. V. Kalo Brick & Tile Co.*; 450 US 311 (1981).



ABANDONMENT, FORFEITURE & RELINQUISHMENT

D. Abandonment, Forfeiture and Relinquishment

D. 1. Approval of Surface Transportation Board (STB)

Because of the public interest involved, the courts have held (f1) that where the railroad is subject to the Interstate Commerce Act, **the abandonment of the legal rights cannot occur unless and until the STB has approved an abandonment of the public service factor involved.**

D. 2. Forfeiture

D. 2. a. Failure to perform.

Forfeiture occurs when the granting act provides for the grantee to perform within a set of circumstances; for railroads its usually construction within a period of time. Generally a forfeiture of this kind is total e.g. all that was given is forfeited.

In §17 of the Union Pacific Railroad Grant of 1862 Congress provided for forfeiture not only of what was granted to the company but also all furniture, fixtures, rolling stock, etc. if not completed by a date certain.

As to the General Railroad Act of 1875, Congress in 1909 (f3) declared all grants forfeited where they have remained unconstructed for five years as of Feb. 25, 1909.

A forfeiture by failure to perform must be addressed, that is the owner of the servient estate must take action against the ROW holder (dominant estate) enforcing the forfeiture action. The holder may contest such action and it may remain to the courts to deliver the final decision.

Where BLM believes that the conditions of a failure to perform forfeiture exist, a "show cause" notice should be issued giving the holder of the railroad ROW at least 30 days to respond. The Surface Transportation Board must be involved in any such actions where the railroad is subject to the Interstate Commerce Act.

Action can then be taken as appropriate to the response provided by the holder. If the holder is amenable, the case may be closed through the filing of a relinquishment of the ROW (see D.3. Relinquishment).

ABANDONMENT, FORFEITURE & RELINQUISHMENT

If service cannot be obtained or there is no answer from the holder, it becomes necessary to confer with the Office of the Solicitor toward filing a quiet title action in Federal District Court.

D. 2. b. Forfeiture by alienation

A forfeiture can occur where the holder of the railroad ROW alienates the ownership of the Limited Fee or the Exclusive Easement by transferring all of the holder's rights and interests to a "non-railroad party" for all or a portion of the railroad ROW.

The transfer of an "outer" portion of the railroad ROW to a State, County or Municipality for public highway or street purposes, or a transfer for Federal highway purposes is permitted without alienation of the railroad holder's interest in the ROW. (f4)

From time to time Congress has enacted legislation to validate conveyances made by the railroad companies. Where such validation has occurred, alienation ceases to exist.

Under railbanking the railroad company may transfer all title and interest to an entity that does not, and probably will never intend to use for railroad operations. This is permitted since Congress has declared that use as a trail under railbanking does not constitute abandonment of the railroad ROW.

D. 2. c. Public Convenience and Necessity.

The STB must be advised of any forfeiture action involving an 'interstate' railroad.



D. 3. Relinquishment

A relinquishment is a voluntary act by the holder of the ROW. Usually in writing, the holder informs the owner of the servient estate that he is giving up or surrendering some right or thing. It may be a relinquishment of all rights or some portion of the total. A relinquishment is normally not a completed action without acceptance of the relinquishment by the owner of the servient estate.

BLM should always require a relinquishment be in writing and signed by an authorized officer of the railroad company. The relinquishment document should,

ABANDONMENT, FORFEITURE & RELINQUISHMENT

as a minimum:

- cite how and when the ROW was acquired;
- contain a specific description of what is being relinquished;
- carry a legal description of the ROW at least sufficient to match to the original map of the ROW;
- contain reference to STB approval of discontinuance or abandonment of service over the railroad;
- whether the railroad had deeded or leased any of the ROW to third parties and, if so, to whom, when, and other appropriate details; and
- contain necessary corporate documentation for the relinquishment.

The BLM should not accept a relinquishment of a railroad right-of-way that is subject to the Interstate Commerce Act unless the Holder has completed abandonment procedures with the STB.

Upon receipt of a relinquishment, the BLM should review it in a normal termination of ROW procedure. Once satisfied with termination conditions, the relinquishment may be accepted by decision by the BLM, the ROW terminated and the records so noted.

Where the railroad has deeded a portion of the ROW for streets or highways under either the 1920 or 1921 acts, that portion of the railroad ROW is not terminated. It should be noted in the decision accepting the relinquishment that the described portion of the ROW has been assumed by (the public agency having received the deed from the railroad). Subsidiary case files should be established for any such deeded portions.

Where the railroad has issued subgrants, these should also be docketed in new case files and action taken as explained in Part B.

D. 4. Abandonment

Abandonment is the concurrent action of the holder to abandon (give up, relinquish, surrender, etc.) and his overt act, or failure to act, which carries implication that the holder neither claims nor retains any interest in the ROW.

The holder may or may not inform the owner of the servient estate of the intent to or the actual abandonment of the rights obtained under the ROW grant.

Under the Interstate Commerce Act, the term "abandon" or "abandonment" relates to abandoning a public service; the discontinuance of passenger or freight

ABANDONMENT, FORFEITURE & RELINQUISHMENT

service. There is a public interest implied under the Interstate Commerce Act that requires the railroad owner to continue to provide the public service, for which it has a certification, until such time as the STB approves diminution of the public service involved.

Mere discontinuance of railroad services does not amount to an abandonment of the railroads' entire right-of-way. In order for abandonment to occur the following must occur:

- a. The railroad must cease paying taxes on the ROW;
 - b. The railroad must take up the tracks and other railroad structures OR the land must become completely unusable, even for side track purposes;
 - c. The railroad must have the intent to abandon - evidenced by statements, action and conduct;
 - d. The railroad must cease using the line for any railroad purpose.
- (f5)

D. 5. Act of Congress or Finding by Court of Competent Jurisdiction

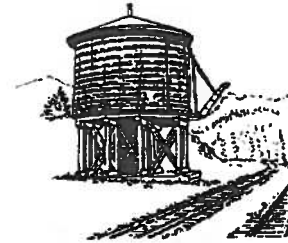


For the provisions of the 1922 Act and the 1988 National Trails Amendment Act to be effective, the forfeiture or abandonment of the railroad must be declared or decreed by a court of competent jurisdiction or by Act of Congress. (f6)

Since both of these Acts have implications relative to the interests of the United States in the railroad ROW being abandoned, the existence, or more likely the absence, of court or Congressional involvement is of major importance to the BLM.

Purported abandonments occurring prior to October 1988 that were not declared or decreed by court/Congress cannot take advantage of the conditions in the 1922 Act settling "title issues."

The BLM, or other appropriate parties, cannot take advantage of the trail or disposition procedures in the 1988 Act without the ROW being declared or decreed by court/Congress.

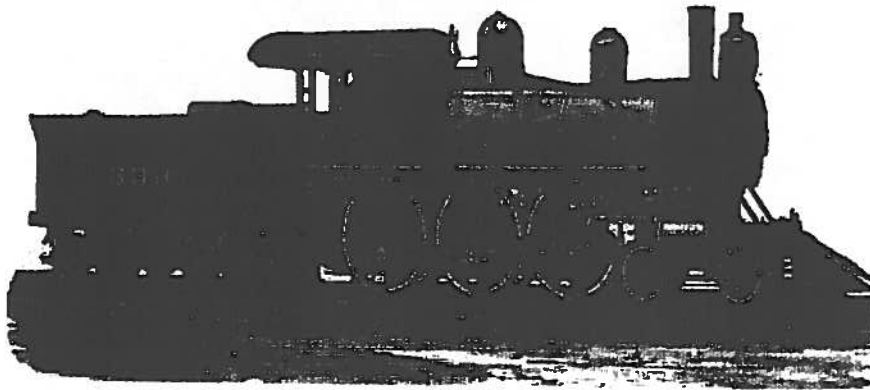


Until a formal relinquishment is accepted by the BLM or there is a finding of forfeiture or abandonment by the Congress or a court of competent jurisdiction, a cloud remains over the servient estate. At any time the holder of the railroad ROW could again operate railroad services over the ROW.

ABANDONMENT, FORFEITURE & RELINQUISHMENT

Footnotes:

- (f1) See Phillips Co. v. Denver & Rio Grande Western RR, et al., Case 95-1412 (10th Cir.), Jan. 23, 1995; Fritsch v. ICC, 59 F. 3r 248 (D.C. Cir. 1995); Grantwood Village v Missouri Pacific RR; Case 95-3588 (8th Cir 1996); Hayfield Northern RR v Chicago & Northwestern Transportation Co; 467 US 622 (1984); 81 Led2d 527; 104 SCt 2610, 1984; Vieux v County of Alameda; 695 F Supp 1023 (ND Cal 1987); aff'd 906 F2d 1330 (9th Cir 1990).
- (f2) Act of July 1, 1862, 12 Stat. 489.
- (f3) Act of Feb. 25, 1909, 35 Stat. 647.
- (f4) 43 U.S.C. 913; 23 U.S.C. 316.
- (f5) Idaho v. Oregon Short Line Railroad Co., 617 F. Supp.213, 217 (D.C.Idaho 1985) (see Ill. 6).
- (f6) See Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1335 (9th Cir. 1990), cert. Denied, 498 U.S. 967 (1990); and Marshall v. Chicago & Northwestern Transp. Co., 826 F. Supp. 1310 (D.Wyo. 1992), aff'd 31 F.3d 1028 (10th Cir. 1994).



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PHYSICS 350
LECTURE 10

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CONGRESSIONAL ACTS OF THE 1920's

E. Congressional Acts of the 1920's; the 1920, 1921, and 1922 Acts



With the turn of the century, especially with the boom following World War I, living conditions and transportation patterns of the American people were changing. The West had been 'settled' with urban areas growing; the automobile and truck was rising as the preferred mode of transportation; air travel was on the horizon but untested and unknown. With all this, together with the beginning of the Federal Highway System, the demand for rail lines slackened appreciably.

Early in the 1920's Congress passed three general laws or parts of laws that have a major impact on railroad ROWs and resultant issues for BLM when the railroad is legally abandoned. These are

- 1) public streets and highways in 1920
- 2) Federal highways in 1921, and
- 3) a 1922 ROW title resolution for abandoned railroad ROWs.

[It should be noted that the initial bills involved were modified to include the General Railroad Grant Act of 1875 since, at that time, such Grants were considered to be "limited fees". It was not until 1942 that the Supreme Court reversed itself and determined that grants under the 1875 Act were not "limited fees" but "exclusive easements." tgb]

E.1. The 1920 Act for Streets and Highways



The growth of the towns and cities around the railroad stations resulted in, the "city fathers" view, the wasting of valuable property between city streets and the railroads. From the railroad tracks outward there was some 100 to 200 feet of railroad ROW that was unusable for anybody but the railroads. And the railroads could not transfer the unused portion without jeopardizing the ROW.

Thus, streets were build on the outer portions of the RR ROW allowing commercial structures to occupy space that otherwise would have had to be used for street purposes.

In many western States there were hundreds of miles of highway built along the railroad ROW. The improvement of these highways was impeded because the State or local government could not obtain title to the ROW for road purposes. Federal dollars would not be spent on highways, the title to which was in the

CONGRESSIONAL ACTS OF THE 1920's

railroad companies. In many instances the railroad ran through canyons or along very narrow valleys of streams where there was no reasonable possibility of constructing a wagon road other than on the railroad ROW.

Congress passed the Act of May 25, 1920, to help ease the situation and to provide additional aid to streets and highways. Congress had previously passed similar acts for individual railroads such as the Union Pacific. (f1)

This act authorizes railroad companies to convey to a State, county, or municipality (Street Entity) any portion of the ROW to be used for a public highway or street. The railroad must retain, at least, 50 feet of ROW on each side of the center of the main track.

All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained. (f2)

The Courts have determined that this act applies not only to Limited Fee grants but to Exclusive Easement grants obtained under the 1875 Act as well. (f3)

This is a conveyance of the ROW from the railroad owner. The dominate estate is split into two or more parcels - the part(s) of the ROW conveyed for streets and highways and the part of the ROW retained by the railroad. The Street Entity holds whatever ROW rights were granted to the railroad as if it had been granted those rights by the United States. The class or type of ROW held by the Street Entity is the same that was held by the railroad - Limited Fee or Exclusive Easement.

Where such conveyances are known to have occurred, a separate case file should be set up for the street or highway portion(s) of the original railroad ROW.

Note: If the conveyance document from the railroad provides for subsequent re-vestment in the railroad owner, the situation would be closer to a sub-grant. If you have this situation, you need to discuss the particulars with the Office of the Solicitor.

CONGRESSIONAL ACTS OF THE 1920's

E.1.a. Abandonment of Railroad ROW

Abandonment or forfeiture of the railroad ROW would encompass only that portion of the dominate estate held by the railroad. Any portion of the original railroad ROW conveyed under the 1920 Act would remain as the dominate estate in the Street Entity.

The abandonment or forfeiture would be handled as any other abandonment or forfeiture of the specific class or type of railroad ROW.

E.1.b. Abandonment of Street or Highway

The abandonment of the street or highway is not subject to a public convenience determination by the STB; the street or highway is not subject to the ICA. The provisions of the 1922 and 1988 acts would apply only if the abandonment were decreed or declared by court/Congress. Since the relevant language is a "court of competent jurisdiction", a declaration of abandonment by a State court would probably suffice to trigger the conditions of the 1922 and 1988 acts.

E.2. Federal Aid Highways



Congress initiated the system of Federal Aid Highways in 1921. As part of that comprehensive piece of legislation, one section provided that a railroad company may convey all or any part of its ROW or other property to a State Highway Department, or its nominee, to be used for Federal highway purposes.

For the purposes of this title [28 U.S.C.] the consent of the United States is given to any railroad or canal company to convey to the State highway department of any State, or its nominee, any part of its right-of-way or other property in that State acquired by grant from the United States. (f4)

Note the difference between this act and the 1920 act (Part E.1. above). Here the conveyance can be all of the ROW and can include property other than the ROW itself. This means for some of our railroad ROWs, the railroad could convey the right to construction material, iron, coal, timber or the like. For the 'land grant' railroads it could include fee property the railroad obtained from the United States.

The Courts have determined that this act applies not only to Limited Fee grants but to Exclusive Easement grants obtained under the 1875 Act as well. (f5)

CONGRESSIONAL ACTS OF THE 1920's

Again, where this is known to have occurred, a separate case file should be established for the portion(s) of the railroad ROW transferred for Federal-aid highway purposes.

E.2.a. Abandonment of Railroad ROW

Where the railroad owner has conveyed all of the ROW to the State entity under this 1921 Act, there is no interest left with the railroad owner to abandon.

Where there has only been a partial conveyance of the railroad ROW under this 1921 Act, the abandonment of the remaining railroad ROW is treated the same as other railroad ROW abandonments.

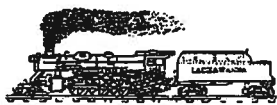
E.2.b. Abandonment of Federal Aid Highway

A conveyance under this 1921 Act transfers whatever the railroad had to the State entity for use in a Federal Highway project and no other use. It would be similar to the State acquiring the use for Federal aid highways from BLM, or through the Federal Highway Administration, under 23 U.S.C. 317.

Where the state no longer needs a ROW obtained under §317, the Solicitor has determined that the ROW strip returns to the United States; i.e., the land status at the time that the ROW was obtained. (b) The same should hold true for a transfer under this provision.

As with E.1.b., above, abandonment procedures under the ICA are not required. For purposes of the 1922 and 1988 Acts, abandonment declared or decreed by court/Congress would be necessary. Again, a state court would probably be sufficient.

E.3. The 1922 Act [43 U.S.C. 912]



In the Act of March 8, 1922, Congress addressed the problem of how to dispose of any interest of the United States in the lands in the railroad ROWs following abandonment or forfeiture by the railroad company.

First, Congress did not want this matter to be at the unfettered discretion of the railroad companies, so it required that the "forfeiture or ... abandonment" be declared or decreed by a "court of competent jurisdiction or by Act of Congress."

CONGRESSIONAL ACTS OF THE 1920's

Once declared the railroad interest (dominant estate) disappears. For Limited Fee ROWs, the United States holds the reversionary interest; for Exclusive Easement ROWs, the easement disappears and the servient estate (fee interest) becomes whole again. For the later, if the United States had conveyed away the servient estate, the United States had no right or title which would be affected by the abandonment.

Unfortunately, the courts have not necessarily agreed with this logical approach. Both the 9th and 10th Circuit Courts have concluded that this Act applies to both Limited Fee and Exclusive Easement ROWs. These cases involved arguments between the underlying fee owners and those who asserted rights obtained from the railroad. Since the courts found that abandonment under the criteria of the 1922 Act had not yet occurred they did not reach the question of resolving the differences in application of the Act between Limited Fee and Exclusive Easement. The courts seemed to suggest that disposal of a properly abandoned railroad would be done in accord with the 1922 Act. The courts also did not look at any complications to the 1922 Act caused by the 1988 amendments to the National Trails Act. (f7)

In a series of opinions, an Idaho Federal Court concluded that the 1920 (Street Entity), 1921 (Federal Aid Highway) and 1922 Acts all applied to Exclusive Easement grants made under the 1875 act. Again this was a case of abandonment and did not reach the application differences. The court also ruled that the 1921 Act has precedence over the 1920 Act. (f8)

The second problem Congress addressed was to whom or to which entities should the fee to the lands pass. In technical terms Congress directed that the fee should go to the "adjoining land owner," however, with a few exceptions.

First, the transfer would not occur to that portion of the ROW embraced within a public highway legally established within one year after abandonment.

Second, the transfer would not occur where the railroad owner made a conveyance that had been validated and confirmed by Act of Congress prior to abandonment.

Finally, where the ROW passed through a municipality, the title would pass to the municipality, based on the patent or previous title given by the United States to the "adjoining land owner."

Note that the 1988 amendment to the National Trails Act supersedes this legislation. The 1988 amendment requires retention of any interest of

CONGRESSIONAL ACTS OF THE 1920's

the United States except where the ROW or the portion of such ROW is embraced in a public highway no later than one year after determination.

Thus for this section to be activated there must be:

- ◆ Finding of forfeiture or abandonment by court of competent jurisdiction or Act of Congress
- ◆ Not embraced in a public highway (have one year from finding); title to any part of the railroad ROW not embraced in the public highway would proceed under this section.
- ◆ Not involve a conveyance by railroad that was validated by Congress

E.3.a. Municipalities

This part of the 1922 Act provides that where the abandoned ROW lands are within a municipality the title to which "...shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever..." (f9)

- ◆ Legal subdivision not patented. If the United States has not patented the legal subdivision traversed or occupied by the railroad ROW, title does not vest in the municipality unless
 - 1) it is a Limited Fee railroad, and
 - 2) abandonment was decreed by Congress or a court of competent jurisdiction, and
 - 3) the abandonment was decreed to have occurred prior to October 5, 1988.
- ◆ Railroad as survey boundary. Where the railroad ROW forms the boundary of the municipality, the railroad ROW would be divided in the same manner as that relating to lands abutting non-navigable waters.
- ◆ Abandonment after October 4, 1988. If abandonment has not occurred by October 4, 1988, the municipality may not receive title under this section to a Limited Fee ROW strip. It also cannot receive title under this section to any ROW strip where the United States is the "adjoining land owner."

E.3.b. "Adjoining Land Owner"

As the courts have interpreted the 1922 Act, the term refers to the party(ies) to whom the United States patented, or appeared to have patented, the legal

CONGRESSIONAL ACTS OF THE 1920's

subdivision over which the RR ROW passes or to the owner of the land touching or contiguous to the RR ROW (where title to the RR ROW has not passed from the United States).

Where the United States has patented the NE 1/4 Sec. 5 over which an Exclusive Easement RR ROW passes, the patentee or its assigns takes the RR ROW upon abandonment.

Where the United States has patented the NE 1/4 Sec. 5 and the Exclusive Easement RR ROW is partially on the NE 1/4 and partially on the NW 1/4, the patentee only obtains that portion of the RR ROW that is within the NE 1/4.

Either of these examples would apply to a Limited Fee RR ROW if the abandonment of the RR occurred prior to October 1988.

Abandonment after October 4, 1988. For Limited Fee RR ROWs that are abandoned after October 4, 1988, the United States retains fee title to the RR ROW.

E.4. Public Highways

From the inception of this country, highways have been important and have been considered the ways and means for human intercourse and for the conduct of trade and business. Historically pack animal and trail use have been recognized as sufficient to be called highway use. In today's modern time a highway is often defined as one used by vehicles.



[H]ighway is the generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers. (f10)

A highway is a thoroughfare used ... by the public for the passage of vehicles carrying people or goods from place to place. (f11)

[A highway u]nder the control of and kept by the public, established by regular proceedings ... or dedicated by the owner of the soil and accepted by the proper authorities and for the maintenance of which they are responsible. (f12)

E.4.a. Establishment of the public highway.

CONGRESSIONAL ACTS OF THE 1920's

Any public highway established on the RR ROW, or within the one year period from abandonment of the ROW, must be done legally. Since repeal of R.S. 2477 in 1976 (f13) the only provisions for obtaining authority for a highway on public lands is either the Federal-Aid highway provisions (23 USC 317) or Title V of FLPMA. (The Solicitor has held that the Limited Fee ROW is not public land and FLPMA, therefore, may not be used while the ROW exists.) In some states, a public highway may be decreed to exist by administrative action without actual construction of the highway.

- ◆ A public highway may be established by administrative decree where allowed by the laws of the State involved. Further action may be required in order for the governmental body to actually, physically occupy the ROW.
- ◆ A public highway exists where the RR has transferred the outer portion of the ROW pursuant to the 1920 (or similar) Act or it was transferred as part of the Federal-aid highway act (23 USC 316). Only that portion of the RR ROW transferred by the RR would be considered the public highway.
- ◆ Prior to October 21, 1976, a public highway could have been established pursuant to R.S. 2477.
- ◆ Subsequent to October 21, 1976, a public highway could be established through application under appropriate law to BLM or the administering Federal agency.

E.4.b. Effect of an Existing or Established Highway

Upon forfeiture or abandonment of the RR ROW decreed by Act of Congress or a court of competent jurisdiction the ROW normally ceases to exist. Where a public highway exists at the time of abandonment or is established within one year, the ROW continues to exist but for highway purposes instead of RR. The governmental body responsible for the public highway obtains the same relationship to the United States as the railroad owner had.

Railroad Abandoned & Public Highway Existed

For these situations that existed prior to October 5, 1988, the provisions of the 1922 Act that transferred interests of the United States to municipalities or adjacent land owners were not effective.

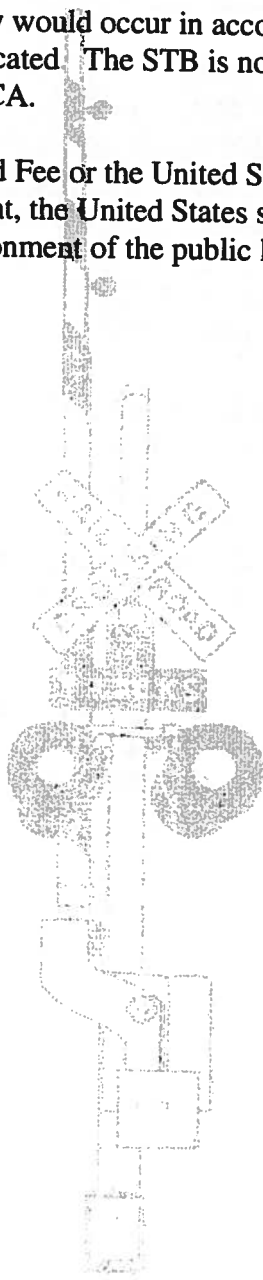
For these situations that occurred subsequent to October 5, 1998, the provisions of the 1988 amendment to the National Trails Act for the United States to retain its interests and for management for trails purposes are not effective.

CONGRESSIONAL ACTS OF THE 1920's

E.4.c. Abandonment of the Public Highway

Abandonment of the public highway would occur in accordance with the laws of the State in which the highway is located. The STB is not involved as the highway does not come under the ICA.

Where the ROW involved is Limited Fee or the United States is still the adjoining land owner to an Exclusive Easement, the United States should exert its ownership of the ROW upon abandonment of the public highway.



CONGRESSIONAL ACTS OF THE 1920's

Footnotes:

- (f1) Act of October 20, 1919.
- (f2) 43 U.S.C. 913, 41 Stat. 621.
- (f3) State of Idaho v. Oregon Short Line Railroad Co., 617 F Supp. 207, (DC Idaho 1985); Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1335 (9th Cir. 1990), cert. Denied, 498 U.S. 967 (1990)
- (f4) 23 U.S.C. 316.
- (f5) Oregon Short Line, supra
- (f6) Field Solicitors Opinion, US93 (Ariz) and Townsite of San Luis, AZ, circa 1990.
- (f7) See Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1335 (9th Cir. 1990), cert. Denied, 498 U.S. 967 (1990); and Marshall v. Chicago & Northwestern Transp. Co., 826 F. Supp. 1310 (D.Wyo. 1992), aff'd 31 F.3d 1028 (10th Cir. 1994).
- (f8) State of Idaho v. Oregon Short Line Railroad Co., 617 F.Supp. 207 (D.C.Idaho 1985; 617 F.Supp. 213 (D.C.Idaho 1985); and 617 F.Supp. 219 (D.C.Idaho 1985).
- (f9) 43 U.S.C. 912.
- (f10) 6 Mod. 255 (other cites omitted).
- (f11) Secretary of the Interior, Jan. 22, 1997.
- (f12) State v. Gross, 119 N.C. 868, 26 S.E. 91.
- (f13) §706(a), Act of October 21, 1976, 90 Stat. 2793

THE MOVE TO TRAILS

F. The Move to Trails



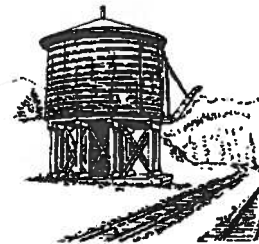
In the 1970's Congress had become concerned about the rapid abandonment of railroad ROWs as evidenced with their passage of the Railroad Revitalization and Regulatory Reform Act in 1976 (4Rs). One major impediment to the preservation of railroad ROWs existed in state property laws which prescribed that once rail service is discontinued after the STB's (then ICC) approval of abandonment, the railroad easements would automatically expire and the ROW would revert to adjacent property owners.

Looking at the National Trails System (NTS) that it created in 1968, Congress responded to the impediment by passing an amendment to the NTS which, among other items, dealt with the question of railroad abandonment. (f1) This authority is referred to as "Railbanking" which is discussed in greater detail in F.1. below.

Still concerned that there was insufficient action at the Federal level in increasing the NTS while attempting to hold railroad ROWs for future use, the Congress again amended the NTS (f2) and, at the same time, caused a major change in the 1922 Act (f3) concerning forfeiture and abandonment of railroad ROWs. This 1988 amendment directs that the United States will retain whatever interest it has in a railroad ROW under abandonment proceedings and will, with some exceptions, manage that interest for NTS purposes. This is referred to as "Rails to Trails" which is discussed in greater detail in F. 2. below.

F. 1. Railbanking

Under the 1983 amendment to the 4Rs, a railroad abandoning service may contract with a qualified entity that would utilize the ROW for trail purposes. Under this condition, the use for trail purposes is considered railroad purposes, and the lack of railroad service does not constitute abandonment. Here Congress determined that the interim trail use was to be treated like discontinuance of rail service rather than as an abandonment.



... Consistent with the purposes of that Act [4Rs], and in furtherance of the national policy to preserve established railroad rights-of-way for future

THE MOVE TO TRAILS

reactivation of rail service, to protect rail transportation corridors . . . in the case of interim use of any established railroad rights-of-way . . . 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. . . . (f4)

The 1983 amendment also instructs the Secretary of the Interior, among others, to “encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs [the 4Rs].”

Under its proceedings, the STB often issues a letter (decision) approving the abandonment of service action but containing a clause providing a 180 day window for interested parties to come forward with any trail use proposals; in which case the abandonment is delayed.. The courts are divided on their interpretation of this “condition subsequent” action by the STB.

Historically, the courts have held that States may again exercise their regulatory powers once the ICC (STB) authorizes the carrier’s abandonment and thus, unless ICC (STB) attaches post-abandonment conditions, brings the ICC’S (STB’S) regulatory mission to a close. (f5)

However, in a 1995 case, the DC Circuit Court held that upon issuance of the letter by the ICC property rights in the ROW reverted to the underlying land owners and there remained no property interests that the STB could hold out for trail purposes. (f6)

In another case, the court distinguished Fritsch, citing the conditions expressed in Idaho v Oregon Short Line RR, in that one had to look beyond the STB’s letter/decision as to whether the Railroad company involved intended to immediately finalize abandonment or were, for instance, engaging in negotiation with an entity for railbanking. (f7)

The BLM should continue to follow the decisions that recognize the STB’s ability to place conditions subsequent in their abandonment letters (decisions).



THE MOVE TO TRAILS

F. 2. Rails to Trails

Feeling that the Administration was not taking the conversion of railroad ROWs to trails seriously enough, the Congress again amended the NTA in 1988. This 1988 amendment to the NTA also supersedes the Act of 1922 [43 U.S.C. 912] and provides that (f8):

- Upon forfeiture or abandonment of a railroad ROW declared or decreed by a court of competent jurisdiction or by Act of Congress, the United States will retain its rights in the ROW.
- The ROW would merge into Conservation Areas or National Forests (CAs).
- ROWs outside of CAs but adjacent to public lands would be managed pursuant to FLPMA and the 1988 Act.
- ROWs outside of CAs suitable for use as public recreational trails would be managed as such.
- For ROWs outside of CAs, may ~~quitclaim~~ surface of the ROW to qualified Trail entity.
- For ROWs outside of CAs, if ~~qualify~~ may ~~sell~~ under §203 of FLPMA.

Note: For this action to occur the ~~forfeiture of~~ abandonment must be either decreed by court action or by Act of Congress. See Part D.5. above. This section is also not applicable to any portion of the railroad ROW that is embraced in a public highway ~~within one year of abandonment or forfeiture.~~



THE MOVE TO TRAILS

Footnotes:

- (f1) See 16 USC 1247(d).
- (f2) See 16 U.S.C. 1248 (c) thru (e).
- (f3) 43 U.S.C. 912.
- (f4) 16 U.S.C. 1247(d).
- (f5) Hayfield Northern RR v Chicago & Northwestern Transportation Co, 467 US 622 (1984); 81 Led2d 527; 104 S Ct 2610, 1984.
- (f6) Fritsch, et al. v. the ICC (STB), et al, 59 F.3d 248 (DC Cir. 1995).
- (f7) Birt v. Surface Transportation Board, et al.; No. 95-1211 9th Cir; Decided August 2, 1996.
- (f8) See 16 U.S.C. 1248 (c) through (e).



INDIAN TERRITORY - OKLAHOMA

G. Indian Territory - Oklahoma



Because of its status as "Indian Territory," Oklahoma requires additional analysis of its class of railroads.

With the exception of the three western counties of Beaver, Texas, and Cimarron, the territory included in the present state of Oklahoma was set aside by Congress in 1834 as the "Indian Territory," for the possession of certain Indian Tribes. In 1866 the Indian Tribes ceded the western part of the Indian Territory to the United States which, together with above, became Oklahoma the area of the great 1889. In 1898 Congress the Indian Territory, certain Indians of the Territory. In of the Indian Territory were for Oklahoma to become a 16, 1907.



the three counties listed Territory in 1890. This was "Oklahoma land rush" of provided for the allotment of exceptions, to individual 1906, after most allotments made, Congress provided State, admitted November

Congress granted only a few RR ROWs through what is now Oklahoma prior to the General Railroad Act of 1875. In the late 1890's and very early 1900's, Congress granted numerous RR ROWs through Indian Territory and, to a lesser extent, through Oklahoma Territory. The granting language of many of these Acts of Congress is similar to each other and reflect that they are probably an Exclusive Easement. A few of the acts are different and may be of the Limited Fee type - these are noted in Appendix 1.

The 10th Circuit Court accepts the concept in Northern v. Townsend, however, it also prides itself as one that believes all RR ROWs split the land between dominant and servient estates. In all cases reviewed for Oklahoma, the 10th Circuit has ruled that the RR ROW is an Exclusive Easement or less. (f1) In one case involving an 1866 grant, it ruled the portion of the RR ROW over the, then, Indian Territory was not a limited fee but an Exclusive Easement. [*This is a direct conflict with Townsend and M-36964.* tgb]

All of these cases involve arguments between prospective owners upon the abandonment or forfeiture of the RR ROW; all cases involved patented subdivisions. In the only case involving the United States as a direct party (and that as Indian Trustee), the decision, as were most of the others, was decided based on the wording of the Act of April 26, 1906; §14, 34 Stat. 137, 142. In this case, U.S. v. Drumb, the 10th Circuit disagreed with certain findings made by the District Court, that of full fee or Limited Fee as one issue, but since it agreed with

INDIAN TERRITORY - OKLAHOMA

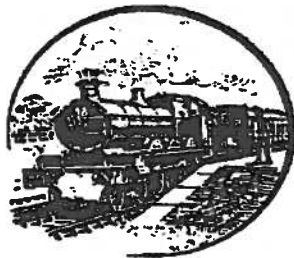
the basic finding under the 1906 act, the 10th did not bother to explain why it disagreed with the District Court on the other findings. Relying on Drumb alone, one would be able to consider such ROWs as being Limited Fee.

The 1906 Act occurred after the initial separation of Oklahoma into Oklahoma and Indian Territories (1890) and was enacted to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory. Section 14 of that act provided for the conveyance of "land reserved from allotment" to the party for whom the reservation was made. Those lands reserved from allotment because of property interests of the RR or RR Companies, in the "nature of an easement" for railroads, station grounds, etc., were not provided the same conveyance directive. The act provided that the RRs were to be given the opportunity to "purchase the fee" under rules to be published by the Secretary of the Interior. Further the act provided for ownership by the owner of the legal subdivision, except within a municipality, where the RR shall fail to buy within the time prescribed or shall cease to use for RR purposes.

Given the Department direction in M-36964 it becomes necessary to separate the RR grants in Oklahoma between those on lands subject to the 1906 Act and the balance of the State.

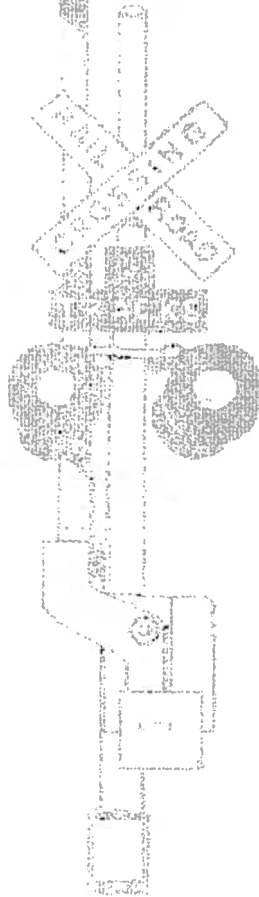
Act of April 26, 1906 lands are, basically, the eastern one-half of Oklahoma. RR ROWs on these lands are subject to railbanking, as that is not considered an abandonment of the RR ROW. Where the RR ROW is abandoned, the 1906 Act provides for the disposition of the ROW in a manner similar to the 1922 Act (43 U.S.C. 912) - if within a municipality, to the municipality; if not then to the owner of the legal subdivision containing the ROW.

Other lands. Grants for RR ROWs on these lands made when they were still Indian Territory should probably be considered Exclusive Easements. The other few, see for example 29 Stat. 077 or 30 Stat. 492 (made over a specific Indian Reservation), should probably be considered Limited Fee Easements. In addition, the General Railroad Act of 1875 was applicable to Oklahoma Territory.



INDIAN TERRITORY - OKLAHOMA

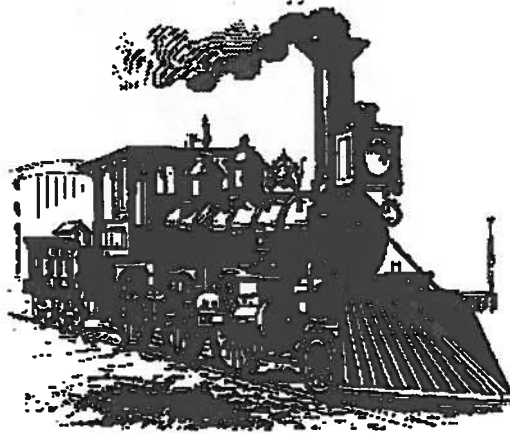
In 1899 Congress passed a general RR grant act for lands in Indian Reservations, land held by an Indian Tribe or Nation within Indian Territory, land held by an individual allottee or lands reserved in connection with the Indian Service. ROW grants under this act would be Exclusive Easements. After 1899 Congress also continued to enact individual RR grants over such "indian lands" see 31 Stat 1447, 3/3/1901. In addition in providing a ROW for the Enid & Anadarko Railway in Indian Territory (32 Stat 43, 2/28/1902), Congress also included the language of the 1899 general grant act as part of that legislation at §13 and following.



INDIAN TERRITORY - OKLAHOMA

Footnotes:

- (f1) See US v. Drumb, et al.; 152 F.2d 821 (10th Cir 1946); Seminole Nation v. Nelly White, et al., 224 F.2d 173 (10th Cir 1955); Chickasha Cotton Oil Co v. Town of Maysville, et al., 249 F.2d 542 (10th Cir 1957); St. Louis-San Francisco Ry Co. V. Town of Francis, 249 F.2d 546 (10th Cir 1957); Kansas City Southern Ry Co v Arkansas Louisiana Gas Co and Fort Smith & Van Buren Ry Co. V. Arkansas Louisiana Gas Co., 476 F.2d 829 (10th Cir 1973).



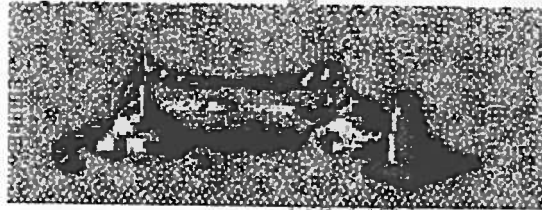
OTHER

H. Other

1. Material - Construction and/or Maintenance

Construction. Nearly all of the grants of ROW, except under FLPMA, authorized the railroad company to use common material and timber from public lands adjacent to the ROW for construction of the railroad.

"... the right also to take necessary materials of earth, stone, and timber for the construction thereof, from the public lands of the United States adjacent to said railroad ... 10 Stat 008



Original construction is generally considered completed when the railroad is open for general public use. (f1) For land grant railroads, construction is considered complete for the segment upon filing of the map of construction with the Secretary of the Interior even though such may be prior in time to actual opening for general public use of the railroad.

The addition of switches and side tracks is generally not considered construction where the main line has been completed. (f2) However, where the franchise of the railroad company provided for the construction of a main line and one or more branch lines, the later construction of the branch line allows for the use of timber or other construction material from anywhere adjacent to the main and branch line. (f3)

Unless a replacement grant of ROW is made under §509(b) of FLPMA there should be no situations remaining where the holder of a ROW can take material from adjacent public lands for construction of the railroad.

Maintenance. Neither FLPMA nor the General Act of 1875 allows for the use of timber or common material from adjacent public land for maintenance of the railroad. The principal railroad land grant acts also did not provide for the use of material for maintenance purposes. Some of the lesser land grant acts, however, provide that material from adjacent public lands may be used for BOTH construction and maintenance. (f4)

OTHER

For Limited Fee ROWs, you must refer to the enabling act to determine whether the railroad may use materials for repair and maintenance.

Adjacent. The meaning of adjacent is a mixed question of law and fact; its meaning depends upon the circumstances of each particular case. To be adjacent lands must be in proximity, contiguous, or near to the line of the railroad. Lands which are far off or distant are not adjacent. (f5)

In answering the question of what is adjacent, one needs to consider all of the relevant facts - the line of ROW, the type of construction or maintenance material, the terrain, the abundance or rarity of the particular material, how such material may be transported to point of use.

If timber cannot be found between the termini of the ROW it is permissible to go a reasonable distance beyond the termini to find suitable timber. (f6)

2. Timber on Mineral Land

In some of the land grant statutes the railroads were prohibited from obtaining title to the alternate sections that were mineral in character.



However, in view of the need for timber for ties, bridges, etc., the railroads were granted any timber upon such mineral lands. This grant of timber was usually limited to the unavailable alternate sections in the initial "grant band" (f7) along the route and did not include areas identified for lieu selections, etc.

The grant of the timber was by operation of law under a given set of circumstances. If the circumstances existed, the railroad company received the rights to the timber as of the date of the Act making the grant. The circumstances are:

- The land must be an odd numbered section within the railroad "grant band."
- The land must have been mineral in character, other than for iron or coal.
- The land, except for its mineral character, must have otherwise been available for acquisition by the railroad, i.e., not within a pre-emption or homestead claim, etc.

OTHER

The timber rights granted are of an indefinite term.

- It is a right that runs with the land.
- The subsequent patentee took or takes subject to the rights of the railroad company or its successors to the timber thereon.
- Although the railroad may cease, or has already ceased, to exist, the timber rights remain with the railroad company or its successors in interest.
- For such odd numbered sections in Federal ownership, the government must consider the timber owner's rights in its land and resource planning and decision process.

Lands reacquired by the government may have included the acquisition of the timber rights.

3. Disclaimers

Once a Limited Fee or Exclusive Use Easement ROW was/is obtained, it remains as a condition or cloud on the title of the entire property until such time as the ROW is removed by:

- Declaration of forfeiture by Act of Congress or court of competent jurisdiction; or
- Determination of abandonment declared by an Act of Congress or court of competent jurisdiction; or
- Relinquishment to and acceptance by the granting entity.

To help remove such a cloud on the title of lands, a recordable document of DISCLAIMER of interest or interests in lands may be issued, upon proper application, where it is determined that a record interest of the United States has terminated by operation of law or is otherwise invalid [43 U.S.C. §1745].

With the passage of the 1988 amendment to the National Trails System Act, the interests of the United States are to be retained upon forfeiture or abandonment of a railroad ROW decreed by a Court of competent jurisdiction or by Act of Congress [16 U.S.C. §1248(c)]. An exception to this is where the ROW, or portions thereof, is embraced within a public highway no later than one year after the determination of abandonment or forfeiture.

3.a. Interests Retained by the United States in a Railroad ROW:

OTHER

The United States retains the following interests for railroad ROWs, excluding the mineral rights which it never granted to the railroad:

For **Limited Fee** ROWs, the United States retains reversion rights to the fee.

For **Exclusive Easement** ROWs where

- A. Title to the the aliquot part remains in the United States
 - 1) United States retains reversion rights to the fee.
- B. Title to the aliquot part has been transferred from the United States
 - 1) United States retains reversion rights to pass the ROW to the holder of an existing public highway or a public highway established within one year of the forfeiture or abandonment of the RR ROW.

3.b. Issuance of a Disclaimer

A disclaimer may not be used where a Limited Fee ROW is involved.



A disclaimer may not be used where an Exclusive Easement ROW is involved and the United States is still the adjacent land owner.

A disclaimer may be used where an Exclusive Easement ROW is involved and the United States is not the adjacent land owner.

Forfeiture or abandonment must be found by Act of Congress or a court of competent jurisdiction.

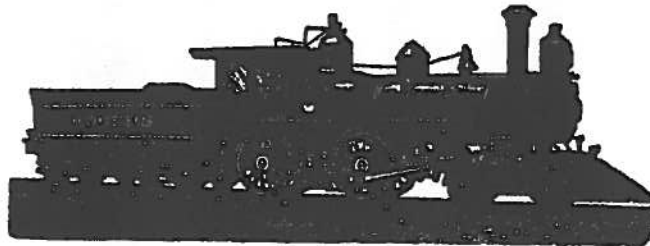
A year must pass from date of determination of forfeiture or abandonment and no public highway exists.

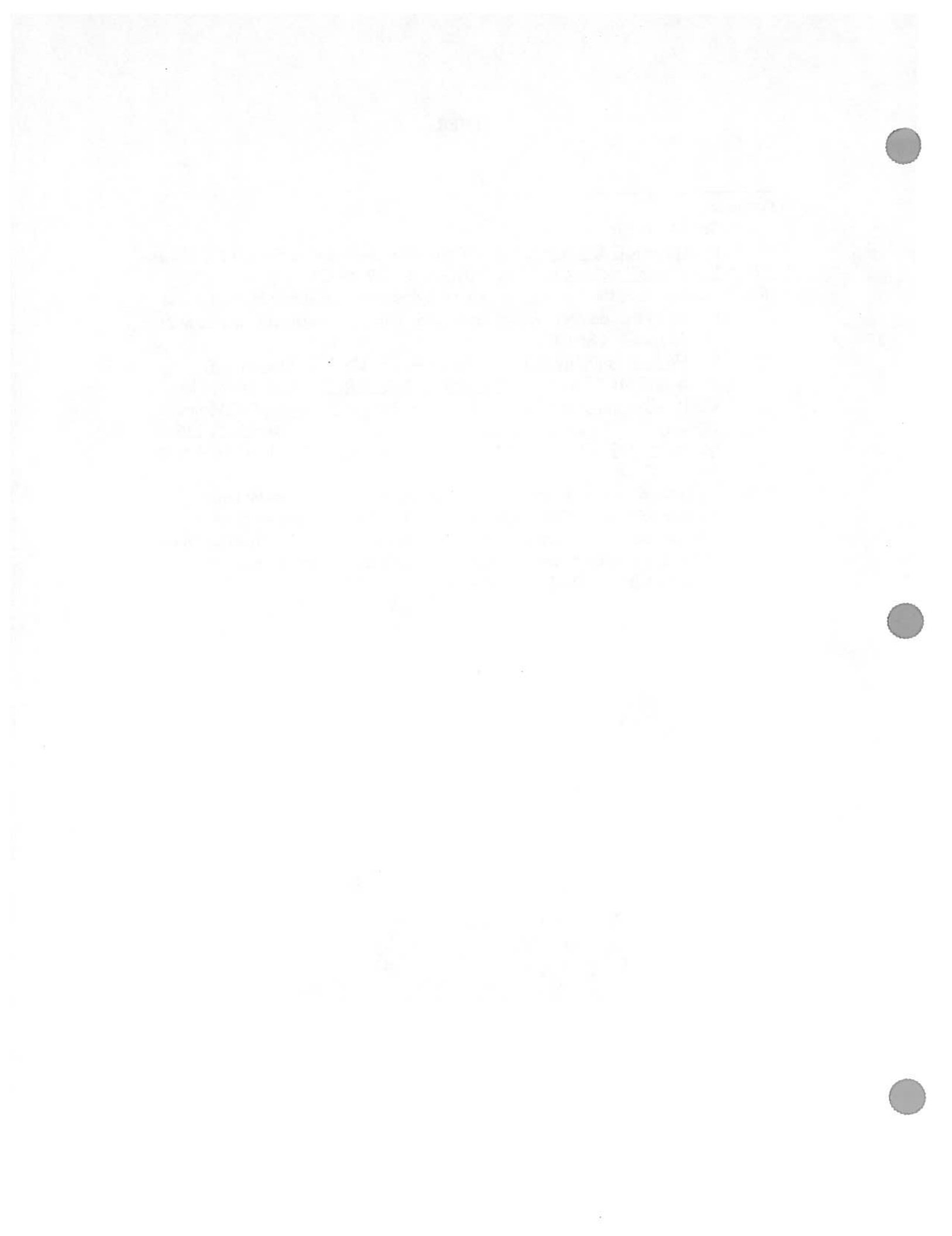
The Act of March 8, 1922, 43 U.S.C. 912, should be cited as the act terminating the interest of the United States in the Exclusive Easement ROW.

OTHER

Footnotes

- (f1) See 14 LD 566
- (f2) Denver & R.G.R. Co. V US, C.C.Colo.1888, 34 F. 838, affirmed 150 US 1
- (f3) US v Price Trading Co., Utah 1901, 100 F. 239, 48 C.C.A. 331.
- (f4) "... shall have the privilege of using the timber on the public lands, for one hundred yards on each side of said railroad, in the construction and repair of said road." 4 Stat 778
- (f5) See US v St. Anthony R. Co., Idaho 1904, 192 US 524; Stone v US, Wash.1897, 167 US 178; US v Denver & R.G. R. Co., Colo.1893, 150 US 1; US v Chaplin, C.C.Or. 1887, 31 F. 890; US v Lnde, C.C.Mont. 1891, 47 F. 297; Denver & R.G. Ry. Co. V US, Colo. 1903, 124 F. 156; Bachelor v US, NM1897, 83 F. 986; US v Chaplin, C.C.Or. 1887, 890
- (f6) See 28 LD 439
- (f7) "... granted to said company ... every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road ..." defines the "grant band." under the Act of July 1, 1862, 12 Stat. 489.





APPENDIX 1

APPENDIX 1

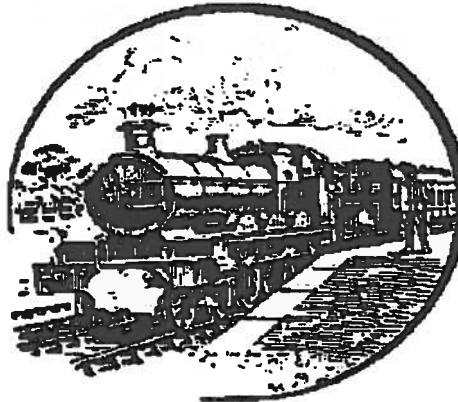
Congressionally Granted Railroad ROWs and/or Land In Aid of Construction of Railroads By State and Act

We the People

By various acts between circa 1830 and 1900, Congress either (1) authorized railroad rights-of-way or (2) granted land to aid in the development of a railroad, the right-of-way for which came from the 1852 Rail and Plank Roads and Macadamized Turnpikes Act or R.S. 2477. In 1875 Congress passed the General Railroad Act which lasted until 1976.

This appendix lists those statutes between 1830 and 1900 that are considered to be Limited Fee Easements. It has not been determined whether the railroad was actually constructed or whether the right-of-way still exists today. In addition, legislation after 1871 is listed which may or may not be a Limited Fee Easement or are of the type granted under the General Act of 1875; these are separately identified.

For each statute an attempt has been made to specify the route or location of the proposed railroad. If the statute authorized more than one line, i.e., a mainline and branches, these are separately identified and numbered 1, 2, 3, etc. Where it could be determined, the name of the railroad is given at the end in italics.



APPENDIX 1

ALABAMA

- 4 Stat 778 1. From Pensacola to the Chatahoochee river near Columbus in Georgia,
3/3/1834 and to such other point designated in the act of the legislature of Alabama.
- 5 Stat 065 1. Granted the right of way through such portions of the public lands as
7/2/1836 remain unsold in the several States through which the said road is intended to pass; *New Orleans and Nashville Rail-road Company*
- 9 Stat 466 1. From the southern terminus of the Illinois and Michigan Canal to a
9/20/1850 point at or near the junction of the Ohio and Mississippi Rivers;
2. Branch of the same to Chicago, on Lake Michigan;
3. Branch via the town of Galena in said State, to Dubuque in the State of Iowa.
Amended by 11 Stat 384; 3/18/1859
- 11 Stat 015 1. From Montgomery to the boundary line between Florida and
5/17/1856 Alabama, in the direction of Pensacola, and to connect with the road from Pensacola to said line.
- 11 Stat 017 1. From the Tennessee River, at, or near Gunter's Landing, to Gadsden,
6/3/1856 on the Coosa River.
2. From Gadsden to connect with the Georgia and Tennessee and Tennessee line of railroads, through Chattooga, Wills, and Lookout Valleys.
3. From Elyton to the Tennessee River at or near Beard's Bluff, Alabama.
4. Extending from Memphis on the Mississippi River, in Tennessee, to Stevenson, on the Nashville and Chattanooga railroad, in Alabama; *Memphis and Charleston Railroad*.
5. From Girard to Mobile, Alabama; *Girard and Mobile Railroad*
6. From near Gadsden to some point on the Alabama and Mississippi State line, in the direction to the Mobile and Ohio railroad, with a view to connect with said Mobile and Ohio railroad; *Northeast and Southwestern Railroad*
7. From Selma to Gadsden; *Coosa and Alabama Railroad*
8. From Montgomery to some point on the Alabama and Tennessee State line in the direction of Nashville, Tennessee; *The Central Railroad*
Amended by 11 Stat 200; 3/3/1857
- 11 Stat 030 1. From the city of Mobile to New Orleans.
8/11/1856
- 11 Stat 195 1. From the line of Georgia, on the Chattahoochee River, to the city of
3/3/1857 Mobile, Alabama, through the counties of Henry, Dale, Coffee, Covington, Conecuh, Baldwin and Mobile;
2. Branch from Eufaula to Montgomery, through the counties of Barbour, Pike, Macon and Montgomery.
- 16 Stat 149 1. Bridge over Alabama R at Selma; *Western Railroad Co.*
6/8/1870
2. Bridge over Alabama R north of Montgomery; *N&S Alabama RR Co.*
- 16 Stat 580 1. From Montgomery to AL/TN line (Nashville)
3/3/1871
- 17 Stat 159 1. From Selma to Gadsden.
5/23/1872

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 17 Stat 340 1. Through public lands is granted

APPENDIX 1

- 6/8/1872
18 Stat 509 1. From present terminus at Apalachicola River, FL, thru FL and AL to
3/3/1875 Mobile, AL
2. Branch from point on line to Pensacola
 3. Branch from point on line opposite Jacksonville on St John's river to St Augustine

The following are likely to be Exclusive Easements

- 25 Stat 500 1. Fort Morgan Military Reservation - 50 ft ROW along N'ern high
10/1/1888 water line of Mil Res; *Birmingham, Mobile & Nancy Cove Harbor Ry*;
repealed by 29 Stat 696; 3/3/1897
- 27 Stat 253 1. Pensacola Military Reserve Area - FL, AL, MS, TN
7/21/1892 100' ROW thru lands of the US in FL, AL, MS, TN and through
Reservations lying near Pensacola, FL; line thru Mil Res subj to Secy Navy
or War; *Mexican Gulf, Pacific & Puget Sound RR*
- 29 Stat 696 1. Fort Morgan Military Reserve - Repeals act 10/1/1888 (25 Stat 500);
3/3/1897 ROW granted to *Birmingham, Mobile & Navy Cove Harbor Ry*

ARIZONA

- 14 Stat 292 1. From at or near Springfield, MO, to W bdy MO, by best route to point
7/27/1866 on Canadian R, thence to Albuquerque, NM, thence via the Aqua Frio or
other suitable pass, to head-waters of the Colorado Chiquito, thence along
45th parallel to Colorado River, thence to the Pacific; *Atlantic & Pacific
Railroad*
- 16 Stat 573 1. From a point at or near Marshall, Harrison Co, TX, thence by route
3/3/1871 near the 32nd parallel to a point at or near El Paso, TX, thence through NM
and AZ to a point on the Rio Colorado, at or near the SE bdy of CA, thence
to San Diego, CA to ship's channel, in the bay of San Diego; pursuing in
location as near as may be the 32nd parallel; *Texas Pacific Railroad*

The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements

- 17 Stat 339 1. For extending line through contiguous territory of US to northern bdy
6/8/1872 Mexico.
[I question if applied to AZ in actual construction, but act could. tgb]

The following are likely to be Exclusive Easements

- 24 Stat 361 1. 100' ROW through Gila Indian Reservation; *Maricopa & Phoenix Ry*
1/17/1887
- 24 Stat 433 1. 100 ft ROW over Whipple Barracks Mil Res; *Prescott & Arizona
2/28/1887 Central Ry*
- 27 Stat 462 1. Whipple Barracks Military Reserve - 100' ROW to *Santa Fe, Prescott
2/18/1893 & Phoenix Ry*; Location subj to Secy War
- 28 Stat 286 1. Yuma Indian Reservation - ROW under same conditions as §23 Act
8/15/1894 3/3/1871 (@335) (§17 of appropriations Act for Indian Department); *So
Pacific RR*
- 28 Stat 665 1. San Carlos Indian Reservation - 50'@ ROW from pt where enter
2/18/1895 IR on S side Gila R, 7 miles below Ft Tomas; continue down Gila R NW'y

APPENDIX 1

- crossing Gila R near San Carlos Ind Agency; up or near San Carlos R N'ly to near Aliso Cr; along creek W'ly or NW'ly to Globe; *Gila Valley, Globe & Northern Ry*
- 29 Stat 253 1. Grand Canyon Forest Reserve - **1875 type ROW** from Pt near
6/6/1896 Moqui Station to pt near Cameron Ranch near the Grand Canyon of the Colorado; *Flagstaff & Canyon RR*
- 30 Stat 418 1. Grand Canyon Forest Reserve - **1875 type ROW** from pt on S
5/18/1898 bdy For Res in Coconino Co; n'ly from Williams, AZ; thru pt near Lombard & Bright Angel Trail; to Indian Gardens.
2. From Bright Angel Trail E'ly to Little Colorado R
3. Necessary side tracks to reach various mines in the For Res; *Santa Fe & Grand Canyon RR*
- 30 Stat 783 1. Sam Francisco Mountains Forest Reserve - **1875 type ROW**
1/10/1899 from pt on Santa Fe RR at Williams, AZ; S'ly to Jerome;
2. spurs to various mines; *Saginaw Southern RR*

ARKANSAS

- 5 Stat 065 1. Right of way over such portions of the public lands as remain unsold
2/2/1836 through which the said road is intended to pass as incorporated by the several States; *New Orleans and Nashville Railroad Company*
- 10 Stat 155 1. From a point on the Mississippi River, opposite the mouth of the Ohio,
2/9/1853 in the State of Missouri, via Little Rock, to the Texas boundary line near Fulton, in Arkansas;
2. Branches from Little Rock, in Arkansas, to the Mississippi River, and to Fort Smith.
- 14 Stat 083 1. From Missouri boundary to or near Helena, on the Mississippi River
7/4/1866
- 14 Stat 289 1. From Fort Riley, Kansas, or near said military reservation, thence
7/26/1866 down the valley of the Neosho River to the S line of Kansas with a view to an extension through a portion of Indian Territory to Fort Smith, Arkansas.
- 14 Stat 292 1. Branch from a point RR strikes Canadian R eastward to W bdy
7/27/1866 Arkansas at or near Van Bruen
- 19 Stat 377 1. upon, over, and across the Hot Springs reservation
3/3/1877

APPENDIX 1

CALIFORNIA

- 12 Stat 489 1. From the Pacific coast, at or near San Francisco, or the navigable
7/1/1862 waters of the Sacramento River, to the eastern boundary of California to UP
RR. *Central Pacific Railroad Company of California*
- 13 Stat. 504 1. The line from San Jose to Sacramento.
3/3/1865 Assigned from *Central Pacific RR to Western Pacific RR*
- 14 Stat 094 1. From Folsom to Placerville
7/13/1866
- 14 Stat. 239 1. From point on Central Pacific RR in the Sacramento Valley, northerly
7/25/1866 through Sacramento and Shasta Valleys to N bdy CA; *California &
Oregon RR (CA)*
- 14 Stat 292 1. From at or near Springfield, MO, to W bdy MO, by best route to point
7/27/1866 on Canadian R, thence to Albuquerque, NM, thence via the Aqua Frio or
other suitable pass, to head-waters of the Colorado Chiquito, thence along
45th parallel to Colorado River, thence to the Pacific; *Atlantic & Pacific RR*
- 14 Stat. 367 1. 100 foot wide ROW granted to UP RR and Co.s constructing branches
7/26/1866 over and upon military reserves through which the RR may pass
- 14 Stat 548 1. From Stockton to Copperopolis
3/2/1867
- 16 Stat 573 1. From a point at or near Marshall, Harrison Co, TX, thence by route
7/3/1871 near the 32nd parallel to a point at or near El Paso, TX, thence through NM
and AZ to a point on the Rio Colorado, at or near the SE bdy of CA, thence
to San Diego, CA to ship's channel, in the bay of San Diego; pursuing in
location as near as may be the 32nd parallel; *Texas & Pacific RR*
2. From Tehachapa Pass, vial Los Angeles, to TP RR at or near the Colorado River

The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements

- 18 Stat 130 1. From Colfax to Nevada City.
6/20/1874
- 19 Stat 056 1. Through lands of the US included in the military reservation near
5/24/1876 Benicia

The following are likely to be Exclusive Easements

- 30 Stat 910 1. San Grabiell Forest Reserve - **1875 TYPE ROW** from Rubio to
2/28/1899 summit of Mount Lowe, LA County CA; *Pasadena & Mt Wilson Ry*

APPENDIX 1

COLORADO

- 14 Stat 292 1. From at or near Springfield, MO, to W bdy MO, by best route to point
7/27/1866 on Canadian R, thence to Albuquerque, NM, thence via the Aqua Frio or
other suitable pass, to head-waters of the Colorado Chiquito, thence along
45th parallel to Colorado River, thence to the Pacific; *Atlantic & Pacific RR*
- 15 Stat 324 1. Extend RR to a connection at Denver to make a continuous line from
3/3/1869 Kansas City by way of Denver to Cheyenne

The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements

- 17 Stat 339 1. For extending line through contiguous territory of US to northern bdy
6/8/1872 Mexico.
- 18 Stat 274 1. From point on line of *Kansas Pacific Railway* at Kit Carson, thence S
6/23/1874 to W Las Animas, thence W along Arkansas River to Pueblo.

The following are likely to be Exclusive Easements

- 25 Stat 085 1. 100 ft ROW over Ft Crawford; *Denver & Rio Grande RR*
4/16/1888
- 26 Stat 489 1. Fort Lewis - NTE 100' ROW; Subj to Secy War; *Rio Grande*
9/26/1890 *Southern Ry*
- 29 Stat 190 1. South Platte & Plum Creek Forest Reserve - **1875 type ROW**
5/28/1896 from Jct N & S forks Platte R (S25 T7S R70W); along S fork to S3 T13S
R71W
2. Also from S21 T9S R70W along Horse Cr & Trout Cr to S34 T10S R69W;
Denver, Cripple Cr & Southwestern RR
- 30 Stat 493 1. Pikes Peak Timber Land Reservation - **1875 type ROW** from pt
6/27/1898 on E or N bdy For Res in El Paso Co., CO; W'ly from Colorado Springs to
W bdy F R;
2. spurs to mines in area; *Cripple Creek District Ry*
- 30 Stat 729 1. Pikes Peak Timber Land Reservation - **1875 type ROW** to
7/8/1898 *Cripple Creek Short-line Ry*

APPENDIX 1

FLORIDA

- 4 Stat 778 1. From Tallahassee to St. Marks.
3/3/1835
2. From Pensacola to the Chatahoochee river near Columbus in Georgia, and to such other point designated in the act of the legislature of Alabama.
3. From the Saint John's river in East Florida, to the Suwanee river in said territory, or to Vacasom bay, at the mouth of said river.
- 5 Stat 144 1. From the St. John's river and thence in the most convenient and
1/31/1837 suitable direction to Tallahassee or the waters of St. Mark's river or bay, on the Gulf of Mexico, or to any other point east or between the St. Mark's and Appalachian rivers, which may be selected by said company.
2. From Pensacola to the waters of Mobile bay or river.
3. Extend from the Georgia line to the city of Tallahassee, and thence to the river Appalachian, or St. George's sound; *Brunswick and Florida Railroad*
4. From the city of St. Joseph to the city of Tallahassee.
5. State of Florida hereafter may provide by law for the construction of railroads from the Appalachian river, or from any other point, to cross or intersect the abovementioned railroad, from the Georgia State line to the Gulf of Mexico.
- 5 Stat 253 1. Over and through any of the public lands of the United States over
6/28/1838 which the railroad may pass; *Florida Peninsula Railroad and Steamboat Company*
- 10 Stat 680 1. From the Perdido River, on the most direct and practicable route, to
3/3/1855 the waters of Pensacola Bay; granted to Jasper Strong, George Terrill, and their associates, for the construction of a railroad
2. Granted to James Herron, of Escambia county, and his associates, for the construction of a railroad from his steam saw and grist mills, on the Perdido River, through the government lands west of the navy-yard, to the Bay of Pensacola.
- 11 Stat 015 1. From St. John's River, at Jacksonville, to the waters of Escambia Bay,
5/17/1856 at or near Pensacola.
2. From Amelia Island, on the Atlantic, to the waters of Tampa Bay;
3. Branch to Cedar Key, on the Gulf of Mexico.
4. From Pensacola to the State line of Alabama, in the direction of Montgomery
- 16 Stat 593 1. Upon and through the naval and military reservations near Pensacola,
1/30/1871 Florida

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 17 Stat 224 1. From St Mary's River to Key West;
6/4/1872
2. Branch from most eligible point to Tampa Bay and Caloosa Entrance
- 17 Stat 280 1. From Jacksonville to Saint Augustine.
6/7/1872
- 18 Stat 509 1. From present terminus at Apalachicola River, FL, thru FL and AL to
3/3/1875 Mobile, AL
2. Branch from point on line to Pensacola

APPENDIX 1

3. Branch from point on line opposite Jacksonville on St John's river to St Augustine

-
- The following are likely to be Exclusive Easements
- 26 Stat 268 1. St Augustine Military Reserve - NTE 100' ROW to Jacksonville,
7/11/1890 *Saint Augustine & Halifax Lines Ry*; Subj to Secy War
 - 27 Stat 253 1. Pensacola Military Reserve Area - FL, AL, MS, TN
7/21/1892 100' ROW thru lands of the US in FL, AL, MS, Tn and through
Reservations lying near Pensacola, FL, to *Mexican Gulf, Pacific & Puget
Sound RR*; line thry Mil Res subj to Secy Navy or War
 - 27 Stat 320 1. Pensacola Military Reserve Area - NTE 100' ROW to *Pensacola
7/28/1892 Terminal Co*; Subj to Secy Navy
 - 30 Stat 911 1. Pensacola Military Reserve Area - 100' ROW to *Pensacola &
2/28/1899 Northwestern RR*; Route subj to Secy War/Navy

GEORGIA

- 4 Stat 778 1. From the Saint John's river in East Florida, to the Suwanee river in
3/3/1835 said territory, or to Vacasom bay, at the mouth of said river.

HAWAII

- 33 Stat 579 1. ROW 40 feet wide through the Military Reservation of Kahauiki, Kona District,
Oahu, *Oahu Railway and Land Company*

APPENDIX 1

IDAHO

- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory of the US, on a line north of the 45 degree latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than 300 miles from its western terminus; *Northern Pacific RR* (Pre April 1904 sales confirmed by act 4/28/1904)
-
- The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements
- 17 Stat 052 1. From Portland, OR, by way of Dalles city to some suitable point on
4/12/1871 the UP or CP RR in the vicinity of Salt Lake, not further east than Green river, with a
2. Branch from a suitable point west of the Blue mountains to a suitable point in Walla-Walla valley.
- 17 Stat 212 1. From Corinne City, UT, by way of Malade River and Snake River
6/1/1872 Valleys through Utah, Idaho, and Montana Territories to a connection with the NP RR or the Helena & Utah Northern RR.
- 17 Stat 612 1. Extend line via Bear River Valley, Soda Springs, Snake River valley
3/3/1873 and through Montana Territory to connect with the NP RR.
- 20 Stat 241 1. By way of Marsh Valley, Portneuf River and Snake River Valley
6/20/1878 instead of by the way of Soda Springs and Snake River Valley as originally granted
- 25 Stat 160 1. Couer d'Alene Indian Res ID; 75 ft @ ROW - POB W line Res near
5/18/1888 W&I RR jct with ID branch near Lone Pine, WA; N'y to near mouth St Joseph's River on CdA Lake; NE'y along E side lake to CdA River; E'y by CdA Mission to E line Res.; *Washington & Idaho RR*
- 25 Stat 349 1. Nez Perce Indian Reservation - 75 ft@ ROW - from W bdy Res at
6/14/1888 Clear Water R; E'y along CWR Valley to E bdy Res
2. Branch: from N bdy Res on Potlach Creek, sec. 16 T37NR3W, along Potlach Cr to Clear Water River; *Oregon Ry & Navigation Co*
- 25 Stat 452 1. Fort Hall Indian Reservation - NTE 200 ft ROW from Blackfoot
9/1/1888 River (N bdy) to S bdy Res; *Utah & Northern Ry*
- 26 Stat 104 1. Nez Perce Indian Reservation - 50'@ ROW from pt on N bdy IR
5/8/1890 on Potlach Cr (S16 T37N R3w); S'y and SW'y along Potlach Cr to Clearwater R; SW'y along River to W bdy IR; *Palouse & Spokane Ry*
- 30 Stat 906 1. Nez Perce Indian Reservation - 50'@ ROW from Pt W bdy NP IR
2/28/1899 in s25 T36N R5W on N bank Clearwater R; along N bank E'y to pt T36N R4W opposite mouth Lapwai Cr: cross to S bank Clearwater R to pt in s22 T36 N R4W; along S bank to mouth Big Canyon s3 T36N R1W; up Big Canyon SE'y to junction with Little Canyon in T36 N R1W; up Little Canyon E'y to Base Mer in T36N; along calley of Little Canyon S'y or SW'y thru T36, 35, 34N R1E; along valley of Little Canyon thry T34 N R1W to divide between Little Canyon/Lawyers Canyon; SW'y thru T34N R1W to Tp line between T33-34N R1W; SW'y thru T33N R1W to T32-33N R1W; S'y & E'y thru T32N R1W to Base Mer; S'y & E'y thru T32N R1E to S bdy I R; *Clearwater Valley RR*

APPENDIX 1

Nothing to impare any rights RR may have or may obtain under act
3/3/1875

ILLINOIS

- 4 Stat 234 1. 90' ROW for canal from Illinois R to Lake Michigan
3/2/1827
- 4 Stat 662 1. May make railroad instead of a canal in 4 Stat 234.
3/2/1833
- 9 Stat 466 1. From the southern terminus of the Illinois and Michigan Canal to a
9/20/1850 point at or near the junction of the Ohio and Mississippi Rivers;
2. Branch of the same to Chicago, on Lake Michigan;
3. Branch via the town of Galena in said State, to Dubuque in the State of Iowa.

APPENDIX 1

IOWA

- 11 Stat 009 1. From Burlington, on the Mississippi River, to a point on the Missouri
5/15/1856 River near the mouth of the Platte River.
2. From the city of Davenport, via Iowa City and Fort Des Moines, to Council Bluffs.
3. From Lyons City northwesterly to a point of intersection with the main line of the *Iowa Central Air Line Railroad*, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across said State to the Missouri River.
4. From the city of Dubuque to a point on the Missouri River near Sioux City;
5. Branch from the mouth of the Tete Des Morts to the nearest point on said road.
- 12 Stat 489 1. From Sioux City [Iowa] upon the most direct and practicable route to
7/1/1862 a point on, and so as to connect with, the branch railroad or with the Union Pacific Railroad; *Pacific Railroad Company*
- 13 Stat 072 1. From Sioux City to the south line of the state of Minnesota, at such
5/12/1864 point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river.
2. From a point at or near the foot of Main Street, South McGregor, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien.
- 13 Stat 095 Amends []
6/2/1864
1. The new line, if located, shall in every case pass through the corporate limits of the cities of Des Moines and Council Bluffs; *Mississippi and Missouri Railroad Company*
2. To connect its line by a branch with the line of the *Mississippi and Missouri Railroad Company*, shall pass through or near Boonsboro, in Boon County, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford County; *Cedar Rapids and Missouri River Railroad Company*
3. Branch road to some point in Monona County, in or at Onawa City.
4. *Dubuque and Sioux City Railroad Company* may so far change their line between Fort Dodge and Sioux City.
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR and Co.s* constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass
- 15 Stat 038b 1. Route changed to Dubuque via Webster City and Fort Dodge to Sioux
3/2/1868 City

APPENDIX 1

KANSAS

- 12 Stat 489 1. From the Missouri River, at the mouth of the Kansas River [Kansas
7/1/1862 City], on the south side thereof to the UPRR at the one hundredth meridian
in Nebraska; *Leavenworth, Pawnee, and Western Railroad*
2. From Leavenworth to unite with the road through Kansas; *Leavenworth,
Pawnee, and Western Railroad Company*
- 12 Stat 772 1. From the city of Leavenworth by the way of the town of Lawrence,
3/3/1863 and via the Ohio City crossing of the Osage River, to the southern line of
the State, in the direction of Galveston bay in Texas; 13 Stat 339: shall run
via Baldwin city
2. Branch from Lawrence by the valley of the Wakarusa River, to the point on the
Atchison, Topeka, and Santa Fe Railroad where said road intersects the Neosho
River. 13 Stat. 339; 7/1/1864: changed to run from Lawrence to Emporia.
3. From the city of Atchison, via Topeka to the western line of the State, in the
direction of Fort Union and Santa Fe, New Mexico;
4. Branch from where this last-named road crosses the Neosho, down said Neosho
valley to the point where the said first named road enters the said Neosho valley.
- 13 Stat. 339 1. From Emporia, via Council Grove, to a point near Fort Riley, on the
7/1/1864 branch *Union Pacific Railroad*.
- 13 Stat. 356 1. From the mouth of Kansas River, by the way of Leavenworth, or, if
7/2/1864 that be not deemed the best route, then from the city of Leavenworth to
unite with the main stem at or near the city of Lawrence; *Leavenworth,
Pawnee, and Western Railroad Company*, now known as the *UP RR
Company, eastern division*. IF the *UP RR* shall not be proceeding in good
faith to build the said railroad through the territories when the *LPW RR
(UPRR east)* shall have completed their road to the hundredth degree of
longitude, then *LPWRR* may proceed to make said road westward until it
meets and connects with the *CPRR* on the same line. And said railroad from
the mouth of Kansas River to the 100 meridian shall be made by way of
Lawrence and Topeka, or on the bank of the Kansas River opposite said
towns:
- 14 Stat 210 1. From Elwood, westwardly via Maryville, to effect a junction with the
7/23/1866 *UP RR*, or any branch, not further west than the 100th meridian.
- 14 Stat 212 1. A horse railway through the military reservation from Fort
7/23/1866 Leavenworth to the *City of Leavenworth*.
- 14 Stat 236 1. From the eastern terminus of the *UP RR*, eastern division, at the line
7/25/1866 Kansas and Missouri, at or near the mouth and on the S side of the Kansas
River, westwardly through the eastern tier of counties, with a view of its
extension to effect a junction at Red River with a *RR* now being constructed
from Galveston to Red River at or near Preston, TX.
- 14 Stat 289 1. From Fort Riley, Kansas, or near said military reservation, thence
7/26/1866 down the valley of the Neosho River to the S line of Kansas with a view to
an extension through a portion of Indian Territory to Fort Smith, Arkansas.
- 14 Stat 292 1. From at or near Springfield, MO, to W bdy MO, by best route to point
7/27/1866 Canadian R, thence to Albuquerque, NM, thence via the Aqua Frio or other
suitable pass, to head-waters of the Colorado Chiquito, thence along 45th
parallel to Colorado River, thence to the Pacific; *Atlantic Pacific RR*.
2. Branch from a point *RR* strikes Canadian R eastward to W bdy Arkansas at or

APPENDIX 1

- near Van Bruen
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR and Co.s* constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass
- 15 Stat 121 1. For railroads, grants up to 300 foot ROW through Ft Leavenworth
7/20/1868
- 15 Stat 238b 1. ROW, 100 feet wide, granted over Ft Leavenworth on E side
7/27/1868 Missouri river on line to be designated by Secy War. *Leavenworth & Des Moines Railway Co,*
2. ROW, 100 feet wide, granted over Ft Leavenworth upon line to be designated by Secy War. *Leavenworth, Atchison & Northwestern Railway Co*
- 15 Stat 324 1. Extend RR to a connection at Denver to make a continuous line from
3/3/1869 Kansas City by way of Denver to Cheyenne

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- The following are likely to be Exclusive Easements
- 25 Stat 135 1. Fort Riley Military Reserve - 100 ft ROW over Ft Riley; *Kansas Valley RR*
5/9/1888
- 25 Stat 863 1. Fort Hayes Military Reserve - 100 ft ROW as approved by Secy War;
3/2/1889 *Omaha, Dodge City & Southern Ry*
- 26 Stat 788 1. Fort Riley Military Reservation - ROW to *Junction City & Ft Riley Street Ry*; Subj Secy War
2/27/1891
- 29 Stat 095 1. Sac & Fox & Iowa Indian Reserrvations - 50'@ ROW to *Atchison & Nebraska RR* (lessee is *Chicago, Burlington & Quincy RR*)
4/7/1896

LOUISIANA

- 5 Stat 065 1. Granted to the *New Orleans and Nashville Rail-road Company*
2/2/1836 incorporated by the several States through which the said road is intended to pass, the right of way through such portions of the public lands as remain unsold.
- 5 Stat 196 1. The, the right of way through such portions of the public land as the
3/3/1837 road or roads of said company is authorized by its charter to construct.
Atchafalaya Railroad and Banking Company
- 5 Stat 197 1. From Carrolton to the town of Bayou Sara, the extension of the *New Orleans and Carrolton Railroad* railroad.
3/3/1837
- 11 Stat 018 1. From the Texas line in the State of Louisiana, west of the town of
6/3/1856 Greenwood; via Greenwood, Shreveport, and Monroe, to a point on the Mississippi River, opposite Vicksburg;
2. From New Orleans by Opelousas, to the State line of Texas;
3. From New Orleans to the State line, in the direction to Jackson, Mississippi.
- 11 Stat 030 1. From the city of Mobile to New Orleans.
8/11/1856
- 16 Stat 573 1. From New Orleans to Baton Rouge, via Alexandria, to *TP RR* eastern
3/3/1871 terminus.

MASSACHUSETTS

APPENDIX 1

- 5 Stat 017 1. *Western Railroad corporation* be, and they are hereby, authorized to
4/29/1836 construct a railroad on lands belonging to the United States, in Springfield,
Massachusetts.

MICHIGAN

- 11 Stat 021 1. From Little Bay de Noquet to Marquette, and thence to Ontonagon.
6/3/1856
2. From Marquette to the Wisconsin State line. [see 12 Stat 620; 7/5/1862]
 3. From Ontonagon to the Wisconsin State line.
 4. From Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay.
 5. From Grand Haven and Perre Marquette to Flint, and thence to Port Huron.
- 11 Stat 381 1. Fort Gratiot Military Reservation - the right of way through and the
2/8/1859 privilege of constructing depots and workshops on the public lands of the
United States lying in the county of St. Clair, State of Michigan, commonly
called the Fort Gratiot military reservation.
- 12 Stat 620 1. From Marquette, on Lake Superior, to the Wisconsin State line,
7/5/1862 changed to eligible route from the township of Marquette aforesaid, to a
point on the Wisconsin State line, near the mouth of the Menomonee River,
and touching at favorable points on Green Bay
- 13 Stat 520 1. From Marquette, on Lake Superior, to the Wisconsin state line, at or
3/3/1865 near the mouth of the Menomonee River; Grant to Michigan for railroad ;
Chicago and Northwestern Railway Co
2. From Marquette to Ontonagon; *Marquette & Ontonagon RR*,
 3. For twenty miles westerly from Marquette to Bay de Noquet; *Bay de Noquet and Marquette RR*
- 16 Stat 586 1. Change terminus from Traverse Bay to Mackinaw and change as
3/3/1871 needed the routing thereof. see 11 Stat 021 #4
- 17 Stat 160 1. Change from "from Fond du Lac, WI, northerly to Esconaba, MI" so
5/23/1872 as to run the line at or near the mouth of the Menomonee river to Esconaba"
[unable to identify act that is so amended.]
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- The following are likely to be Exclusive Easements
- 18 Stat 081 1. Permit the *Port Huron city street railroad* to lay and use a curved
6/18/1874 track over the NW corner of Ft Gratiot reservation in a curve rad of 54 feet
and encroaching about 15 feet from the angle.

APPENDIX 1

MINNESOTA

- 10 Stat 302 1 From the southern line of said Territory, commencing at a point
6/29/1854 between township ranges nine and seventeen, thence by the bay of St.
Repealed Paul, by the most practicable route to the eastern line of said Territory in the
direction of Lake Superior. Repealed - 10 Stat 575; 8/4/1854
- 11 Stat 195 1. From Stillwater, by way of Saint Paul and Saint Anthony, to a point
3/3/1857 between the foot of Big Stone Lake and the mouth of Sioux Wood River;
2. Branch via Saint Cloud and Crow Wing, to the navigable waters of the Red
River of the north, at such point as the Legislature of said Territory may
determine. [see 12 Stat 624; 7/12/1862]
3. From St. Paul and from Saint Anthony, via Minneapolis, to a convenient point of
junction west of the Mississippi, to the southern boundary of the Territory in the
direction of the mouth of the Big Sioux River;
4. Branch, via Faribault, to the north line of the State of Iowa, west of range
sixteen.
5. From Winona, via Saint Peters, to a point on the Big Sioux River, south of the
fourth-fifth parallel of north latitude.
6. From La Crescent, via Target Lake, up the valley of Root River, to a point of
junction with the last mentioned road, east of range seventeen.
- 12 Stat 624 1. In lieu of that part of the railroad which extends northwesterly from
7/12/1862 intersection of the tenth standard parallel with the fourth guide meridian, a
new branch line having its southwestern terminus at any point on the
existing line, between the Falls of Saint Anthony and Crow Wing, and
extending in a northeasterly direction to the waters of Lake Superior.
- 13 Stat 064 1. From the city of Saint Paul to the head of Lake Superior.
5/5/1864
- 13 Stat 072 1. From St. Paul and St. Anthony, via Minneapolis, to a convenient point
5/12/1864 junction west of the Mississippi, to the southern boundary of the state, in
the direction of the mouth of the Big Sioux river.
- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory
of the US, on a line north of the 45 degree latitude to some point on Puget's
Sound, with a branch, via the valley of the Columbia River, to a point at or
near Portland, in the State of Oregon, leaving the main trunk-line at the most
suitable place, not more than 300 miles from its western terminus;
Northern Pacific RR (Pre April 1904 sales confirmed by act 4/28/1904)
- 14 Stat 087 1. From Houston, Houston County, through the counties of Fillmore,
7/4/1866 Mower, Freeborn, and Faribault, to the W bdy of state.
2. From Hastings, through counties of Dakota, Scott, Carver, & McLeod, to point
of W bdy of state.
- 16 Stat 588b 1. May alter branch lines to a line from Crow Wing to Brainerd to
3/3/1871 intersect with the *NP RR*, and
2. From St Cloud to a point of intersection with the line of the original grant at or
near Otter Tail or Rush Lake. see 11 Stat 195; 3/3/1857
- 17 Stat 631 1. Amends Act by extending time to complete line from St. Anthony to
3/3/1873 Brainerd by 9 months which is further amended by Act of 6/2/1874 [18 Stat
203] which extends Act of [] until 3/3/1876. [unable to identify specific act
being amended.]

APPENDIX 1

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- The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements
- 25 Stat 558 1. Fond du Lac Indian Reservation - 50 ft @ ROW from Duluth to pt near
10/17/1888 Grand Rapids on Mississippi R; *Duluth & Winnipeg Ry*
 - 25 Stat 647 1. White Earth Indian Reservation - 100 ft ROW from Moorhead; NE'ly
1/16/1889 through Clay Co; E'ly through Becker Co; into & through Ind Res passing
Flat Lake; through Hubbard, Cass, Atkin & St Louis Co's to Duluth;
Moorhead, Leech Lake & Northern Ry
 - 25 Stat 696 1. White Earth Indian Reservation - 75 ft @ ROW thru Ind Res; *St Paul,*
2/25/1889 *Minneapolis & Manitoba Ry*
 - 25 Stat 1010 1. Leech Lake & White Earth Indian Reservations - 50 ft @ ROW from
3/2/1889 Duluth; to international line between Lake of the Woods and Red R of the
North; *Duluth & Winnipeg Ry*
 - 26 Stat 126 1. Winnipigoshish, Cass Lake, White Oak Point & Red Lake
6/2/1890 Indian Reservations - 50' @ ROW to *Duluth & Winnipeg RR*
 - 26 Stat 290 1. Mille Lacs Indian Reservation - 75' @ ROW to *Little Falls, Mille*
9/26/1890 *Lacs & Lake Superior Ry*
 - 26 Stat 660 1. Red Lake Indian Reservation - 100' ROW from pt on W line IR in
10/1/1890 T152 or 153, R42 or 43; NE'ly to Red Lake River; *Red Lake & Western*
Ry & Navigation Co
 - 28 Stat 099 1. Leech Lake Indian Reservation - 50' @ ROW from pt on S line IR;
7/6/1894 NW'ly thru secs 13, 12, 1, 1 T141 R31 to pt on W line IR in sec 2;
Brainerd & Northern Minnesota Ry
 - 28 Stat 112 1. White Earth, Leech Lake, Chippewa and Fond du Lac Indian
7/18/1894 Reservation - NTE 100' ROW to *St Paul, Minneapolis & Manitoba Ry*
 - 28 Stat 489 1. Leech Lake, Chippewa & Winnebago Indian Res - 50' @ ROW to
8/23/1894 *Northern Mississippi Ry*
 - 28 Stat 504 1. Chippewa & White Earth Indian Res - 50' @ ROW from pt on existing
8/27/1894 line; W'ly or NW'ly to pt on W bdy Minn or to pt on N bdy between Red R
of the North and Lake of the Woods, or to both such points; *Duluth &*
Winnipeg RR
 - 29 Stat 012 1. Leech Lake & Chippewa Indian Reservations - 50' @ ROW
2/12/1896 from pt on S line LL IR; NW'ly thru sec. 11 T141 R31 to pt on W line LL
IR in sec. 2
 - 2. From pt on S line C IR in T142, R31W; NW'ly thru T143N R31-32W to pt on
W line C IR; *Brainerd & Northern Minnesota Ry*
 - 29 Stat 092 1. Winnibago Indian Reservations - 50' @ ROW to *Duluth & North Dakota RR*
4/2/1896

APPENDIX 1

MISSISSIPPI

- 5 Stat 065 1. Granted to the *New Orleans and Nashville Rail-road Company*
2/2/1836 incorporated by the several States through which the said road is intended to pass, the right of way through such portions of the public lands as remain unsold.
- 9 Stat 237 1. Brandon to E bdy of Mississippi (Jackson to Brandon to bdy toward
6/16/1848 Montgomery, AL)
- 9 Stat 466 1. From the southern terminus of the Illinois and Michigan Canal to a
9/20/1850 point at or near the junction of the Ohio and Mississippi Rivers;
2. Branch of the same to Chicago, on Lake Michigan;
3. Branch via the town of Galena in said State, to Dubuque in the State of Iowa.
4. Amended by 11 Stat 384; 2/18/1859.
- 11 Stat 030 1. From Jackson to the line between the State of Mississippi and the State
8/11/1856 Alabama.
2. From Tuscaloosa to the *Mobile railroad* within Mississippi.
3. From Brandon to the Gulf of Mexico.
4. From the city of Mobile to New Orleans.

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 27 Stat 253 1. Pensacola Military Reserve Area - FL, AL, MS, TN
7/21/1892 100' ROW to *Mexican Gulf, Pacific & Puget Sound RR* thru lands of the US in FL, AL, MS, Tn and through Reservations lying near Pensacola, FL; line thry Mil Res subj to Secy Navy or War

MISSOURI

- 5 Stat 065 1. Granted to the *New Orleans and Nashville Rail-road Company*
2/2/1836 incorporated by the several States through which the said road is intended to pass, the right of way through such portions of the public lands as remain unsold.
- 10 Stat 008 1. From the town of Hannibal to the town of St. Joseph.
6/10/1852 2. From the city of St. Louis to such point on the western boundary of said State as may be designated by the authority of said State.
- 10 Stat 155 1. From a point on the Mississippi River, opposite the mouth of the Ohio,
2/9/1853 State of Missouri, via Little Rock, to the Texas boundary line near Fulton, in Arkansas;
2. Branch from Little Rock, in Arkansas, to the Mississippi River.
3. Branch from Little Rock, in Arkansas, to Fort Smith.
- 10 Stat 754 1. 60' ROW over St Louis Arsenal, Hospital & Jefferson Barracks, MO;
2/14/1853 Subj to Secy War; *St Louis & Iron Mtn RR*
- 12 Stat 489 1. From Saint Joseph, via Atchison, to connect and unite with the road
7/1/1862 through Kansas; *Hannibal and Saint Joseph Railroad Company of Missouri*

APPENDIX 1

- 14 Stat 83 1. From its present terminus at Pilot Knob to a point on the southern
7/4/1866 boundary of the State; *Iron Mtn RR*
- 14 Stat 292 1. To construct RR from at or near Springfield, MO, to W bdy MO, by
7/27/1866 best route to point on Canadian R, thence to Albuquerque, NM, thence via
the Aqua Frio or other suitable pass, to head-waters of the Colorado
Chiquito, thence along 45th parallel to Colorado River, thence to the
Pacific; *Atlantic & Pacific RR*
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR* and Co.s constructing branches
7/26/1866 over and upon military reserves through which the RR may pass

MONTANA

- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory
of the US, on a line north of the 45 degree latitude to some point on Puget's
Sound, with a branch, via the valley of the Columbia River, to a point at or
near Portland, in the State of Oregon, leaving the main trunk-line at the most
suitable place, not more than 300 miles from its western terminus;
Northern Pacific RR (Pre April 1904 sales confirmed by act 4/28/1904)

The following are likely to be Exclusive Easements

- 17 Stat 212 1. From Corinne City, UT, by way of Malade River and Snake River
6/1/1872 Valleys through Utah, Idaho, and Montana Territories to a connection with
the *NP RR* or the *Helena & Utah Northern RR*.
- 17 Stat 612 1. Extend line via Bear River Valley, Soda Springs, Snake River valley
3/3/1873 through Montana Territory to connect with the *NP RR*.
- 24 Stat 402 1. From Minot across Ft Berthold Res N of Tp line 153/154 N; along
2/15/1887 Missouri R to valley of Milk River; along valley to Ft Assiniboine; SW'ly
to the Great Falls of the Missouri River; *St Paul, Minnesota & Manitoba RR*
2. Same grant over Mil Res but rte first approved by Secy War
- 24 Stat 545 1. Crow Reservation - ROW, 75 ft @ side c/l, from near Laurel to mouth
3/3/1887 Rock Creek; up creek to coal mines near Red Lodge PO; thence to Cooke
City; *Rocky Fork & Cooke City Ry*
- 25 Stat 094 1. Division of Sioux Reservation - confirms *Chicago, Milwaukee & St*
4/30/1888 *Paul RR & Dakota Central RR* prior agreements w/Indians, gives first right
to ROW over PL for existing/planned routes.
- 25 Stat 167 1. Crow Indian Reservation - 75 ft @ ROW - from N line Reservation
6/4/1888 where Clark's Fork enters Yellowstone R; S'ly to near where Clark's Fork
crosses S line Res.
2. Branch: POB where Bear Creek enters Clark's Fork; 10 miles up Bear Creek;
Billings, Clark's Fork & Cooke City RR
- 25 Stat 660 1. Crow Indian Reservation - 75 ft @ ROW from *NP RR* near mouth of
2/12/1889 Big Horn R, Yellowstone Co; up river to near mouth Little Big Horn R; up
river to near mouth Owl Creek; up creek to and across Ind Res bdy; *Big
Horn Southern RR*
- 25 Stat 690 1. Fort Custer Military Reservation - 100 ft ROW through Ft Custer; *Big*
2/23/1889 *Horn Southern RR*

APPENDIX 1

- 26 Stat 1091 1. Flathead Indian Reservation - 75'@ ROW from pt near mouth
3/3/1891 Jocko River on the NPRR in Missoula County; N'yly to s end Flathead Lake;
either W or E side of Lake N'yly to N bdy Montana; *Missoula & Northern
RR*
- 27 Stat 529 1. Crow Indian Reservation - Amd Act 2/12/1889 - *Big Horn*
3/1/1893 *Southern RR*
Extend time for 2 years from 12/20/1892
2. Change route POB: pt on Yellowstone R in Yellowstone Co.; across IR to valley
of Big Horn R; up valley & across Ft Custer Mil Res; up valley of Little Big
Horn R & tributary to and across S bdy IR
3. Branch from Ft Custer or pt in valley of Little Big Horn: Sw'yly or W'yly to bdy of
IR ROW over Mil Res subject to Secy War

NEBRASKA

- 12 Stat 489 1. Commencing at a point on the one hundredth meridian of longitude
7/1/1862 west from Greenwich, between the south margin of the valley of the
Republican River and the north margin of the valley of the Platte River, in
the Territory of Nebraska, at a point to be fixed by the President of the
United States, after actual surveys; thence running westerly upon the most
direct, central, and practicable route, through the territories of the United
States, to the western boundary of the Territory of Nevada; *Union Pacific
Railroad*
2. From the Missouri River, at the mouth of the Kansas River, on the south side
thereof to the UP RR at the one hundredth meridian; *Leavenworth, Pawnee,
and Western Railroad*
3. From a point on the western boundary of the State of Iowa, to be fixed by the
President of the United States to form a connection with the lines at some point
on the one hundredth meridian; *Union Pacific Railroad Company*
4. From Sioux City [Iowa] upon the most direct and practicable route to a point on,
and so as to connect with, the branch railroad or with the Union Pacific Railroad;
Pacific Railroad Company
- 13 Stat. 356 1. Extend road through the Territory of Nebraska from the point where it
7/2/1864 strikes the Missouri River, south of the mouth of the Platte River, to some
point not further west than the 100th, so as to connect with the main trunk of
the UP RR or that part which runs from Omaha to the 100th; *Burlington
and Missouri River RR*
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR and Co.s* constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass
- 16 Stat 118 1. May change portion that lies west of Lincoln, NE, to connect with the
5/6/1870 *UP RR* at or near Ft Kearney reservation

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- The following should be reviewed as to whether they are Limited Fee
- 24 Stat 434 1. 100 ft ROW over Ft Meade Mil Res; *Fremont, Elkhorn & Missouri*
2/28/1887 *Valley RR*
- 28 Stat 095 1. Omaha & Winnebago Indian Reservations - 50'@ ROW to
6/27/1894 *Eastern Nebraska & Gulf Ry*
- 29 Stat 095 1. Sac & Fox & Iowa Indian Reservations - 50'@ ROW to *Atchison*
4/7/1896 *& Nebraska RR* (lessee is *Chicago, Burlington & Quincy RR*)

APPENDIX 1

- 30 Stat 344 1. Omaha & Winnebago Indian Reservations - 50" @ ROW to
3/26/1898 *Omaha Northern Ry*; Route to be approved by Secy Int
- 30 Stat 912 1. Omaha & Winnebago Indian Reservations - 100' ROW from pt
2/28/1899 near Decatur, Burt Co, NE; N'y & W'y thru Irs to pt on N line of Irs in
Thurston Co.; *Sioux City & Omaha Ry*

NEVADA

- 12 Stat 489 1. Commencing at a point on the one hundredth meridian of longitude
7/1/1862 west from Greenwich, between the south margin of the valley of the
Republican River and the north margin of the valley of the Platte River, in
the Territory of Nebraska, at a point to be fixed by the President of the
United States, after actual surveys; thence running westerly upon the most
direct, central, and practicable route, through the territories of the United
States, to the western boundary of the Territory of Nevada; *Union Pacific
Railroad*
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR* and Co.s constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass

The following are likely to be Exclusive Easements

- 17 Stat 393 1. From Elko to Hamilton.
6/10/1872
- 18 Stat 306 1. From Winnemucca, on the CP RR, thence NW'y to and across Goose
2/5/1875 Lake valley, by way of Sprague River valley, to the waters of the Middle
Fork of the Willamette River, in the Cascade Mtns; thence down river on the
N side to Springfield; thence crossing and continuing upon the W side of
river to waters of the Columbia River, via Portland, OR.

NEW MEXICO

- 14 Stat 292 1. From at or near Springfield, MO, to W bdy MO, by best route to point
7/27/1866 on Canadian R, thence to Albuquerque, NM, thence via the Aqua Frio or
other suitable pass, to head-waters of the Colorado Chiquito, thence along
45th parallel to Colorado River, thence to the Pacific; *Atlantic Pacific
Railroad*
- 16 Stat 573 1. From a point at or near Marshall, Harrison Co, TX, thence by route
3/3/1871 near the 32nd parallel to a point at or near El Paso, TX, thence through NM
and AZ to a point on the Rio Colorado, at or near the SE bdy of CA, thence
to San Diego, CA to ship's channel, in the bay of San Diego; pursuing in
location as near as may be the 32nd parallel; *Texas Pacific Railroad*

The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements

- 17 Stat 339 1. For extending line through contiguous territory of US to northern bdy
6/8/1872 Mexico.
- 17 Stat 343 1. From NW bdy NM (jct San Juan and Rio Mancos), through Santa Fe

APPENDIX 1

- 6/8/1872 county, down Pecos River to point river enters TX (near 32nd parallel)
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- 24 Stat 068 1. The following are likely to be Exclusive Easements
5/18/1886 100' ROW over Ft Selden Mil Res; Rio Grande, Mexico Pacific RR

NEW YORK

- 10 Stat 028 1. Through the public land of the United States lying in Black Rock, in
8/4/1852 county of Erie.
- 15 Stat 033 1. On the Shore line, across the property belonging to the government at
12/14/1867 West Point, in the State of New York
- 15 Stat 060 1. Construct over military land at Plattsburgh, NY
5/20/1868
- 15 Stat 345 1. Through the public land at Ft Oswego.
2/19/1869
- 17 Stat 345 1. The north 25 acres of lands owned by US in Plattsburgh, Clinton
6/8/1872 county, NY, and situated upon the westerly banks of Lake Champlain,
together with a ROW from the south thereto.

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- The following are likely to be Exclusive Easements
- 27 Stat 527 1. Fort Montgomery Military Reservation - 100' ROW Subj to act
3/1/1893 7/28/1893 authorizing Secy War to lease public property. *Champlain & Saint Lawrence RR*

NORTH DAKOTA

- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory
of the US, on a line north of the 45 degree latitude to some point on Puget's
Sound, with a branch, via the valley of the Columbia River, to a point at or
near Portland, in the State of Oregon, leaving the main trunk-line at the most
suitable place, not more than 300 miles from its western terminus; *Northern
Pacific Railroad* (Pre April 1904 sales confirmed by act 4/28/1904)

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- The following are likely to be Exclusive Easements
- 17 Stat 202 1. *Dakota Grand Trunk RR* to extend its routes in accordance with its
6/1/1872 Terr charter
- 24 Stat 402 1. from Minot across Ft Berthold Res N of Tp line 153/154 N; along
2/15/1887 Missouri R to valley of Milk River; along valley to Ft Assiniboine; SW'y
to the Great Falls of the Missouri River; *St Paul, Minnesota & Manitoba RR*
2. Same grant over Mil Res but rte first approved by Secy War
- 25 Stat 094 1. Division of Sioux Reservation - confirms *Chicago, Milwaukee & St
4/30/1888 Paul RR & Dakota Central RR* prior agreements w/Indians, gives first right
to ROW over PL for existing/planned routes.
- 26 Stat 179 1. Fort Pembina Military Reservation - NTE 100' ROW to *Duluth*

APPENDIX 1

6/25/1890 & Manitoba RR

OHIO

- 10 Stat 754 1. 60' ROW to *Cleveland & Pittsburgh RR*
2/14/1853 60' ROW to *Cleveland, Painesville & Astabula RR*
over Hospital Grounds, Cleveland, OH; Subj to Secy Treasury
- 12 Stat 569 1. The bridge partially constructed across the Ohio River at Steubenville.
7/14/1862

OKLAHOMA

[The 1906 Act settling the land titles for the five civilized tribes provides for resolution of title upon abandonment of the Railroad.]

- 14 Stat 236 1. From the eastern terminus of the UP RR, eastern division, at the line
7/25/1866 between Kansas and Missouri, at or near the mouth and on the S side of the
Kansas River, westwardly through the eastern tier of counties, with a view
of its extension to effect a junction at Red River with a RR now being
constructed from Galveston to Red River at or near Preston, TX.
- 14 Stat 289 1. Across Indian Terr, only with consent of Indians, along the valley of
7/26/1866 Grant and Arkansas Rivers, to Fort Smith.
- 14 Stat 292 1. Branch RR at point RR strikes Canadian R eastward to W bdy
7/27/1866 Arkansas at or near Van Bruen
- 37 Stat 131 1. Over SW29 and SE30 T14N R20W Indian Meridian *Clinton &*
7/10/1912 *Oklahoma Western Ry Co*

Most of the following fall within or partially within the five civilized tribe settlement. All should be reviewed as to whether they are Limited Fee.

- 24 Stat 073 1. from Ft Smith nw'ly to pt on N bdy IT between Arkansas R and
6/1/1886 Caney River.
2. Branch line to connect with SoKansas Ry near Coffeyville, KN; *Kansas & Arkansas Valley Ry* [see 26 Stat 783]
- 24 Stat 117 1. from point on Red River near Dennison toward Ft Smith to intersect
7/1/1886 with *StL & SF Ry; Denison & Washita Valley Ry*
- 24 Stat 419 1. 100 ft ROW from pt on S bdy IR between W line Wichita Co, TX and
2/24/1887 100th Meridian, to pt on S bdy Kansas W of W line of Comanche Co. KN;
FW&DC Ry
- 24 Stat 446 1. 100 ft ROW: from pt on N line I T near 101st Meridian/Kansas State
3/2/1887 line; SW'yly toward El Paso; also starting on Kansas Line near Caldwell t Ft
Reno then SW'yly toward Cisco, TX; *Chicago, Kansas & Nebraska Ry*
- 25 Stat 035 1. 100 ft ROW; POB pt on S bdy @ Red River @ Rocky Cliff to pt on E
2/18/1888 bdy @ Polk or Sieve Co., Ark
2. Branch from main line NW'yly to leased coal in Bucksey Co, Choctaw Nation;

APPENDIX 1

- Choctaw Coal & Ry* [see 25 Stat 668]
- 25 Stat 140 1. 100 ft ROW - POB S bdy KN, Co of Labette or Montgomery or near
5/14/1888 Coffeyville; to S bdy Ind Terr w/in 3 miles of where Denison & Whichita Valley Crosses the Red River
2. Branch @ Ockmulgee; W'ly to S bdy Ind T near mouth of N Fork Red River;
Kansas City & Pacific RR
- 25 Stat 162 1. 100 ft ROW from Ft Smith; to crossing of the Missouri, Kansas &
5/18/1888 Texas RR near Savanna; W'ly to near Cherokee Town; W'ly near SW corner Ind Terr; *Fort Smith & El Paso Ry*
- 25 Stat 205 1. 100 ft ROW - from pt on Red R near Hook's Ferry; NE'ly toward Hot
6/14/1888 Springs & Little Rock, AR; to point on E bdy Ind Terr; *Paris, Choctaw & Little Rock Ry*
- 25 Stat 668 Amd act 2/18/1888 [25 Stat 035] for route for *Choctaw Coal & Ry Co*
2/13/1889 to read:
1. From point on Red R (S bdy Ind Terr) at Rocky Cliff (bluff) to point on E bdy contiguous to W bdy Arkansas,
2. Branch from Main line W'ly or NW'ly to leased coal in Tobucksey Co, Choctaw Nation; thence to intersect with AT&SF RR between Halifax Station and Ear Creek (N fork Canadian R).
- 25 Stat 745 1. 100 ft ROW from Ft Smith to near Baxter Springs (Cherokee Co);
2/26/1889 *Fort Smith, Paris & Dardanelly Ry*
2. Repeals act (Vol 24 pg 124) authorizing the Kansas City, Fort Scott & Gulf Ry to construct through Ind Terr
- 26 Stat 147 1. Amd Act 7/1/1886, 24 Stat. 117 - *Denison & Washita Vally Ry*
6/12/1890 Extends ROW to include from terminus in 7/1/1896 act pt intersect w/projected line of *St Louis & San Francisco RR* from Ft Smith to Paris, TX; NE'ly to Ft Smith, AR.
2. Branch from pt on main line not exceeding 50 mi from Red R; NW'ly thru Ind Terr to pt on S line Kansas near 100th Mer.
- 26 Stat 170 1. 100' ROW from any pt on S line Cherokee Co., Kansas, near SW cor
6/21/1890 lot 3, S14 T35 R24E; thru Ind Terr to W line IR, via or near Guthrie and Kingfisher or Lisbon; *Galena, Guthrie and Western Ry*
- 26 Stat 184 1. 100' ROW from pt near SW cor lot 4 S14 T35 R23E on S line of
6/30/1890 Kansas; thru IT via Afton & Tahelquah to pt on Arkansas R near Ft Smith; *Pittsburgh, Columbus & Ft Smith Ry*
- 26 Stat 485 1. 100' ROW from pt on N line of IT, S of Anthony, KN; to connection
9/26/1890 with Chicago, Kansas & Nebraska RR near Pond Creek; to connect with Santa Fe RR near Guthrie; *Hutchinson & Southern RR*
- 26 Stat 632 1. 100' ROW from pt on N line TX in Grayson or Cooke Co at suitable
10/1/1890 crossing of Red River; N'ly thru coal fields near Ardmore, between the Mo., KN & Tx and Gulf, CO & SF Rys to S line Kan at pt in Cowley Co; *Sherman & Northwestern Ry*
- 26 Stat 783 1. Add'l ROW to *Kansas & Arkansas Valley Ry* [see 24 Stat 073;
2/24/1891 6/1/1886] 100' ROW from pt on present main line near Wagoner; W'ly & NW'ly near Guthrie, near Fort Supply Mil Res, to pt on W bdy Ind Terr
2. Branch from pt on above line; SW'ly near Oklahoma City near Fort Reno Mil Res to pt on W bdy Ind Terr
3. Branch from pt on main line near Fort Gibson; SW'ly thru Cherokee, Creek, Choctaw & Chickasaw counties to pt on S bdy Ind Terr
- 26 Stat 844 1. 100' ROW from Town of Rodgers, Benton Co., AR; W'ly via

APPENDIX 1

- 3/3/1891 Bentonville to E bdy Cherokee Nation near mile post 22; thence via Tahlequah, Cherokee Nation, to Fort Gibson; *Fort Gibson, Tahlequah & Great Northern Ry*
- 27 Stat 002 1. Amd act 9/26/1890, 26 Stat. 485; *Hutchison & Southern RR*
2/3/1892 Extends RR line from pt within 20 miles of connection with Santa Fe RR near Guthrie; SE'y or S'y to S bdy IT near Denison, TX
- 27 Stat 336 1. 100' ROW from pt on Red R near Denison; N'y to S bdy Kansas near
7/30/1892 Coffeerville
2. Branch from pt +/- 20 miles N of Red R on Main line; NW'y to W line IT near Canadian R; *Denison & Northern Ry*
- 27 Stat 465 1. 100' ROW from pt on Red R N of W part of Cooke Co., TX; NW'y
2/20/1893 to pt on S bdy Kansas; *Gainesville, Oklahoma & Gulf Ry*
- 27 Stat 487 1. 100' ROW from pt on S line Cherokee Co near Galena, KN; S'y thru
2/27/1893 IT or AR/IT to pt on Red R near Clarksville, TX; *Kansas City, Pittsburgh & Gulf RR*
- 27 Stat 492 1. 100' ROW from pt near Chicasha Station; SE'y to S line IT in
2/27/1893 direction of Dallas, TX
2. From pt near Chicasha Station; W'y or SW'y to W or S line of OK Terr; *Chicago, Rock Island & Pacific Ry*
- 27 Stat 524 1. 100' ROW from pt on Red R N or E part of Cooke Co., TX, or W part
3/1/1893 of Grayson Co., TX; NE'y to pt on W bdy AR; *Gainesville, McCallester (McAlester) & St Louis Ry*
- 27 Stat 747 1. 100' ROW from pt on W line Sebastian Co., AR (S of Ft Smith); W'y
3/3/1893 thru IT & OK T to pt on W line OK T between the N Canadian & Washita Rs
2. Branch from main line in Choctaw Nation; S'y or SW'y to pt on Red R near Denison, TX
3. Branch from pt in Seminole Nation near Wewoha R; N'y or NW'y to pt on S line Kansas near Otto, KN; *Interoceanic Ry*
- 28 Stat 022 1. 100' ROW from pt on S line KN in Montgomery Co on S line Sec 13
12/21/1893 or 14 T 35 R13E or S line sec. 13 or 14 T35 R16E, 6th PM; thru IT to W bdy;
Limited Fee? S'y or SW'y thru OK T to pt on Red R between TX and Comanche/Apache IR, OK T via Stillwater, Guthrie & Elreno in OK T & thru the Osage, Pawnee, Wichita, Comanche & Apache IRs and thru counties of Payne, Logan, Oklahoma & Canadian in OK T; *Kansas, Oklahoma Central & Southwestern Ry*
- 28 Stat 229 1. 100' ROW from pt on Red R N of N bdy Montague Co., TX; NE'y to
8/4/1894 pt on W bdy AR; *Arkansas, Texas & Mexican Central Ry*
- 29 Stat 006 1. Amd Act 2/27/1893, 27 Stat. 487 - *Kansas City, Pittsburgh & Gulf RR* - Adds
Branch from pt on main line S of Arkansas R and N of town of Poteau; to Ft Smith, AR w/bridge over Poteau R
2. Spur from above branch about 4 miles NE of Scullyville to pt on W line AR about 10 miles S of Ft Smith w/bridge over Poteau R
- 29 Stat 013 1. 100' ROW from pt bdy line Choctaw Nation & Little River Co., AR;
2/12/1896 NW'y to near Atoka; *Arkansas & Choctaw Ry*
- 29 Stat 040 1. 100' ROW from pt on W bdy AR near Ft Smith; thru Choctaw Nation
3/2/1896 SW'y thru counties of Scullyville, Sans Bois, Gaines & Tobuckey to pt on the MO, KN & TX Ry between McAlester & S Canadian w/bridge over Poteau R; *Fort Smith & Western Coal RR*
- 29 Stat 069 1. 100' ROW from pt near Sapulpa, IT by way of Chandler and

APPENDIX 1

- 3/6/1896 Oklahoma City to pt on Red R near W line Kiowa & Commanche Res;
 Limited Fee? *St Louis & Oklahoma City RR*
- 29 Stat 077 1. 50'@ ROW from pt on S line KN near Baxter Springs; to town of
 3/28/1896 Miami, IT; *Kansas City, Fort Scott & Memphis RR*
 Limited Fee?
- 29 Stat 080 1. 100' ROW from pt between Claremore & Sapulpa on *the St Louis &*
 3/25/1896 *San Francisco RR*; W'ly and S'ly thru/near the Cherokee, Creek, Seminole
 & Chicksaw Nations; to pt near Stonewall; to pt on Red R near Willis IT;
 Thru TX to pt near Aransas Pass, TX
2. Branch from pt on main line between Okmulgee & Saskwa; SW'ly thru I & O T
 to pt near Purcell, Chicksaw Nation OR to intersect ATSF RR between Norman
 & Ardmore; SW'ly to N side Wilbarger Co., TX' to E line New Mexico Terr;
 thry NM to pt near El Paso, TX; *St Louis, Oklahoma & Southern Ry*
- 29 Stat 087 1. 100' ROW from pt near Southwest City, McDonald Co., MO; NW'ly
 3/25/1896 thru IT to pt between Chetopa & Baxter Springs, KN; *Arkansas*
Northwestern Ry
- 30 Stat 241 1. 100' ROW from pt near Red Fork, Creek Nation; thru Creek Nation &
 2/14/1898 Oklahoma T to Guthrie; *Muscogee Coal & Ry*
- 30 Stat 341 1. 100' ROW from pt on Red R near Denison, TX; N'ly thru I T to S bdy
 3/23/1898 KAN at pt in S line Chantauqua Co.
2. Branch from pt w/in 35 miles N of Red R on main line; NW'ly to Ft Sill, OK T;
Denison, Bonham & New Orleans Ry
- 30 Stat 347 1. 100' ROW from pt on S line Harper Co., KN; S'ly & SE'ly thru I & O
 3/30/1898 T to pt near Denison, TX; to Galveston, TX; *Nebraska, Kansas & Gulf Ry*
- 30 Stat 492 1. Chilocco Indain Reservation - 100' ROW is hereby granted to *Kansas,*
 6/27/1898 *Oklahoma & Gulf Ry*; Maps to be approved by Secy Int
 Limited Fee?
- 30 Stat 806 1. 100' ROW from pt on bdy between Choctaw N and Little River Co.,
 1/28/1899 AR; W'ly thru Choctaw & Chickasaw N to pt on W bdy Chichasaw N near
 Sugden; *Arkansas & Choctaw Ry*
- 30 Stat 816 1. 100' ROW from pt where RR intersects bdy AR/Choctaw N in Little
 2/4/1899 River Co., AR; W'ly thru Choctaw N to pt near Atoka; NW'ly up valley of
 Washita R thru Choctaw and Chickasaw N to bdy Chichasaw and Ok T
2. Branch from main line opposite Clarksville & Paris, TX
3. Branch from main line in Choctaw to Red R on bdy TX/Choctaw N; *Little*
River Valley Ry
- 30 Stat 844 Amd acts 12/21/1893, 28 Stat. 022, & 2/15/1897 - *Kansas, Oklahoma*
 2/21/1899 *Centrral & Southwestern Ry*
 Limited Fee? Ext time to 3 years after 12/21/1898
 §3 act 2/15/1897 amd to describe
1. Branch from pob near Bartlesville, I T; S'ly or SE'ly thru Cherokee I N and thru
 Creek, Ceminole & Chickasaw N to pt on TX line & on Red R; to Sherman TX
 by way of Collinsville, Okmulgee, Wewoka & Tishomingo
2. Branch from near Stillwater, OK T; S or SW'ly thru Lincoln, Pottawatomie &
 Cleveland to pt on S line OK T/Canadian R/N bdy Chickasaw N; S or SW'ly
 thru Chickasaw to pt on N bdy TX/Red R; to Henrietta, TX by way of Chandler
 and Shawnee in OK T and Pauls Valley, I T
- 30 Stat 1368 1. 100' ROW from pt on W bdy AR near Ft Smith; thry Choctaw N
 3/3/1899 SW'ly and W'ly thru counties of Skullyville, San Bois, Gaines & Tobucksy
 (crossing MO, KN & TX Ry); W'ly to S Canadian R; NW'ly thru Creek

APPENDIX 1

- Nation to pt on W bdy near Sac & Fox Agency
2. Branch from pt in Choctaw N to connect with *St Louis & San Francisco RR* between Cedar Station & Backbone Tunnel; *Ft Smith & Western RR*

OREGON

- 12 Stat 577 1. Through the public lands of the United States lying in Wasco County
7/15/1862 be, and the same is hereby, granted to the *Oregon Steam Navigation Company*.
- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory of the US, on a line north of the 45 degree latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than 300 miles from its western terminus; *Northern Pacific RR* (Pre April 1904 sales confirmed by act 4/28/1904)
- 14 Stat 239 1. From Portland southerly through Willamette, Umpqua and Rouge
7/25/1866 River valleys to S bdy OR; *C&O RR (OR)*
- 16 Stat 057 1. From near Portland, OR, to some suitable point on Puget Sound; also
4/10/1869 to connect with the *NP Main Line* west of the Cascade mountains in Washington Terr.
- 16 Stat 094 1. From Portland to Astoria.
5/4/1870
2. From a suitable junction near Forest Grove to the Yamkill River near McMinnville; *Portland to Astoria and McMinnville RR*
- 23 Stat 296 1. Those lands adjacent and conterminous to uncompleted portions of the
1/31/1885 *Portland to Astoria and McMinnville RR* (act 5/4/1870, 16S94) are declared forfeit and restored to PD

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 17 Stat 052 1. From Portland, OR, by way of Dalles city to some suitable point on
4/12/1871 the *UP* or *CP RR* in the vicinity of Salt Lake, not further east than Green river, with a branch from a suitable point west of the Blue mountains to a suitable point in Walla-Walla valley.
- 18 Stat 306 1. From Winnemucca, on the *CP RR*, thence NW'ly to and across Goose
2/5/1875 Lake valley, by way of Sprague River valley, to the waters of the Middle Fork of the Willamette River, in the Cascade Mtns; thence down river on the N side to Springfield; thence crossing and continuing upon the W side of river to waters of the Columbia River, via Portland, OR.
- 25 Stat 347 1. Siletz Indian Reservation - 75 ft @ ROW - from E line Ind Res at
6/14/1888 Rock Creek; W'ly down vallies of Rock Cr and Siletz R to W bdy Ind Res near SW corner; *Newport & King's Valley RR*
- 26 Stat 663 1. Siletz Indian Reservation - 75'@ ROW from pt on E line where
10/1/1890 Rock Cr crosses; w'ly down creek valley and valley of Siletz River to W line IR near SW corner; *Newport & King's Valley RR*
- 28 Stat 087 1. Grand Ronde Indian Reservation - NTE 100' ROW to *Albany &*
6/6/1894 *Astoria RR* Per map filed w/Secy Int

APPENDIX 1

PENNSYLVANIA

- 10 Stat 754 1. ROW over grounds of US at or near Allegheny Arsenal, Allegheny
2/14/1853 Co., PA; Route subj to Secy War; *Allegheny Valley RR*
- 18 Stat 280 1. Extend its tracks over and occupy the ground between the present
6/23/1874 track and the Allegheny River within the Allegheny Arsenal, Allegheny Co,
PA.; adds to 10 Stat 754; 2/14/1853. *Allegheny Valley RR*
- 24 Stat 050 1. 30' ROW thru Arsenal grounds at Bridesburg, Philadelphia;
5/17/1886 *Kensington & Tacony RR*

SOUTH DAKOTA

- 20 Stat 032 1. from W line State of Minn to and into Sioux Falls, in Dakota Terr so
4/2/1878 as to form a continuous RR line from Nobles County to SF

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 17 Stat 162 1. From Sioux City, IA, by way of Yankton, to west line of Bon Homme
5/27/1872 county
- 17 Stat 202 1. *Dakota Grand Trunk RR* to extend its routes in accordance with its
6/1/1872 Terr charter.
- 25 Stat 094 1. Division of Souix Reservation - confirms *Chicago, Milwaukee & St
4/30/1888 Paul RR & Dakota Central RR* prior agreements w/Indians, gives first right
to ROW over PL for existing/planned routes.

The following are likely to be Exclusive Easements

- 25 Stat 684 1. Yankton Indian Reservation - 100 ft ROW from point on E bdy Ind
2/23/1889 Res between NE corner and 1 mile S of jct with fork Choteau Creek with E
Fork; W'yly or NW'yly across Ind Res; *Yanktown & Missouri Valley Ry*
- 25 Stat 852 1. Sioux Indian Reservation - 75 ft @ ROW from point on W bank
3/3/1889 Missouri R in Dewey Co, opposite Forest City; SW'yly between Cheyenne &
Moreau Rs to Deadwook, Dakota; *Forest City & Watertown RR*
- 28 Stat 653 1. Sioux Indian Reservation - 50' @ ROW from pt on W bank
2/12/1895 Missouri R in Dewey Co., SD opposite Forest City; SW'yly between
Cheyenne & Moreau Rs to Deadwood or Rapid City; *Forest City & Sioux
City RR*
2. Also grants ROW on PL per 3/3/1875 Act

TENNESSEE

- 27 Stat 253 1. Pensacola Military Reserve Area - FL, AL, MS, TN
100' ROW to *Mexican Gulf, Pacific & Puget Sound RR* thru lands of the US
in FL, AL, MS, Tn and through Reservations lying near Pensacola, FL; line
thru Mil Res subj to Secy Navy or War

APPENDIX 1

TEXAS

[Although no public lands should have existed in Texas, there were acquired lands.]

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- The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements
- 16 Stat 573 1. From a point at or near Marshall, Harrison Co, TX, thence by route
3/3/1871 near the 32nd parallel to a point at or near El Paso, TX, thence through NM and AZ to a point on the Rio Colorado, at or near the SE bdy of CA, thence to San Diego, CA to ship's channel, in the bay of San Diego; pursuing in location as near as may be the 32nd parallel; *Texas Pacific RR*
2. From New Orleans to Baton Rouge, via Alexandria, to *TP RR* eastern terminus.
- 24 Stat 404 1. 100 ft ROW over Ft Bliss Mil Res ; *Rio Grande & El Paso RR*
2/17/1887
- 29 Stat 386 1. Fort Bliss Military Reservation - 100' ROW to *El Paso &*
6/10/1896 *Northeastern RR*; Subj to Secy War

UTAH

- 12 Stat 489 1. Commencing at a point on the one hundredth meridian of longitude
7/1/1862 west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada; *Union Pacific RR*
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR* and Co.s constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass
- 16 Stat 395 1. From point at or near Odgen to Salt Lake City
12/15/1870

-
- The following are likely to be Exclusive Easements
- 17 Stat 052 1. From Portland, OR, by way of Dalles city to some suitable point on
4/12/1871 the UP or CP RR in the vicinity of Salt Lake, not further east than Green river, with a branch from a suitable point west of the Blue mountains to a suitable point in Walla-Walla valley.
- 17 Stat 212 1. From Corinne City, UT, by way of Malade River and Snake River
6/1/1872 Valleys through Utah, Idaho, and Montana Territories to a connection with the *NP RR* or the *Helena & Utah Northern RR*.
- 20 Stat 241 1. road by way of Marsh Valley, Portneuf River and Snake River Valley
6/20/1878 instead of by the way of Soda Springs and Snake River Valley as originally granted
- 24 Stat 477 1. 100 ft ROW over Ft Douglas Mil Res; *Salt Lake & Fort Douglas Ry*
3/3/1887
2. 100 ft ROW over s24, Es26 T1R1E; Ss8, Ws20, Ns30 T1R2E; *Salt Lake & Fort Douglas Ry*

APPENDIX 1

- 24 Stat 548 1. Uncompahgre & Uintak Reservations - ROW, 75 ft @ side, from pt on
3/3/1887 E bdy near White River; w'ly toward SLC; *Utah Midland Ry*

WASHINGTON

- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory of the US, on a line north of the 45 degree latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than 300 miles from its western terminus; *Northern Pacific RR* (Pre April 1904 sales confirmed by act 4/28/1904)
- 15 Stat 325 1. From Walla Walla, WN, to some eligible point on the navigable
3/3/1869 waters of the Columbia R
- 16 Stat 057 1. From near Portland, OR, to some suitable point on Puget Sound; also
4/10/1869 to connect with the *NP* Main Line west of the Cascade mountains in Washington Terr.
- 16 Stat 378 1. locate and construct its main road to some point on Puget Sound, via
5/31/1870 the valley of the Columbia river, with branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; see 13S365

The following should be closely reviewed as to whether they are Limited Fee or Exclusive Easements

- 17 Stat 052 1. From Portland, OR, by way of Dalles city to some suitable point on
4/12/1871 the *UP* or *CP RR* in the vicinity of Salt Lake, not further east than Green river, with a branch from a suitable point west of the Blue mountains to a suitable point in Walla-Walla valley.
- 17 Stat 612 1. Extend line via Bear River Valley, Soda Springs, Snake River valley
3/3/1873 and through Montana Territory to connect with the *NP RR*.
- 19 Stat 072 1. through the lands of the Fort Walla Walla military reservation
7/3/1876

The following are likely to be Exclusive Easements

- 25 Stat 350 1. Puyallup Indian Reservation - 66 ft ROW from NW bdy Res near
6/14/1888 Tacoma to SE bdy; to Summer, WA; *Puyallup Valley Ry*
- 26 Stat 102 1. Colville Indian Reservation - 100' ROW from pt on Columbia R
5/8/1890 near Kettle Falls (NE pt of WA); NW'ly thru the I R; *Spokane Falls & Northern Ry*
- 27 Stat 468 1. Puyallup Indian Reservation - 60' ROW from pt on Cascada
2/20/1893 branch of *NPRR* to W bdy IR; *Northern Pacific RR*
- 29 Stat 044 1. Colville Indian Reservation - 100' ROW from pt near Little
3/4/1896 Dalles on Columbia R in Stevens Co.; N'ly to international bdy with BC; together with all rights granted to RR by act of 3/3/1875; *Columbia & Red Mountain Ry*
- 29 Stat 600 1. Fort Spokane Military Reservation - 100' ROW to *St Paul,*
3/2/1897 *Minneapolis & Manitoba Ry*; Location appvd by Secy War
- 30 Stat 430 1. Colville Indian Reservation - 1875 type ROW from pt on
6/4/1898 Columbia R near mouth Sans Poil R; N'ly to pt in T37N R32E; N'ly to pt

APPENDIX 1

- 30 Stat 475 1. near mouth Curlew Cr; N'ly to international border; *Washington*
6/18/1898 *Improvement & Development Co*
Colville Indian Reservation - 100" @ 1875 type ROW to *Kettle*
River Valley Ry

WEST VIRGINIA

- 4 Stat 744 1. Through the property held by the United States at Harper's Ferry
6/25/1834

APPENDIX 1

WISCONSIN

- 11 Stat 020 1. From Madison, or Columbus, by the way of Portage City to the St.
6/3/1856 Croix River or Lake between townships twenty-five and thirty-one, and from
thence to the west end of Lake Superior;
2. And to Bayfield;
3. From Fond du Lac on Lake Winnebago, northerly to the State line.
- 12 Stat 618 1. Lying at or near the mouth of said river, in the county of Brown and
4/25/1862 State of Wisconsin, known as the Fort Howard Military Reserve, required
for right of way, tracks, turnouts, depots, workshops, warehouses, wharves,
and other railroad uses, not exceeding eighty acres.
- 13 Stat 066 1. From a point on the Saint Croix river or lake, between townships
5/5/1864 twenty-five and thirty-one, to the west end of Lake Superior.
2. From some point on the line of said railroad, to be selected by said state, to
Bayfield.
3. From the town of Tomah, in the county of Monroe, to the Saint Croix river or
lake, between townships twenty-five and thirty-one.
4. From Portage City, Berlin, Doty's Island, or Fon du Lac, as said state may
determine, in a northwestern direction, to Bayfield, and thence to Superior, on
Lake Superior. [see 14 Stat 360; 6/21/1866]
- 13 Stat 365 1. Beginning at a point on Lake Superior, in the State of Minnesota or
7/2/1864 Wisconsin; thence westerly by the most eligible railroad within the territory
of the US, on a line north of the 45 degree latitude to some point on Puget's
Sound, with a branch, via the valley of the Columbia River, to a point at or
near Portland, in the State of Oregon, leaving the main trunk-line at the most
suitable place, not more than 300 miles from its western terminus. *Northern
Pacific RR* (Pre April 1904 sales confirmed by act 4/28/1904)
- 14 Stat 360 1. Modified to from city of Portage by way of Ripon, Fond du Lac
6/21/1866 county, and Berlin, Green Lake county, to Steven's Point, thence to
Bayfield, thence to Superior on Lake Superior. [see 13 Stat 066;
5/5/1864]
-
- The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements
- 16 Stat 588 1. Over Oneida IR
3/3/1871
- 25 Stat 169 1. Lac de Flambeau Indian Reservation - 50 ft @ ROW to *Milwaukee,*
6/4/1888 *Lake Shore & Western Ry*
- 27 Stat 083 1. Menominee Indian Reservation - 100' ROW Within 1 ½ mile of N
7/6/1892 line of T30 R13-15 in Shawano Co and T30 R 16 in Oconto Co;
Marinette & Western RR

APPENDIX 1

WYOMING

- 12 Stat 489 1. Commencing at a point on the one hundredth meridian of longitude
7/1/1862 west from Greenwich, between the south margin of the valley of the
Republican River and the north margin of the valley of the Platte River, in
the Territory of Nebraska, at a point to be fixed by the President of the
United States, after actual surveys; thence running westerly upon the most
direct, central, and practicable route, through the territories of the United
States, to the western boundary of the Territory of Nevada; *Union Pacific
RR*
- 14 Stat. 367 1. 100 foot wide ROW granted to *UP RR* and Co.s constructing branches
7/26/1866 Over and upon military reserves through which the RR may pass
- 15 Stat 324 1. Extend RR to a connection at Denver to make a continuous line from
3/3/1869 Kansas City by way of Denver to Cheyenne

The following should be closely reviewed as to whether they are Limited Fee or
Exclusive Easements

- 24 Stat 104 1. 100 foot ROW across Ft Russell and Ft Laramie Military Res -
6/30/1886 *Cheyenne & Northern RR*
- 25 Stat 691 1. Fort Russell Military Reserve - 60 ft ROW as appvd by Secy War;
2/25/1889 *Cheyenne Street RR*

APPENDIX 2
COURT DECISIONS

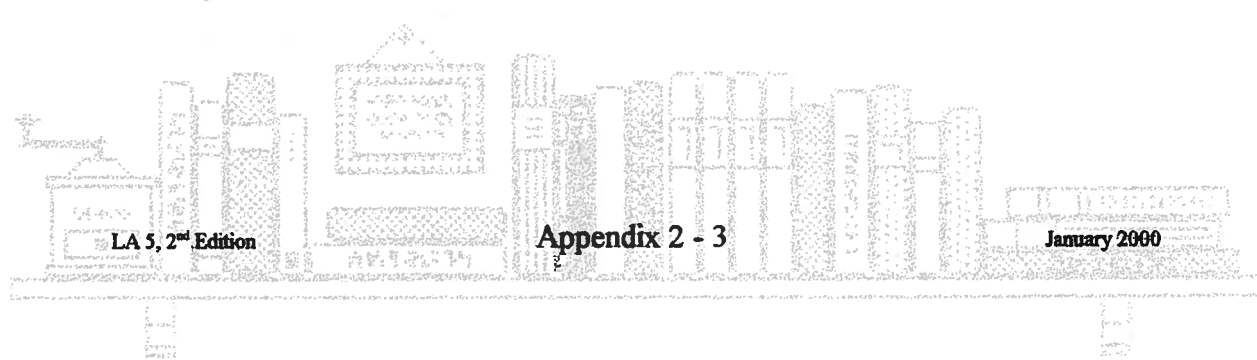
<p><u>Aberdeen City v Chicago & Northwestern Trans Co.</u>, 602 F Supp 589 (1984) Civil 82-1057 DC SD-12/21/1984 1875 43 USC 912 43 USC 913 Railroad</p>	<p><u>Great Northern</u> renders 43 USC 912 inapplicable to this case, 1875 Act. <u>Wyoming v Udall</u>, 379 F2d 635 (10th 1967) supports "after <u>Great Northern</u> 43 USC 912 applic only to pre-1871 grants."</p>
<p><u>Auburn City v. STB</u>, Nos. 96-71051, 97-70022, and 97-70920 (9th Cir.) Sept. 3, 1998. Railroad STB</p>	<p>ICC Termination Act of 1995 broadly preempts state and local permitting laws regarding railroad operations EA prepared by the agency reflected a thorough, independent investigation of the environmental consequences</p>
<p><u>Barney v Burlington Northern RR</u>: 490 NW 2d 726; September 9, 1992 (SD) Railroad 1875 grant Trails Abandonment Public Highway Reserved Interest ICC</p>	<p>Congress retained an interest in RR ROW despite subsequent patent For 1922 act to apply, RR must cease use and abandonment must be declared by court of competent jurisdiction or act of Congress ICC's authority is not "an act of Congress." State law determines what constitutes a public highway for the 1922 act</p>
<p><u>Becker v STB</u>, No. 95-1481 (DC Cir) December 30, 1997 Consolidated with No. 97-1243 Railroad Railbanking Abandonment</p>	<p>The right-of-way had been abandoned and that the Commission therefore lacked jurisdiction to issue a notice of interim trail use</p>
<p><u>Board of County Comm of Weld Co v Anderson</u>, 525 P.2d 478, 34 Colo App 37, aff'd Anderson v UP RR, 534 P.2d 1201, 188 Colo 337 (1974) Limited Fee Odd No. Section</p>	<p>RR granted ROW. Sec under Pacific RR Acts, reserved fee to ROW (not easement) when deeds section reserving to RR and its assigns the ROW for said RR as now located on the premises.</p>
<p><u>Boise Cascade Corp v Union Pacific Ry</u> 630 F2d 720 (10th Cir 1980) Railroad Applicable law Actual construction Profile maps</p>	<p>Actual construction is notice of location, whether before or after 1875 act. Filing profile with Secy operates to perfect RR ROW.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Brit v. STB, et al.</u>; No. 95-1211 9th Cir; Decided August 2, 1996. Railroad Railbanking Abandonment Fritsch distinguished</p>	<p>ICC's orders regarding the UP/Nampa CITU were not arbitrary and capricious. Although several actions which could be construed as evidence of an intent to abandon the Stoddard Branch, countervailing evidence suggested that the railroad intended to negotiate a rails-to-trails agreement with the City of Nampa, not to fully abandon its right-of-way</p>
<p><u>Boyd v AT&SF Ry</u>, 4 P.2d 670, 39 Ariz. 154 Railroad Width Acquisition by prescription Trespass</p>	<p>Width of ROW acquired by entering and laying track upon another's land was presumably 100' @ side (ARS §40-809) RR entering & Laying track acquired merely easement and subsequent grantees acquired reversionary interests (ARS§12-1113) Purchasers after RR laid out could not maintain action of trespass against RR.</p>
<p><u>Buckley v Burlington Northern RR</u>; 723 P2d 434 (Wash 1986) Railroad Abandonment 43 USC 912 Municipalities</p>	<p>Municipality was entitled to Fed Gov't's reversionary interest in abandoned RR ROW even though it had not received patent to underlying fee (43 USC 912)</p>
<p><u>Burlington Northern RR v Kmezich</u>, 48 F.3d 1047 (8th Cir) February 27, 1995 Railroad Abandonment State Law Non-interstate use</p>	<p>Iowa law does not extinguish a railroad's property interest in a right-of-way when RR "abandons" a railroad line for interstate-commerce purposes pursuant to the ICA, but continues to use the line for other railroad purposes</p>
<p><u>Buttz v Northern Pacific Ry</u>; 119 US 55; November 15, 1886 Railroad Indian Title</p>	<p>Act of 7/2/1864 gave 'fee' to RR subject to occupancy by Indians As RR attaches fully upon extinguishment of Indian title, no intervening preemption could occur.</p>
<p><u>Bybee V Oregon & California RR Co</u>; 139 US 663; April 20, 1891 Railroad ROW Land Grant Forfeiture</p>	<p>RR does not lose power to take possession of ROW by failure to construct within time frame allotted in granting act. Lands granted in aid of construction are not reverted until forfeiture has been asserted by US Subsequent entry takes subject to rights of RR RR grant is grant <i>in praesenti</i> Forfeiture and reversion are conditions subsequent and grantee must act to enforce.</p>

**APPENDIX 2
COURT DECISIONS**

<p><u>Cadwell et al v United States</u>, 250 US 14; May 19, 1919 Railroad 1875 Timber Rights</p>	<p>Grant of ROW under 1875 act allows use of timber from adjacent lands but did not include profiting from the sale of "slash", etc. Land Department may not enlarge acts of Congress nor give rights in the public land not conferred by the Act.</p>
<p><u>CSX Transportation v STB</u>, No. 95-1513 (DC Cir) October 11, 1996 Railroad Abandonment Public Interest</p>	<p>Case is remanded to the Surface Transportation Board with instructions to grant CSXT's request to abandon the Elkins-Bergoo segment.</p>
<p><u>Central Pac Ry v. Alameda Co.</u>, 284 U.S. 463, February 15, 1932. Existing roads Acquiescence of US Seasonal variance RS 2477</p>	<p>Where roads have been originally formed by the passage of wagons over the natural soil, the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. Long before the Act of July 26, 1866, highways in large numbers had been laid out by local, state, and territorial authorities, upon and across the public lands, and that this practice had been so long continued and the number of roads thus created had been so great, as to compel the conclusion that they were established and used with the knowledge and acquiescence of the national Government</p>
<p><u>Chicago, Burlington & Quincy RR v Otoe County</u>, 16 Wall 667; March 31, 1873 Railroad Aid to RRs Corporate powers</p>	<p>State may authorize County to financially aid RR even where RR is outside county</p>



APPENDIX 2
COURT DECISIONS

<p><u>Chicago, Milwaukee & St Paul Ry v. US.</u>, 244 U.S. 351, June 4, 1917 Railroad Reserved land 1875 1899</p>	<p>Lands reserved for forest purposes, whether by temporary withdrawal or permanent reservation, are "specially reserved from sale" within the meaning of § 5 of the general railroad right of way act of March 3, 1875, 18 Stat. 482, and also, like the military, park and Indian reservations therein mentioned, are set apart for a public purpose, and are not subject to the provisions of that act.</p> <p>Under the provision relating to the subject in the Act of March 3, 1899, 30 Stat. 1233, a railroad right of way may be obtained over a temporary or permanent forest reservation only if in the judgment of the Secretary of the Interior the public interests will not be injuriously affected thereby, and, in exercising his broad discretion under this provision, the Secretary may condition his approval of an application upon the prior filing of a stipulation, binding upon the applicant, respecting the use and enjoyment of the privilege granted, the prevention of forest fires, and compensation for timber cut or destroyed or for other injuries done to the reservation.</p>
<p><u>Chicago, Milwaukee, St Paul & Pacific RR Debtor. Appeal of Wisconsin</u> No 83-1449 (7th Cir) June 28, 1984 Reorganization Purchase Condemnation</p>	<p>Trustee erred in not allowing Wisconsin to condemn the 'to be abandoned' strip of RR ROW</p>
<p><u>Chicago & Northwestern Transportation Co v Kalo Brick & Tile Co</u>; 450 US 311 (1981) Railroad Abandonment ICC(STB) State Court</p>	<p>Interstate Commerce Act precluded shipper from seeking damages in State court. Shipper should have completed action during period ICC considered abandonment action.</p>
<p><u>Chicago & Nwern Trans Co. v. US.</u>, 678 F.2d 665 (7th Cir) April 26, 1982 Abandonment Railroad Fair Market Value STB</p>	<p>Was entitled to acquire the Lake Geneva line at its salvage value</p>
<p><u>Choctaw, Oklahoma & Gulf Ry v Mackey</u> (Co. Treasurer Hughes Co,OK); 256 US 531; June 1, 1921 Railroad Indian Title Limited Fee Taxation</p>	<p>Mere possibility of reverter to Creek Nation does not relieve RR ROW/Station grounds from local taxation.</p> <p>ROW on land which belonged to Creek Nation - Creek Agreement, Act 3/1/1901, 31 Stat 861,864 Congress in 1888 granted ROW to Choctaw Coal & Ry Classifies ROW as Limited Fee</p>

APPENDIX 2
COURT DECISIONS

<p><u>Churchill v Choctaw Ry</u>; 46 Pac 503; September 4, 1896 (OK) Railroad <i>in praesenti</i></p>	<p>Ruled act 2/18/1888 a grant <i>in praesenti</i></p>
<p><u>Clairmont v United States</u>; 225 US 551; June 10, 1912 Railroad Indian Title Limited Fee</p>	<p>Act 7/2/1864 grants ROW through Public Land to NP RR and US to extinguish Indian Title as rapidly as possible.. RR map filed 7/5/1882. Teaty of 9/2/1882 suruendered Indian Title to ROW strip.</p>
<p><u>Clayton by Murphy v Atlantic Richfield Co</u>, 717 P.2d 558, 221 Mont 166 (1986) Railroad Prescription</p>	<p>RR acquired a prescriptive easement over portion of ROW covered by patent where RR was in exclusive possession of property for 29 years and owner was in actual & constructive notice of that possession.</p>
<p><u>Dave v. Rails to Trails</u>; Case 94-36071 (9th Cir March 27, 1996) Railroad Trails Taking Jurisdiction Railbanking Ct of Federal Claims</p>	<p>Since the district court had no jurisdiction over the federal question claims, it could not exercise jurisdiction over the remaining common law claims and properly declined to do so.</p>
<p><u>Doran v Central Pacific Ry Co</u>; 24 Cal 245; ()</p>	
<p><u>Dunbar Corp. v. Lindsey</u>, 905 F.2d 754 (4th Cir.) June 8, 1990. As Amended June 19, 1990. Taking Quiet Title</p>	<p>Suit filed for taking, court found actually seeking quiet title and dismissed for lack of jurisdiction.</p>
<p><u>Energy Transportation Systems Inc v Union Pacific Ry</u>; 606 F2d 934 (10th Cir 1979)</p>	<p>Servient Estate not Transferred in even # sections. In odd # sections, RR granted servient estate when conveyed</p>
<p><u>Energy Transportation Systems Inc v Union Pacific Ry</u>; 619 F2d 696 (8th Cir 1980)</p>	<p>Servient transferred from US to State Servient title sufficient to allow pipeline</p>
<p><u>Erie v Tompkins</u>; 304 US 64, 82 Led 1188 Common law: no Federal, only State Taking</p>	<p>Regarding injury. There is no "Federal common law" only "common law" within the various States.</p>
<p><u>Fetzer v Cities Service Oil Co.</u>, 572 F.2d 1250 (8th Cir) March 13, 1978 Railroad Interest in ROW Minerals</p>	<p>Although the term ROW has two-fold signification, when a deed purports to grant ROW to RR Co., it generally does not convey fee, only an easement, under Arkansas law.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Fort Smith & Van Buren Ry v Arkansas Louisiana Gas Co</u> Also <u>Kansas City Southern Ry v Arkansas Louisiana Gas Co;</u> 476 F.2d 829 (10th Cir 1973) Railroad Interference w/RR use Indian Territory Servient/Dominant estates</p>	<p>Installation of gas pip beneath RR did not interfere with RR operation ROW across then Indian Terr granted by Congress to 2 RR in 1893 and 1899 were easements and there were both dominant & servient estates. (acts 2/27/1893, 27 Stat 487 & 3/3/1899, 30 Stat1368) RR thru ROW is not entitled to deprive the owner of the servient estate from making use of the land in strata below the surface and below substrata which are used or needed by RR</p>
<p><u>Fritsch v ICC;</u> 59 F3d 248 (DC Cir 1995) Railroad Abandonment Railbanking ICC(STB) 180 day 'wait' period</p>	<p>Challenge of 180 day "wait" period in STB/ICC decision allowing abandonment. With STB approval §10903 applies and RR no longer has "property" which could be banked under railbanking. Thus ROW reverted to servient estate holders. However, see <u>Birt v. STB</u>; No. 95-1211 9th Cir, Decided August 2, 1996</p>
<p><u>Gauger v State,</u> 815 P.2d 501, 249 Kan 86 (1991) Railroad Servient estate</p>	<p>When owner of abutting property deed to another, the rights to the servient estate also pass unless intention not to do so is clearly indicated.</p>
<p><u>Georgia v. Cincinnati Southern Ry.</u> 248 U.S. 26 November 18, 1918. Railroad State grant Perpetual</p>	<p>In the absence of language suggesting a different intention, a grant of the use of a railroad right of way must be taken as granting the right of way itself. A grant of a railroad right of way to a corporation, or to perpetual trustees holding for corporate uses, does not need words of succession to be perpetual</p>
<p><u>Glosemeyer v Missouri-Kansas-Texas RR,</u> 879 F.2d 316 (8th Cir) July 5, 1989 Railbanking Taking</p>	<p>Congress did not address the liability of the United States to pay just compensation if a taking be found to have occurred. Congress either did not believe that the postponement of a railroad's abandonment of a right-of-way constituted a taking or assumed that the general grant of jurisdiction under the Tucker Act would provide a necessary remedy for any taking that might be found to have occurred</p>
<p><u>Goos v ICC,</u> 911 F.2d 1283 (8th Cir) August 22, 1990 Railbanking NEPA</p>	<p>Agency complied with NEPA</p>
<p><u>Grand Trunk RR v Richardson;</u> 91 US 454 (1875); Sct 1 Otto:454; 23 LEd 356 1/17/1876 Railroad Use within ROW Alienation</p>	<p>RR has exclusive control of all land within ROW; cannot alienate any part; may license use for other purposes for its convenience even though may also be convenience to others.</p>

APPENDIX 2 COURT DECISIONS

<p><u>Grantwood Village v Missouri Pacific RR</u>; Case 95-3588 (8th Cir 1996) Railroad Abandonment ICC(STB) Jurisdiction State Courts</p>	<p>STB/ICC has exclusive and plenary jurisdiction of question of abandonment. Quiet title under State law may only be brought after STB has authorized and RR has implemented abandonment.</p>
<p><u>Great Northern Ry v Steinke, et al</u>; 261 US 119; February 19, 1923 1875 Railroad Patent LO Records</p>	<p>Under 1875 act RR may drop a selected Depot site and select another. Failure to note LO records of RR ROW does not diminish the RR rights because of later land patent.</p>
<p><u>Great Northern Ry v US</u>; 315 US 262 (1942); 119F2d 821 2/2/1942 Railroad 1875 Act Minerals Easement Limited Fee O&G</p>	<p>The right of way Act, 3/3/1875, granting to Rrs the right of way through public lands of the US, grants an easement only, not a fee, & confers no right to O&G and minerals underlying the right of way.</p>
<p><u>Great Northern Ry. V. Washington</u>; 300 U.S. 154; (2/1/1937); 184 Wash. 648; 52 P.(2d) 1274; Reversed Railroad State fees</p>	<p>The statute is not void on its face, as applied to an interstate RR. merely because it exacts fees at the same rate from the RR and other public utilities as well, or because the proceeds compose a common fund which may be used not only for expense of inspection & supervision, but for other purposes. But, to sustain the exaction in the case of an interstate RR, the burden rests upon the State to show that the sums collected from the RR do not exceed what is reasonably needed in its case for inspection & supervision service.</p>
<p><u>Hartford Insurance Co v Chicago Minneapolis & St Paul Ry</u>; 175 US 91 (1899) Railroad Use of ROW</p>	<p>May use for other purposes which are not inconsistent with railroad operations.</p>
<p><u>Hayfield Northern RR v Chicago & Northwestern Transportation Co</u>; 467 US 622 (1984); 81 Led2d 527; 104 Sct 2610, 1984 Railroad Abandonment ICC(STB) State Court Post-abandonment conditions</p>	<p>State may again exercise its regulatory powers once STB/ICC authorizes carrier's abandonment of service and thus, unless STB attaches post-abandonment conditions, brings the STB's regulatory mission to an end.</p>
<p><u>Hennick v Kansas City Southern Ry</u>; 269 SW 2d 646, May 10, 1954(MO) Railroad Abandonment</p>	<p>Abandonment is a question of fact; must be a relinquishment of possession with intent to terminate easement Application to ICC, by itself, is insufficient Nonuse, alone, is insufficient</p>

APPENDIX 2
COURT DECISIONS

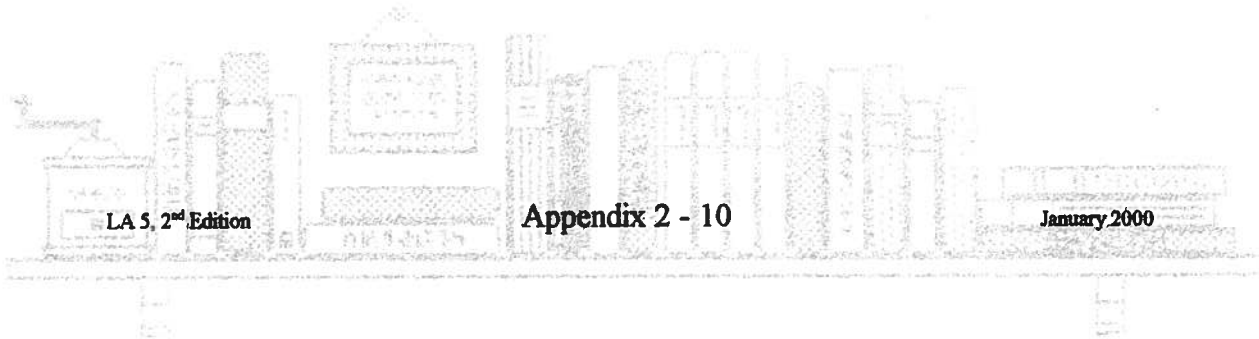
<p><u>Holland Co. v. Northern Pacific RR</u>; 214 F 920 (9th Cir 1914) Railroad ROW not merged Effect to legislative intent</p>	
<p><u>Higgins et al v Oklahoma City and Noble v Oklahoma City</u>; 297 US 481; March 2, 1936 Railroad Indian Territory Limited Fee <i>In praesenti</i> Map of Location</p>	<p>1888 grant is not <i>in praesenti</i> grant of land; does not use term "is hereby granted" Rights acquired by RR inferior to persons settling after staking of RR ROW but before the filing of plat for Secretarial approval as required by Act Legislation granting RR franchise, authorizing a taking upon compensation, as was not grant of land. Similarity to General Act of 1875, believe must be given a similar "base or limited fee" construction; does not accrue until map is filed or actual construction of RR.</p>
<p><u>Houston, East & West Texas Ry et al v US (ICC)</u>; 234 US 342; June 8, 1914 STB Interstate Intrastate</p>	<p>The powers of the ICC are such that they can control intrastate rates where otherwise the local setting of such rates discriminates against interstate commerce.</p>
<p><u>Idaho v Oregon Short Line RR</u>; 617 F Supp 207 (DC Idaho 1985) Railroad 1875 Act Exclusive Easement 43 USC 912 43 USC 913 23 USC 316 Retained US Interest</p>	<p>"... Congress, in granting the 1875 Act ROWs, did not intend to convey to the railroads a fee interest in the underlying lands. . . intend to give . . . an interest suitable for railroad purposes . . . carried with it the right to exclusive use & occupancy of the land. Both 1920 and 1922 acts apply to 1875 RR ROWs as well as 1921 Fed-Hwy act. Congress intended to retain an interest in the 1875 RR ROW</p>
<p><u>Idaho V Oregon Short Line RR</u>; 617 F Supp 213 (DC Idaho 1985) Railroad 1875 Act Abandonment Partial abandonment 43 USC 913 Discontinuance</p>	<p>43 USC 913 does not allow abandonment which serves merely to diminish width; must be entire width of ROW Mere discontinuance or RR services does not amount to an abandonment of the RR's entire ROW Gives examples of abandonment conditions and non-abandonment conditions</p>
<p><u>Idaho v Oregon Short Line RR</u>; 617 F Supp 219 (DC Idaho 1985) Railroad 1875 Act 23 USC 316</p>	<p>23 USC §316 takes precedence over 43 USC §913</p>

APPENDIX 2
COURT DECISIONS

<p><u>Idaho v. I.C.C.</u>; 939 F.2d 784 (9th Cir. 1991); July 24, 1991, and August 22, 1991 Railroad Abandonment STB</p>	<p>Commission's voting procedures are valid</p>
<p><u>Illinois Commerce Com v ICC</u>, 848 F.2d 1246 (DC Cir) May 24, 1988 Railroad Abandonment Sufficiency of Regulations</p>	<p>Found sufficient</p>
<p><u>Jamestown & Northern R Co. V. Jones</u>; 177 US 125, 20 SCt 568, 44 Lcd 698 Railroad Construction Map of Location</p>	<p>A definite location of a RR ROW, which will entitle it to benefits of 1875 Act, is made by act of construction of road although a profile map of the road had not yet been filed.</p>
<p><u>Jay v City of St Louis</u>; 138 US 1; January 19, 1891 Railroad Joint use</p>	<p>In re joint use of RR ROW</p>
<p><u>Jost, et al. V STB</u>, No. 99-1054 (DC Cir) October 22, 1999 Railroad Railbanking Qualification of Trail Proponent Partial Sale of ROW by RR Reestablishment of RR</p>	<p>Full width right-of-way sales are material to a decision to impose a trail condition and may make interim trail use and railbanking impossible</p>
<p><u>Kansas City Southern Ry v Arkansas Louisiana Gas Co</u> Also <u>Fort Smith & Van Buren Ry v Arkansas Louisiana Gas Co</u>; 476 F.2d 829 (10th Cir 1973) Railroad Interference w/RR use Indian Territory Servient/Dominant estates</p>	<ol style="list-style-type: none"> 1. Installation of gas plp beneath RR did not interfere with RR operation 2. ROW across then Indian Terr granted by Congress to 2 RR in 1893 and 1899 were easements and there were both dominant & servient estates. (acts 2/27/1893, 27 Stat 487 & 3/3/1899, 30 Stat 1368) 3. RR thru ROW is not entitled to deprive the owner of the servient estate from making use of the land in strata below the surface and below substrata which are used or needed by RR
<p><u>Kansas City Southern Ry v Girdner</u>, 421 P.2d 250, Okla. 1966 Exclusive ROW Trespass</p>	<p>At common law, RR entitled to exclusive possession and had no obligation to fence or keep safe property of adjoining proprietors.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Kindred v. Union Pacific RR</u>; 225 US 582, 56 Led 1216, 32 S Ct Rep 780 Railroad Indian Land Public Land</p>	<p>Under § 2 of the act of July 1, 1862, and other provisions of that act, the predecessor in title of the Union Pacific Railroad Company acquired a right of way four hundred feet in width across the lands in Kansas, within the Delaware Diminished Indian Reservation, those lands having been assigned in severalty to individual Delawares under the treaty of May 30, 1860, providing for such right of way.</p> <p>While the phrase "public lands" is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in § 2 of the act of July, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department.</p> <p>Where an Executive Department has constantly given the same construction to a statute affecting title to real estate, rights acquired thereunder will not be lightly disturbed after a lapse of many years.</p>
<p><u>Kirianoff et al, v. Southern Pacific Rail Corp. et al</u>, No. 97-1037 (10th Cir) Abandonment STB</p>	<p>Because the STB has not authorized defendants to abandon the rail line at issue here, there is no abandonment of the RR</p>
<p><u>Kunsman v Union Pacific Ry Co</u>; 169 Colo 374 (1969); 456 P2d 743 (1969); cert denied 396 US 1039 (1970) Railroad Map of location Public Land Subsequent Patent Pre-1871</p>	
<p><u>Lawson v State</u>; 730 P.2d 1308 (Wash 1986); 107 Wash2d 444 ROW Change in use Reversion</p>	<p>Change in use of ROW would give effect to reversionary clause.</p>



APPENDIX 2
COURT DECISIONS

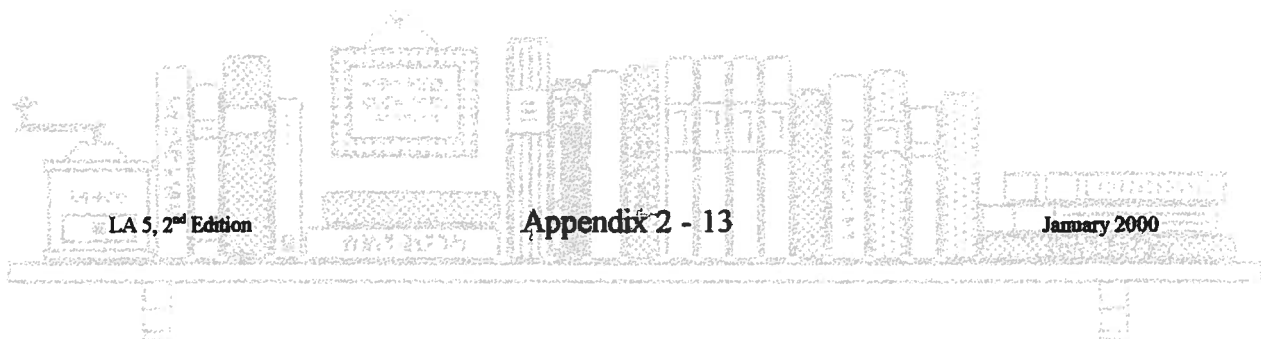
<p><u>Leavenworth, Lawrence & Galveston RR v US</u>; 92 US 634; April 10, 1876 Grants Interpretation <i>in praesenti</i> Indian lands Railroad</p>	<p>"...for public officers can bind the Government only within the scope of their lawful authority." Grant under act 3/13/1863 to Kansas is grant <i>in praesenti</i> and cannot be construed to include Osage land. Osage land is not subject to survey (as is public land) therefore the grant of alternate sections cannot apply. Indians retain right to occupy land until voluntarily relinquished by treaty or other. What is not given expressly or by necessary implication is withheld.</p>
<p><u>Leo Sheep v US</u>; 440 US 668 (1979) Railroad Language construction</p>	<p>"... the familiar cannon of construction that when grants to Federal lands are at issue, any doubts 'are resolved for the Government, not against it.' [cites omitted] But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts."</p>
<p><u>Lincoln Sav & Loan Assn v State</u>, 768 P.2s 733, certiorari denied (Colo App 1988) Easement Railroad</p>	<p>"Deed for ROW" which provided grant shall benefit the RR 'for the purposes aforesaid' conveyed only an easement.</p>
<p><u>Mayberry v Gueths</u>, 777 P.2d 1285, 238 Mont 304 (1989) Railroad Fee title</p>	<p>RR held fee under terms of deeds granting, bargaining and selling to RR; therefore when RR abandoned ROW did not revert to adjoining landowners.</p>
<p><u>Maroa, City, v Illinois Central RR</u>; 592 NE 2d 660; May 12, 1992 (Illinois) Railroad 1850 Act Limited Fee Abandonment 1922 Act Municipality</p>	<p>1850 Act granting RR ROW to State Illinois was Limited Fee grant 1922 Act applies to such ROWs Under 1922 act, Maroa owns all of abandoned RR within city limits</p>
<p><u>Marshall v. Chicago & Northwestern Transportation Company, et al</u> 826 F.Supp. 1310-1315 (D. Wyoming, 1992) Railroad 1875 43 USC 912</p>	<p>concludes that . . ."a railroad cannot alienate any part of its right-of-way nor can it adversely possess the related servient estate. This is because a railroad's interest is but an easement pursuant to 43 U.S.C. 934,937.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Marshall v Chicago & Nwrn Trans Co</u>, 31 F.3d 1028 (10th Cir) August 5, 1994 Railroad Abandonment 1875 43 USC 912</p>	<p>Affirms. Chicago and Northwestern Transportation Company on or before August 31, 1990, abandoned its right-of-way Marshall owns in fee simple, and is entitled to the quiet and peaceful possession of, the real property encompassed by the former right-of-way</p>
<p><u>McDonald v. Oregon Navigation Co.</u>, 233 U.S. 665, May 25, 1914. Railroad Forfeiture Time to Construct</p>	<p>Railroad by virtue of its failure to build within the period specified and the reentry of the defendants, had lost all right to the land and therefore that the subsequent action of the railroad in entering upon the land to complete its railroad was a trespass.</p>
<p><u>McKinley v Waterloo RR</u>; 368 NW 2d 131; May 22, 1985 (Iowa) Railroad Easement 4R's Aleination Abandonment</p>	<p>Condemnation of land for RR ROW creates easement and upon abandonment reverts to former owner. RR easements are commercial in nature and therefore aleinable. 4R's does not purport to transform interest of RR into greater interest or permit RR, by aleination, to convert to fee interest.</p>
<p><u>Miller v StLouis SWern Ry</u>, 718 P.2d 610, 239 Kan 198 (1986) Easement Use Railroad</p>	<p>Granted easement only which cannot be enlarge by adverse possession without use that is adverse, hostile or inconsistent with RR rights in property. RR not estopped from claiming ROW where owner of servient used ROW for other purposes as servient owner is entitled to use property for uses not inconsistent with RR ROW</p>
<p><u>Missouri, Kansas & Texas Ry v Kansas Pacific RR</u>; 97 US 491, 7 Rop 65; December 16, 1878 Railroad <i>in praesenti</i> Senior 'applicant' Amending v replacement Act</p>	<p>RR Grants are grants <i>in praesenti</i> and attached as of the date of the act. Amendment of 1864 changed description and extent of grant and operated from date of original act; otherwise Congress would have made an entirely new granting act. Later route change also relates back to date of original act. As between two rivals for the same property under <i>in praesenti</i> grants, the first act takes the cake.</p>
<p><u>Missouri, Kansas & Texas Ry v Roberts</u>; 152 US 114 (1893) Railroad Limited Fee</p>	<p>"The title to the land for the two hundred feet in width thus granted vested in the company . . . That grant was absolute in terms, covering both the fee and possession . . ." at 116-117</p>

APPENDIX 2
COURT DECISIONS

<p><u>Missouri, Kansas & Texas Ry v State of Oklahoma & City of McAlester</u>, 271 US 303; May 24, 1926 Railroad Local Taxation Street crossings</p>	<p>While police powers of State may, for public safety, require RR to build or modify street crossings, it cannot do so where city/RR have agreement where RR gave rights to city for street and City agreed to construct and maintain.</p>
<p><u>Moore, Dorothy, et al., v US</u>, No. 93-134 L, July 2, 1998 Railroad Railbanking Taking Class Action</p>	<p>Property is traversed by the Katy Trail, a recreational trail located between Machens and Sedalia, Missouri. Over 2000 potential class members who likewise own property along the Katy Trail. Motion to certify this action as a class action on an "opt-in" basis is granted. The class shall consist of landowners whose property is burdened by the Katy Trail.</p>
<p><u>Moore v Robins</u>; 96 US 530; May 6, 1878 Patent Cancellation Preemption Secretarial Decision</p>	<p>Patent when issued and accepted carries with it the legal title and when it passes the Executive Department loses control. For reason, appropriate remedy is court action to annul or cancel patent</p>
<p><u>Muckleshoot Indian Tribe v. USFS</u>, No 98-35043 (9th Cir) May 19, 1999 NEPA NHPA Exchange</p>	<p>Forest Service violated the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) in conducting an exchange</p>



APPENDIX 2
COURT DECISIONS

<p><u>Nadeau v Union Pacific Ry</u>; 253 US 442 (1920) Railroad Indian Title</p> <p style="text-align: right;">Indian Lands Extinguishment</p>	<p>The fact that tracts of land forming parts of the reservation set apart for the Pottawatomie Indians by Treaty, 9 Stat. 853, became subject to be allotted to individual members of the tribe, under Treaty, 12 Stat. 245, in virtue of occupation and improvements by such members, did not divest the United States of the fee to such tracts or prevent the granting of a railroad right of way across them by act of Congress.</p> <p>Such lands remained "public lands" within the meaning of the Act, July 1, 1862, granting to the Union Pacific Railroad Company a right of way 200 feet in width on each side of said railroad where it may pass over the public lands.</p> <p>Upon the identification of the railroad route, the right of way grant took effect as of the date of the granting act, and was unaffected by intervening allotments under the last named treaty or by the patents issued subsequently thereunder for the lands so allotted.</p> <p>Land constituting part of the right of way granted by Congress for the Union Pacific Railroad cannot be acquired by individuals by adverse possession</p>
<p><u>Nashville, Chattanooga & St. Louis Ry v Wallace (Tenn)</u>; 288 US 249; February 6, 1933 Railroad</p> <p style="text-align: right;">Taxation</p>	<p>RR property is not immune from local taxation so long as such is not discriminatory to interstate commerce.</p>
<p><u>National RR Passenger Corp v Boston, etc</u>; Sct No. 90-1419; (1992) Labor</p>	<p>Labor issue</p>
<p><u>National Wildlife Federation v. ICC</u>, 850 F.2d 694 (DC Cir) June 10, 1988 Railbanking Takings</p> <p style="text-align: right;">Regulations</p>	<p>Commission was not unreasonable in deciding to read § 8(d) as authorizing only voluntary transfers of rights-of-way.</p> <p>The application of its rules may constitute a taking of the reversionary interests of property owners whose land is subject to a railroad right-of-way.</p>
<p><u>Nebraska Trails Council v. STB</u>, 120 F.3d 901 (8th Cir) July 31, 1997 Railbanking</p> <p style="text-align: right;">Fees</p>	<p>Fee is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law</p>
<p><u>New Mexico v United States Trust Co</u>; 172 US 171 (1898) Railroad ROW</p> <p style="text-align: right;">Corporeal property Real Estate Tax</p>	<p>The ROW through the public lands on @ side of RR, including station grounds, etc., does not mean "right of passage" but is "real estate of corporeal quality."</p>

APPENDIX 2
COURT DECISIONS

<p><u>Newhall v Sanger</u>; 92 US 761; May 8, 1876 Grants Public Lands Land grants <i>in praesenti</i> Railroad</p>	<p>Grants of land for internal improvements (railroads) do not embrace dedicated lands. Public lands are those subject to sale of disposal under general laws. Land in an alleged Spanish land grant was not public land for <i>in praesenti</i> railroad grant act of 7/1/1862 even though the land grant was later found to be invalid.</p>
<p><u>Noble v Oklahoma City and Higgins et al v Oklahoma City</u>; 297 US 481; March 2, 1936 Railroad Indian Territory Limited Fee <i>In praesenti</i> Map of Location</p>	<p>!888 grant is not <i>in praesenti</i> grant of land; does not use term "is hereby granted" Rights acquired by RR inferior to persons settling after staking of RR ROW but before the filing of plat for Secretarial approval as required by Act Legislation granting RR franchise, authorizing a taking upon compensation, as was not grant of land. Similarity to General Act of 1875, believe must be given a similar "base or limited fee" construction; does not accrue until map is filed or actual construction of RR.</p>
<p><u>Noble v Union River Logging RR</u>; 147 US 165 (1893) Railroad 1875 Act Secy Decision Recision of Decision Due Process</p>	<p>Secy Interior is to decide whether RR Co is entitled to 1875 Act benefits and once approved, the Act vests the ROW. Revocation by Secy's successor in office is an attempt to deprive the RR CO. without due process.</p>
<p><u>Northern Pacific RR v Ely</u>; 197 US 1; February 20, 1905 Railroad Adverse possession Confirmation RR Sales</p>	<p>Title to the ROW granted to Northern Pacific cannot be acquired by adverse possession, unless conditions would have had property confirmed by act 4/28/1904 as a conveyance by the RR Co.</p>
<p><u>Northern Pacific RR v Smith</u>; 171 US 260; May 31, 1898 Railroad Public Lands Limited Fee Patent</p>	<p>Occupation and survey of lands with intent to locate town but without filing plat or obtaining patent until after RR located thereon, does not prevent the land from being Public Lands for purpose of grant to RR</p>
<p><u>Northern Pacific Ry v Townsend</u>; 190 US 267 (1903) Railroad Pre-1871 Limited Fee Implied Reverter</p>	<p>The substantail consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."</p>

**APPENDIX 2
COURT DECISIONS**

<p><u>Oregon State DOT v Tolke</u>, 586 P.2d 791, 36 Or.App. 751 (1978) Review denied Railroad Limited Fee</p>	<p>Where deed conveyed strip in fee simple "so long as" and provided for reversion to grantors, such deed created 'fee simple determinable' interest (Limited Fee)</p>
<p><u>Oregon Short Line RR v City of Mountain Home</u>, 465 P.2d 105, 93 Idaho 494 (1970) Railroad Exclusive Use</p>	<p>RR has perpetual & exclusive possessory interest in the land surface as long as ROW is used for RR purposes; owner of servient estate may not use surface of ROW without permission of the RR.</p>
<p><u>Peterson v City of Reno</u>, 436 P.2d 417, 84 Nev 60 (1968) Acquisition Abandonment Railroad</p>	<p>Notwithstanding that granting clause could be read as conveying fee, such was precluded by statute providing for reversion to grantor upon cessation of use. City interest in dedicated street sufficient to be adjoining owner to obtain interest in abandoned RR ROW.</p>
<p><u>Phillips Co v Denver & Rio Grande Western RR</u>: Case 95-1412 (10th Cir 1995); 902 F Supp 1310 (D Colo 1995) 1/23/1995 Railroad ICC(STB) Abandonment</p>	<p>Where it has jurisdiction, STB/ICC must authorize abandonment before RR may actually abandon ROW</p>
<p><u>Platt v UP RR</u>; 99 US 48</p>	<p>Where UP RR "mortgaged" the alternate sections, that is considered "being disposed of."</p>
<p><u>Pollnow v State of Wisconsin</u>: 276 NW 2d 734; (Wisc 1979) Railroad 1875 Act 4 R's Act Abandonment Conversion Trails</p>	<p>RR abandonment in 1973 not subject to the 4R's act of 1976. Conversion in same type of transportation, i.e., electric streetcar to motor bus, is within reason and does not affect ROW Conversion from railroad to recreational trail stretches beyond reasonable limits.</p>
<p><u>Pratt v Griese</u>, 409 P.2d 777, 196 Kan. 182 (1966) Easement use Abandonment Railroad</p>	<p>However created, easement for RR ROW is limited to use for which the easement is acquired. When use is abandoned, the easement is terminated & reverts to owner of servient estate.</p>

APPENDIX 2 COURT DECISIONS

<p><u>Preseault v US & State of Vermont:</u> Case 93-5067, 5068 (Fed Cir November 5, 1996)</p> <p>Railroad Railbanking Rails to Trails Taking Property Rights Abandonment Federal liability Use of ROW State Law</p>	<p>The 1899 transfers to the railroad created easements for use for railroad purposes; the fee estates remained with the original property owners. Ultimately this is a matter to be decided under controlling federal law and Constitution, but we reject the thesis that general federal legislation providing for the governance of interstate railroads, enacted over the years of the Twentieth Century, somehow redefined state-created property rights and destroyed them without entitlement to compensation.</p> <p>Based on the state's property law, we conclude that even if these easements were still in existence at the time the trail was created, there was no legal justification for the intrusion upon the Preseault's property. We find no support in Vermont law for the proposition that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails. But we find in fact these easements had been abandoned years before the creation of the trail.</p> <p>The taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government. Whether the State's role in the matter should have resulted in liability for the State, or whether the State could absolve itself by pointing to the Federal Government is immaterial. The Federal Government authorized and controlled the behavior of the State in this matter, and the consequences properly fall there</p>
<p><u>RLTD Ry Corp v. STB</u>, No. 96-4142, elec cit 1999 FedApp 0034P (6th Cir) (1/28/1999)</p> <p>Abandonment STB Railbanking</p>	<p>Portion was removed from interstate system over 20 years ago with STB (ICC) approval of abandonment or intermediate lines. Upheld STB's position that it could not now consider railbanking of the portion still in operation. There had been <i>de facto</i> and <i>de jure</i> abandonment.</p>
<p><u>RR Commission of Texas v Pullman Co</u>; 312 US 496; March 3, 1941</p> <p>Railroad Discrimination</p>	<p>Discrimination case</p>
<p><u>Rice v Minnesota & Northwestern RR</u>; 1 Black 358; March 3, 1862</p> <p>Patents Railroad Construction Grant to State</p>	<p>Land grant to Territory for RR - act 6/29/1854 Territory acquired no vested interest until 20 mile segment of RR was built Grants by legislature are not warranted and are void if not in ownership or possession of legislature to grant.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Rice v US</u>; 414 US 858 (1973) cert denied 94 Sct 66, 38 Led2 108 348 F Supp 254;(D ND 9/29/1972); 479 F.2d 58 (8th Cir 1973); Railroad Pulic Lands Subsequent patent</p>	<p>Tract lawfully appropriated to any purposes was severed from the public lands. Subsequent Hd patent, although RR not mentioned, did not include RR ROW</p>
<p><u>Rio Grande Western Ry v Stringham</u>; 239 US 44; November 1, 1915 Railroad 1875 Patent</p>	<p>Held that the ROW was a Limited Fee (overturned by Great Northern 315 US 262 (1942))</p>
<p><u>Roeder Co v Burlington Northern</u>. 716 P.2d 855, 105 Wash.2d 567, reconsideration denied</p>	<p>Where granting clause declares purpose to be ROW for RR, deed passes easement only and not a limited fee</p>
<p><u>Rogers v City of Burlington</u>; 3 Wall 651 Granting authority Railroads Public Highways Aid to RRs</p>	<p>Corporation derive their power from granting auhtority Railroads are considered public highways State may empower City to financially aid RRs</p>
<p><u>Rutherford v Greene Heirs</u>; 2 Wheaton 195</p>	<p>Act language "shall be allotted for, and given to" vested title even though conditions subsequent would actually identify specific area.</p>
<p><u>Ryan v Railroad</u>; 99 US 382 2/3/1879 Railroad</p>	<p>The doctrine that land occupied at time of passage of RR grant act is never available to RR applies only to the set limit area and not to lieu selection areas.</p>
<p><u>Santa Fe Pacific RR Co. v. Payne</u>. 259 U.S. 197 (1922) Railroad Lieu land Like Quality</p>	<p>It is established in the parallel cases of Payne v. Central Pacific Ry. Co., 255 U.S. 228, 41 Sup. Ct. 314; Payne v. New Mexico, 255 U.S. 367, 41 Sup. Ct. 333, and Wyoming v. United States, 255 U.S. 489, 496, 41 S. Sup. Ct. 393, that the validity of the selection must be determined according to the conditions existing at the time when it was made.</p>
<p><u>Santa Fe Pacific RR. Co. v. Work</u>. Secretary of the Interior. 267 U.S. 511 (1925) Railroad Mineral land Lieu selection</p>	<p>The act applied not only to railroad grants in which the term 'lands not mineral' did not exclude iron or coal lands as in this case, but also to similar grants of which there were several in which the phrase 'not mineral' was used in its usual sense and excluded iron and coal. It would seem to be impossible, therefore, to give a meaning to the phrase 'not mineral' in the act of 1874 which should mean including coal in some cases and excluding coal in others</p>

**APPENDIX 2
COURT DECISIONS**

<p>Schulenberg v Harriman; 21 Wall 44 (1875)</p>	<p>1856 & 1864 grant acts to Wisc for RR as <i>in praesenti</i> and pass title upon location of RR. Timber standing on land is part of real estate; when cut it becomes personal property but still belongs to land owner until sold.</p>
<p>Seminole Nation v White; 224 F2d 173; 10th Cir May 25, 1955; Cert Denied 350 US 895, 76 Sct 153, 100 Led 787 Railroad Indian Land</p>	<p>Servient estate in strip of land set apart for a RR ROW or other similar purposes passes with conveyance of fee abutting legal subdivision or tract out of which strip or small area was carved, even in absence of express provision to such effect.</p>
<p>SOUTHERN PACIFIC CO. V. U.S.; 307 U.S. 393; NO. 613. Argued March 29, 1939; Decided May 29, 1939; 87 CT. CLS.442 Affirmed Railroad Route Change Land Grant Interpretation</p>	<p>Doubts in respect of the interpretation of public grants are to be resolved in favor of the Government</p>
<p>St Joseph & Denver City RR v Baldwin; 103 US 426; (1881) Railroad In praesenti</p>	<p>Act 7/31/1866 to Kansas for SJ & DC RR is a present absolute grant. Persons acquiring any portion after passage of Act took subject to RR ROW</p>
<p>Stalker v Oregon Short Line; 225 US 142 (1912) Railroad 1875 Act Map Approval Date of Location Public Land Subsequent patent</p>	<p>The approval of plat of station grounds by Secy Interior relates back to date of filing with Secy.</p>
<p>State ex rel. Washington Midlife Preservation Inc v State; 328 NW2d 543 (Minn 1983) Easement Use change Reversion Railroad</p>	<p>Trail use within original interest would not give rise to reversion of ROW</p>
<p>Thomas v Railroad Co; 101 US 71 (1888) Railroad Alienation Public Good <i>State v. Minnesota Central RR Co.,</i> 36 Minn 246, 30 NW 816 (1886)</p>	<p>To contract with others for mutual transfer of goods & passengers over others' RR is proper; to absolute lease trackage, rolling stock, etc., is in violation of franchise and void (would constitute an alienation).</p>
<p>Timberlake v Southern Pac Co, 461 P.2d 903, 80 NM 770 (1969) Railroad Acquisition</p>	<p>Rights RR acquired under NM law are limited to any restrictions or prohibitions of laws of US</p>

APPENDIX 2
COURT DECISIONS

<p><u>Union Pacific Ry v Chicago Rock Island & Pacific Ry</u>; 163 US 564 (1896) Railroad ROW use</p>	<p>May use for other purposes which are not inconsistent with railroad operations</p>
<p><u>Union Pac R.R. Co. v. Snow</u>, 231 U.S. 204 December 1, 1913 Railroad Forfeiture Act 6/24/1912, 37 Stat 138</p>	<p>Courts will not enforce a literal interpretation of a statute if antecedent rights are affected or human conduct given a consequence the statute did not intend. <u>Union Pacific Railroad Co. v. Laramie Stock Yards</u>, ante, p. 190, followed to effect that the act of June 24, 1912, 37 Stat. 138, permitting state statutes of limitation to apply to adverse possession of portions of the right of way granted to railroads under the act of July 1, 1862, did not have retroactive effect.</p>
<p><u>US v Big Horn Land & Cattle Co.</u>; 176 Fed 593; ()</p>	
<p><u>US ex rel Search et al v Choctaw, Oklahoma & Gulf Ry</u>; 41 Pac 729; September 7, 1895 (OK) Railroad Indian Terr Map of location Secretarial duty</p>	<p>Court held Secy was limited to considering quality of map against conditions in 1888 act as amended and not new external conditions</p>
<p><u>U S v. State of Idaho</u>, 298 U.S. 105 (1936) 298 U.S. 105 Railroad STB Spur Line</p>	<p>The ICA provides that no interstate carrier 'shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the ICC a certificate that the present or future public convenience and necessity permit of such abandonment.' Paragraph 22 provides that the 'authority of the commission' conferred by paragraph 18 shall not extend to the 'abandonment of spur, industrial, team, switching, or side tracks, located ... wholly within one State</p>
<p><u>US v Denver & Rio Grande RR</u>; 150 US 1 (1893) Railroad Language interpretation</p>	<p>... When an act, operating as a general law, & manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests & welfare by means of benefits more or less valuable ... such legislation ... should receive ... a more liberal construction in favor of the purposes for which it was enacted."</p>
<p><u>US v Fisher</u>; 2 Cr 396; Bankruptcy Language interpretation</p>	<p>Interpretation of legislation in re a bankruptcy case and whether US had priority to attach assets</p>

**APPENDIX 2
COURT DECISIONS**

<p><u>US v. Fuller et ux</u>; Case No. 71-559; 409 U.S. 488; 9th Cir Jan 16, 1973 Grazing Condemnation Compensation Property rights</p>	<p>The fifth amendment requires no compensation for any value added to the fee lands by the permits, which are revocable and, by the Act's terms, create no property rights.</p>
<p><u>US v. ICC</u>; 396 U.S. 491 (1970); Decided Feb 2, 1970 Merger Antitrust</p>	<p>On the entire record we cannot say that the District Court erred in upholding the order set forth in the Second Report or that the Commission has done other than give effect to the Transportation Act of 1920 as amended in 1940, which vested in the Commission the responsibility of balancing the values of competition against the need for consolidation of rail transportation units.</p>
<p><u>US v Illinois Central RR</u>; 89 F Supp 17 (DC EDist Illinois, Civil No. 1642, 12/30/1949) Railroad 1850 Act Minerals</p>	<p>Nature and extent of title to ROW owned by RR by virtue of grant must be that intended by Congress at time of grant, if such can be discerned A deed from State to IC RR given pursuant to 1850 act, conveyed a limited fee subject to implied reverter & hence RR obtained title to mineral under surface of ROW</p>
<p><u>US v Magnolia Petroleum Co</u>; 110 F2d 212 (10th Cir 11/8/1939) Railroad Indian Territory Purchase of ROW Abandonment 1906 Act 5 Civilized Tribes</p>	<p>Servient estate in a strip of land set aside for a RR or highway, ROW, or for a street, passes with conveyance of the fee to the abutting legal subdivision or tract out of which the strip was carved</p>
<p><u>United States v Michigan</u>; 190 US 379; June 1, 1903 Canal Land Grant Receipts</p>	<p>Surplus receipts from the sale of the public land and tolls rightfully go with the canal and may not be used for other purposes Intent of US was not to exclusively enrich the State but to accomplish a public works for the general good of all classes of people.</p>
<p><u>U.S. v. Northern Pacific Ry. Co.</u>; 311 U.S. 317 Nos. 3 and 4; December 16, 1940. Affirmed in part - Reversed in part. Railroad Indian Title Lieu Selections</p>	<p>Unsurveyed lands were not available for grant until surveyed; reservation while unsurveyed continues unavailability. Indian Treaties of 1851/1855 & Act 6/30/1834 all land W of Miss.R considered Indian country were not reserved lands re §3 Act 7/2/1864</p>
<p><u>US v Railroad Bridge</u>; 6 McLean 517</p>	

APPENDIX 2
COURT DECISIONS

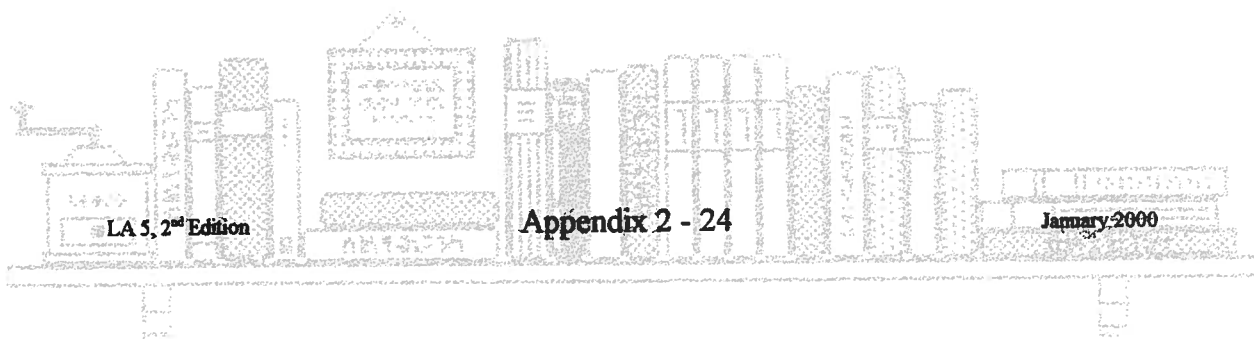
<p><u>U.S. V. SANTA FE PACIFIC R. CO.</u>; 314 U.S. 339 NO. 23; December 8, 1941; 114 F.2D 420, Affirmed with a modification. Railroad Pre-1871 Indian Title Indian Rights</p>	<p>Lands include in the grant by Act 7/27/1866 were subject to any existing Indian right of occupancy until such right was extinguished by the US through a voluntary cession of the Indians, as provided by §2 of the Act. The creation of the Walapai Indian Reservation, January 4, 1883, at the request of the Walapais & its acceptance by them, amounted to a relinquishment of any tribal claims which they might have had to lands outside that reservation, and was tantamount to an extinguishment by "voluntary cession."</p>
<p><u>US et al v. So Pac Transportation Co. et al.</u>, No 74-3333, 75-1080 (9th Cir) September 10, 1976 Railroad Indian Lands Trespass 1875</p>	<p>Southern Pacific does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation except though the lands ceded by the Tribe to the United States in 1906. Southern Pacific has never had a revocable license to operate a railway across the reservation</p>
<p><u>US v Union Pacific Ry</u>; 353 US 112 9(1957); 230 F2d 690 4/8/1957 Railroad Minerals Limited Fee</p>	<p>On the face of the Act, it would seem that the use of the words "right of way" describes a lesser interest than the grant of "public land." The right of way was granted "for the construction of said railroad & telegraph line," and that purpose is not fulfilled when the right of way is used for other purposes. Whatever rights may have been included in the grant of a "right of way," mineral rights were excepted by reason of the proviso in §3 excepting "mineral lands," which extends to the entire Act. The reservation of the mineral resources of these public lands for the United States was in keeping with the policy of the times.</p>
<p><u>US v Vogler</u>; No. 87-3798; 859 F.2d 638; September 28, 1988 RS-2477 Mining in Parks</p>	<p>The regulations do not deprive Vogler of "adequate and feasible" access to his claims</p>
<p><u>US v Whitney et al</u>; 176 Fed 593; ()</p>	
<p><u>Van Wyck v Knevals</u>; 16 Otto 360 (1882)</p>	<p>Benefits of 1875 Act take effect when RR route definitely fixed by construction or filing of profile. Failure of Secy to act does not affect. Only US can seek forfeiture for failure to construct. Deviation of actual route from map does not change RR right to ROW or land so long as still within "limits" for alt sections.</p>

APPENDIX 2
COURT DECISIONS

<p><u>Veach v Culp</u>, P.2d 818, 21 Wash. App. 454, reversed 599 P.2d 526,92 Wash.2d 570 (1978)</p> <p>Use of ROW</p>	<p>Where deed conveyed a ROW 100 feet wide but contained no declaration of the purpose of the grant nor contain a reverter, deed conveyed fee simple title to the strip of land.</p>
<p><u>Vieux v County of Alameda</u>; 695 F Supp 1023 (ND Cal 1987); aff'd 906 F2d 1330 (9th Cir 1990)</p> <p>Railroad 43 USC 912 1875 Act Abandonment ICC(STB) Congress Court of Competent Jurisdiction</p>	<p>See below</p>
<p><u>Vieux v East Bay Regional Park, et al.</u>; 906 F.2d 1330 (9th Cir. 1990); Opinion January 10, 1990; Opinion Withdrawn June 26, 1990; Decided June 26, 1990.</p> <p>Railroad 1922 Act Abandonment Public Highway STB/Congressional Act</p>	<p>Adjacent owners lost their reversionary rights under 43 U.S.C. 912 when the railroad actually abandoned their rights of way, conveyed them to the County for a public highway, and the County established a legal public highway under the exceptions clause of 912</p>
<p><u>Washington Dept of Game v ICC</u>, No 86-7346 (9th Cir) October 6, 1987</p> <p>Railbanking STB Voluntary v Involuntary</p>	<p>Congress did not specify when it enacted the 1983 amendments to the Trails Act whether the Commission would have the authority to compel interim trail use in lieu of abandonment. The Commission's view that it does not have this authority is a permissible construction of § 1247(d).</p>
<p><u>Western Radio v. Espy</u>; No. 94-35605; D.C. No. CV-93-00552-MFM; March 18, 1996</p> <p>Comm Site Interference Site Management Law Regulation Handbook</p>	<p>Manual and Handbook do not have the force and effect of law Service did not act arbitrary and capricious</p>
<p><u>Western Union Telegraph Co v Pennsylvania RR</u>; 195 US 540 (1904)</p> <p>Railroad Limited Fee Corporeal Property</p>	<p>A railroad right of wy is a very substantial thing. It is more than a mere right of passage, It is more than an easement . . . if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee,' and like it corporeal, not incorporeal property.</p> <p>A railroad's right of way has, therefore, the substantiality of the fee, and is private property even to the public in all else but an interest and benefit in its uses</p>

APPENDIX 2
COURT DECISIONS

<p>Whitmore v Pleasant Valley Coal; 75 P 748, 27 Utah 284; (1904) RS 2339/2340</p>	<p>The ROW constitutes but an easement granted for, and limited to the purpose mentioned in the Act and the owner of such easement has no right to occupy or use the surface of the land for any other purpose.</p>
<p>Wilcox v Jackson; 13 Peters 498 (1839)</p>	<p>Question whether title to property, which had belonged to US, has passed must be resolved by US laws.</p>
<p><u>Wilkinson et al v Northern Pacific Ry; 6 Pac 349; January 29, 1885 (MT)</u> Railroad <i>In praesenti</i></p>	<p>Grant to NP RR was <i>in praesenti</i></p>
<p><u>Wisconsin Central Ltd. v. STB; o. 95-3728; 7th Cir; April 30, 1997</u> Railroad Abandonment STB</p>	<p>WCL did not subject itself to the Commission's jurisdiction merely by leasing the previously abandoned line to another carrier that provided service</p>
<p><u>Wyoming v Andrus; 602 F2d 1379 (10th Cir 1979); Aff'm 83 ID 365 (1976) (13 LD 454 supported)</u> Railroad School Land Indemnity No provision in law 43 USC 912</p>	<p>Even though state has no present interest in RR ROW, it had reversionary interest under 43 USC 912 Grant to RR of ROW was not disposition of property, & thus Congress intended for state to take school sections subject to RR ROW</p>
<p><u>Wyoming v Udall; 255 F Supp 481 (D Wyo 1966); aff'd 379 F2d 635 (10th Cir 1967); cert denied 389 US 985 (1967)</u> Railroad Minerals Coal/Iron 1875 Act Servient Estate</p>	<p><i>Union Pacific</i>, 353 US 112, did not overturn <i>Townsend</i>, 190 US 267 Rule that location of RR ROW across PL does not separate the servient estate from the PD with result that title to servient estate passes without express mention in subsequent grant by the US of the traversed tract applies to post-1871 RR ROW Grants</p>
<p><u>Zobrist v Culp, 570 P.2d 147, 18 Wash App 622 (1977)</u> Easement</p>	<p>When granting clause declares purpose to be ROW for RR then deed passes an easement only; fact that boundaries described in detail does not outweigh intent of grantor to grant only right to use.</p>



I. OVERVIEW

By the mid-1970's, our nation's rail transportation system was in dire financial condition. Rail carriers were faced with increased competition from other modes of transportation (especially trucking), rising labor, fuel and maintenance expenses, and pervasive regulation that made it difficult for rail carriers to get rid of unprofitable lines. These conditions had contributed to the bankruptcy of several prominent rail carriers.

Against this background, Congress enacted a series of new laws, most notably the Staggers Rail Act of 1980 (Staggers Act). Together with the implementing regulations issued by the Interstate Commerce Commission, the STB's predecessor, this legislation sought to increase the role of the marketplace, rather than government regulation, in shaping rail transportation. In essence, the Staggers Act gave railroads more flexibility to set prices and adjust service as the market requires and thus enabled them to act more competitively. At the same time, the necessity for some regulatory protection was recognized because rail carriers still have significant market power in particular situations and because rail transportation is sometimes vital to the public. The current regulatory scheme governing abandonments and acquisitions to preserve service seeks to balance these competing considerations.

Where the market has spoken clearly and regulation is found to be unnecessary, a rail carrier may usually abandon a line, subject to appropriate labor protection and environmental conditions. Indeed, lines over which no local traffic has moved for two years without any formal complaint have been exempted from traditional regulatory scrutiny and can be abandoned simply by filing a notice with the STB.

Under the more detailed abandonment application process for active lines, the Board balances the economic burden of continued operation against the public's need for the service. Permission usually will be given to abandon lines on which there are significant operating losses. On the other hand, the carrier's ability to earn more money by disinvesting from a line and reinvesting its assets elsewhere usually is not sufficient to allow abandonment in the face of a strong public need for service.

Although it may be easier for carriers to abandon unprofitable rail lines, it is also now much easier for States and private parties to preserve rail service. The Feeder Railroad Development Program enables any financially responsible person to force a rail carrier to sell a line that has been designated for possible abandonment, even though no abandonment application has been filed. Similarly, once an abandonment application is filed for a line, financially responsible parties can offer to subsidize the carrier's service or force the railroad to sell them the line for continued rail service. To encourage entrepreneurs and the States to operate these lines, the Board has frequently exempted them from many regulatory requirements. Also, they can often avoid expensive labor protective

conditions.

With this general background, we will first set out the standards and procedures that govern formal applications to abandon a line (Part II). We will then discuss exemptions, a widely used alternative to the more detailed abandonment application process (Part III). Several alternative ways of preserving rail service will be reviewed (Part IV), including the purchase or subsidy of lines slated for abandonment. The role labor plays in these cases will be examined (Part V). Finally, we explore alternative means of preserving rail rights-of-way through rail banking (Part VI).

In 1995, Congress enacted the "ICC Termination Act" which abolished the Interstate Commerce Commission and established the Surface Transportation Board to handle rail abandonments, *inter alia*. The new statutory reference is 49 U.S.C. 10903. The new rules are codified at 49 CFR Parts 1105 and 1152. A quick summary of the changes to 49 CFR 1152, which became effective on January 23, 1997, is included at Appendix I. The full text of the new rule is at Appendix IV.

II. ABANDONMENTS

Under the ICC Termination Act of 1995 (Act), a railroad may abandon a line only with the STB's permission. The Board must determine whether the "present or future public convenience and necessity require or permit" the abandonment. In making this determination, the Board balances two competing factors. The first is the need of local communities and shippers for continued service. That need is balanced against the broader public interest in freeing railroads from financial burdens that are a drain on their overall financial health and lessen their ability to operate economically elsewhere.

The railroad first must show how continued operation of the line would be a burden to it. If it cannot establish this, the abandonment will be denied. However, the railroad does not have to show an actual operating loss. It may also calculate its "opportunity costs" for the line. These are the costs of tying up the railroad's assets in the line when those assets could earn more money elsewhere.

If the railroad does demonstrate a burden, then evidence of the public's need for continued service is examined. The effect on local businesses, surrounding communities, the local economy, and the environment may be considered. Parties opposing abandonment should present that evidence and should also challenge the railroad's financial data.

With this general introduction, we will now address in more detail the steps in the abandonment process and the kinds of factors and evidence the Board considers in deciding these cases.

A. Steps In The Abandonment Process

The Act establishes strict filing and procedural requirements for abandonment applications. (49 U.S.C. 10904). The STB has adopted regulations to implement these requirements. These regulations are found at 49 CFR 1152.

Once an abandonment application is filed, interested parties have only 45 days to file protests. Yet, an effective opposition to abandonment requires substantial preparation. The Act, therefore, also gives communities and shippers advance notice of a railroad's abandonment plans.

1. System Diagram Map

The earliest indication that a railroad intends to abandon a line comes from the carrier's system diagram map. The Act requires a rail carrier to maintain a map of all its rail lines. A Class III carrier may choose to prepare a narrative description of its lines instead of a map. On this system diagram map or in its narrative report, the carrier must identify separately (1) any line for which it expects to file an abandonment application within the next three years and (2) any line that it considers to be a potential candidate for abandonment. The Board will reject an abandonment application if any part includes a line that has not been identified as a category 1 line (abandonment application planned within 3 years) for at least 60 days before the carrier filed the abandonment application. A carrier must publish its system diagram map or narrative in a newspaper of general circulation in each county containing a rail line in category 1, and publish all subsequent changes to its system diagram map. (The system diagram map rules are found at 49 U.S.C. 10903(c)(2) and 49 CFR 1152.10-13.)

Thus, the first indication that a railroad intends to abandon a line comes at least 60 days before the carrier's application is filed. This time should not be wasted. It gives shippers, local and State governments, and interested citizens an opportunity to meet to weigh possible opposition to abandonment, and to consider alternative means of continuing rail operations by the current railroad or another operator. For example, rate and service changes which might permit the railroad to operate more efficiently or profitably may be negotiated.

A line need not have been listed in category 2 (potentially subject to abandonment) prior to abandonment, so no weight should be attached to the fact that a line was or was not listed in category 2.

2. Notice of Intent

In addition to the system diagram map requirement, the STB requires the railroad to file a "Notice of Intent" to abandon. The railroad must publish this notice once a week for three consecutive weeks in general circulation newspapers in each country where the line is located, send it to each of the significant shippers on the line, send it to the State agency responsible for rail transportation planning, and post it at each agency station and terminal on the line. All these

notice requirements must be fulfilled 15-30 days before the application is filed at the STB.

The complete form and all the information this notice must contain are set out in Section 1152.21 of the regulations. The notice describes when and how to file a protest to the proposed abandonment. It also explains how to obtain information on possible subsidy or purchase of the line. Once the Notice of Intent to abandon is received, shippers, communities, and interested citizens should organize their activities concerning the abandonment and prepare to present their position to the STB and the railroad. For help in preparing a Notice of Intent or preparing an opposition to an abandonment, please contact OPS at (202) 565-1592.

3. Abandonment Application

The abandonment application must contain detailed information about the costs and revenues on the line to be abandoned and the overall financial condition of the carrier. (A complete recitation of what must be in the application is found at 49 CFR 1152.22.) Any interested person may request a copy of the application from the carrier, and persons planning to participate should obtain a copy as soon as the application is filed and immediately begin to examine the information carefully.

Abandonment applications may contain pages of figures, tables, charts, and graphs, some of which may be less important than other parts. Opponents should make an effort to verify and, if appropriate, recalculate and reconcile key figures and totals. Shippers and small communities often lack the expertise to sort out rail financial data or the money to hire experts to do it for them. State rail officials can help in this area and should be contacted for assistance.

A railroad may ask the Board to waive certain informational requirements. For example, a railroad is normally allowed to exclude data concerning overhead or bridge traffic (shipments not actually originated or terminated on the line sought to be abandoned) if it would retain that traffic by rerouting it over other routes. However, an opponent who believes relevant information has been left out, should appeal the waiver explaining why the information is necessary. If the Board agrees, it will rescind the waiver and require the information.

4. Protests or Comments To The Proposed Abandonment

Once an application is filed, protestants have only 45 days to submit protests.⁽¹⁾ Protests should attempt to quantify the harm to shippers and the community and explain each protestant's interest in continued service. If possible, they should also try to critically evaluate the railroad's financial evidence. Section 1151.25(a) of the regulations lists all the information that should be in the protest.

All larger shippers and every community on the line should submit statements describing in detail their use of the line and the impact a loss of rail service will have on their operations and area. Opposition from elected officials from both the local and national level is also very helpful.

Shippers should submit car loading data and estimates of future use -- the best are showings of projected increased traffic. They should also point out any defects in the carrier's cost data. Communities and shippers should make every effort to quantify the harm from abandonment.

Protestants should describe their interest in the proceeding in as much detail as possible. For instance, if the line sought to be abandoned is used for grain shipments and the protestant is a grain producer, the statement should at least specify the number of years in farming, the farm's size, the amount of grain produced and shipped by rail, the number of people employed directly on the farm, the availability of alternative (whether rail, truck or barge) transportation, the cost of alternative transportation compared to the cost of using this line, and any other factors believed to be relevant. In addition, protestants should present any evidence they may have developed that contradicts the revenue and cost evidence the railroad has submitted. Always use specific numbers, facts and figures when possible, and explain where the information comes from or how it was developed. Cost and revenue information is usually critical. Remember: If it is shown that the line is not a financial burden to the railroad, abandonment will be denied.

Again, protests and comments to the proposed abandonment must be received at the STB within 45 days after the filing of the application. An original and 10 copies of each comment or protest must be filed with the Board. A copy must be mailed to the applicant railroad, and each copy must contain a "Certificate of Service" (a statement that the railroad was mailed a copy of the comment or protest). No set "form" exists for a protest and many letter protests are received. However, the more detailed a protest is, the more weight it will receive.

5. Modified Procedure And Oral Hearings

The Board will either set the proceeding for an oral hearing or, more often, what is called "modified procedure". (In the years 1990 and 1991, 8 of the 27 abandonment applications filed resulted in an oral hearing. During its first year in existence the STB held no oral hearings.) Modified procedure means that no oral hearing is held, and all evidence is filed in writing. Oral hearings are for the primary purpose of cross examining witnesses who have filed verified statements in the proceeding. See 49 CFR 1152.25(a). With this in mind, requests for oral hearing should specify any factual matters which are likely to be disputed and require cross-examination.

Regardless of whether modified procedure or oral hearing is used, the

core of both the railroad's and protestant's case will come in the form of written evidence.

After receiving the protests and the carrier's reply, the Board must issue its decision within 110 days after the application is filed.

6. Appeals

If a party is dissatisfied with a Director's decision, it may ask the STB to reconsider the matter. Director's decisions are made during certain stages of the proceeding. For example, the Director of the Office of Proceedings makes the determination whether or not an Offer of Financial Assistance is *bona fide*. See 49 CFR 1152.25(e) for other decisions made by the Director.

A party that is dissatisfied with a decision of the full Board may seek judicial review of the STB's decision by filing a petition for review in the appropriate United States Court of Appeals. In situations where the abandonment application was protested a dissatisfied party may ask the STB to reopen the case if it can show material error, new evidence, or substantially changed circumstances. In an unopposed case, the only recourse for a dissatisfied party is if it can show that the carrier's abandonment application was defective (for failure to provide the required notices, for example) in which case it can ask the Board to vacate the abandonment certificate.

B. Issues In Abandonments

We will now discuss the important issues in rail abandonments and the factors the Board weighs in deciding these cases.

As explained earlier, the standard used in deciding abandonment cases is whether the railroad's burden of continued service outweighs the public's current and future need for the service.

The railroad first must establish that it is indeed suffering a loss or burden from the line. If it fails to prove this, the abandonment will be denied. However, the railroad does not have to demonstrate an "operating" loss. The Board also considers the annual "opportunity costs" of owning and operating the line. This is the cost of tying up the railroad's assets in track, land, and materials on the line, rather than putting those assets to other, more profitable uses. It is calculated by multiplying the carrier's investment in the line (including the net liquidation value of the track and land) by an appropriate annual rate of return. Where there is evidence of public need, the Board may refuse to grant abandonment based only on opportunity cost losses. If the railroad does show a loss or burden, then the protestants' evidence of public need is examined.

The statute specifically directs the STB to consider whether the abandonment "will have a serious, adverse impact on rural and community

development." 49 U.S.C. 10903(d). Protestants can address this factor through evidence showing the economic impact abandonment would have on the area. This can be done by computing (1) markets that would be lost without rail service, (2) the number of business failures or relocations and lost jobs that would result from abandonment, and (3) the number of current or future ventures (such as industrial parks) that depend upon continued rail service. Likely sponsors of this type of testimony would be shippers (using data from their own business, industry, or farm), development experts from local or state governments, elected or appointed officials, and Chamber of Commerce representatives. In sparsely populated areas, for example, discontinuance of rail service may cause a significant loss of jobs and reduce the tax base upon which the community depends to support its local school system and other important public services.

A critical factor in assessing the impact of abandonment on a rail shipper's farm or business is the possible transportation alternatives available after abandonment. If shippers have already switched to truck transportation for part of their traffic, then truck transportation may be a suitable alternative for all their traffic. Yet, truck rates may be higher than rail rates, bringing into question whether the business can survive with higher transportation costs. Also, sufficient trucks may not be available in the area to handle the increased traffic, or the local road system may not be capable of handling the increased wear and tear of truck transportation. These issues need to be fully explored and developed by protestants. This is another area where State transportation specialists can provide shippers and local communities with invaluable assistance.

Local shippers also should be able to present testimony concerning past and future use of the rail line. Reasons for the low levels of past rail shipments, such as sporadic business fluctuations, drought or other local disaster, should be explained. If shippers are expecting increased rail shipments, based on sound and defensible business forecasts, this should be documented.

Besides the economic impact of the proposed abandonment, protestants may also point out any effect that the abandonment would have on the environment. For example, increased use of alternative modes of transportation, such as trucks, might adversely affect noise levels in congested areas or pose safety problems. The environmental consequences of abandonment are assessed by the STB's Section of Energy and Environment (SEE). For more information about environmental issues you can contact SEE at (202) 565-1538. Also see the STB's regulations at 49 CFR 1105.

The balancing test the Board employs to decide abandonments has factors on both sides of the equation. To be successful, protestants should not only present the harm that they will suffer from abandonment, but they should also attempt to discredit the railroad's evidence of losses or burden from operating the line.

C. Evaluating Railroad Financial Data

Nobody opposing an abandonment can afford to ignore the railroad's financial data. The railroad must show it is incurring a loss or a burden. The railroad will attempt to show that (1) it is not receiving, and cannot reasonably expect in the future to earn, sufficient revenues from the line; and/or (2) it expects to face significant costs on the line in the future that it will not be able to recover. Normally, the past revenue generated by the line can be determined fairly accurately based on carrier and shipper records. Other data are subject to interpretation by the parties, however. These include: (1) projecting the revenues for the line; (2) isolating the historical expenses of operating and maintaining the line, and projecting future operating, maintenance and rehabilitation expenses; and (3) calculating the opportunity costs of operating the line.

Protestants who can critically evaluate this data will have a better chance of success. The assistance of a CPA or rail cost analyst is useful and can be critical. Even if there is insufficient time or money to analyze the financial data thoroughly, there are a number of key issues that should be examined.

Railroads are required to include in their abandonment applications projections of their revenues and costs on the line for a "forecast year" --the 12-month period beginning the first day of the month the application is filed. To project future revenues and costs, the railroad must necessarily make assumptions. Those assumptions should be evaluated critically. Nobody can predict the future with certainty, and in many instances the protestants may be in as good or better position than the railroad to make accurate predictions. For example, a substantial component of revenues usually consists of the number of shipments originating or terminating on the line. Shippers on the line presumably know their own businesses and future transportation needs and may be able to dispute the railroad's projections of future traffic. Wherever possible, protestants should provide specific facts and figures to support their own projections.

Of course, projections as to the future usually are based upon prior experience. Thus, the railroad's historical data should also be examined. Again, there are some issues that can be explored even if a rail cost analyst or other expert is not available.

First, confirm that all the data are from the relevant periods. Historical cost and revenue data must be submitted for a so-called "base year." The base year is the most recent 12 month period for which data have been collected at the branch level, ending no earlier than 6 months prior to the filing of the application.

Second, be alert to circumstances that may make the historical data unrepresentative. For example, was the carrier's ability to meet requests for service impaired by a shortage of rail cars? Or was there a recession or drought that resulted in lower, unrepresentative traffic volumes and revenues?

Third, confirm that actual costs and revenues are used where required by the regulations. Maintenance-of-way expenses usually cannot be estimated by prorating expenses from a larger section of track; actual expenses incurred on the line sought to be abandoned are normally required. Similarly, depreciation of equipment, the return on investment for locomotives, and fuel costs must be based upon the type of locomotive and freight cars actually used on the line. The use of summary data based upon "Road" and "Yard" categories is generally unacceptable, because it tends to overstate costs when, as is often the case, a local or way train serves the branch line.

Fourth, if there are high rehabilitation or deferred maintenance costs, a qualified individual should examine the railroad's work papers and physically inspect the properties. It may be possible to further defer maintenance-of-way expenses for yet another year, taking those costs out of the forecast year. Usually only those rehabilitation costs necessary to meet Federal Railroad Administration minimum class I standards are allowed. As a rule of thumb, rehabilitation costs and maintenance-of-way expenses vary inversely. That is, if rehabilitation costs are high, then maintenance-of-way costs should be low.

Fifth, as with the actual and projected revenue and cost information, the railroad's claimed opportunity costs should also be examined thoroughly by an analyst. Even if this is not possible, several key components of opportunity costs can be examined.

For example, land values are usually an important factor in calculating opportunity costs. Protestants should check with the Register of Deeds to make sure the land included in the railroad's calculations is and would still be owned by the railroad in the event of an abandonment. In some cases, ownership of the land reverts automatically to adjoining landholders. In addition, local bankers and real estate agents can supply accurate information on land values that may contradict the railroad's estimate of the value of its land holdings. Protestants should also (1) verify the tons of track material that will result from salvaging the line; (2) obtain an estimate of the scrap value in dollars per ton, and (3) see whether the cost of dismantling the track was deducted from the railroad's estimated sales proceeds.

It should be noted that a carrier may either calculate its own (pre-tax) cost of capital or use the industry-wide (pre-tax) cost of capital figure that is determined annually by the STB. To obtain the Board's latest cost of capital determination call the STB's Section of Costing and Financial Information at (202)565-1533.

Finally, the railroad's projected gains or losses on its rail assets should be examined. Local real estate agents or brokers can check projections of changes in value for land, and the railroad's projections can also be compared to the index price series for historical sales of rail assets maintained by the Board. The railroad must justify departures from these trends.

III. EXCEPTIONS TO THE ABANDONMENT PROCESS UNDER 49 CFR 1152.50

The STB's power to exempt rail lines from the normal abandonment procedures is found in the ICC Termination Act, 49 U.S.C. 10502. Section 10502 gives the Board a broad grant of authority to exempt carriers, services and transactions from almost any and all kinds of STB regulation. The Board must exempt a carrier, service or transaction from regulation if it finds (1) that continued regulation is unnecessary to carry out the national rail transportation policy of 49 U.S.C. 10101, and (2) that either the transaction or service is of limited scope or application of the regulatory scheme is unnecessary to protect shippers from an abuse of market power. Congress clearly contemplated that the STB would use this general exemption power broadly. The legislative history reflects Congress' desire that the Board actively exempt railroads from unnecessary regulation, particularly regulations restricting changes in rates and services. But Congress also provided the Board with authority to revoke exemptions that it has issued if and when the Board finds that its regulation is indeed necessary.

The STB and the ICC before it have both used broad exemption authority to facilitate the abandonment of lines where it believes that closer regulatory scrutiny is unnecessary, through both class exemptions and individual line exemptions. As a class, the Board has exempted the abandonment of lines over which no local traffic has moved for at least 2 years without formal complaint about a lack of service. Where a line has generated traffic within the last 2 years, the railroad may seek to persuade the STB that an exemption is nevertheless appropriate for that individual line.

These exemptions are widely used.

A. Class Exemption: Out-of-Service Lines

To invoke the class exemption for out-of-service lines, a carrier must file a notice at the Board certifying that (1) no local traffic has moved on the line for the past 2 years; (2) any overhead traffic that has moved over the line can be rerouted over other lines; and (3) no formal complaint about a lack of service is pending or has been decided in favor of the shipper.

Unlike the traditional application process, no Notice of Intent to abandon or system diagram map or narrative notice is required. However, 10 days before filing the exemption notice with the Board, the railroad must notify the affected State's Public Service Board or equivalent agency of its intention to do so. The railroad must also send an advance environmental notice to the State, in accordance with STB regulation 49 CFR 1105.11.

The STB will publish the exemption notice in the Federal Register within

20 days after it is filed. Thirty (30) days after the Federal Register notice, the railroad may abandon the line, unless the Board stays the exemption.

Stay requests that raise transportation concerns must be filed within 10 days after the exemption notice is published in the Federal Register. Stay requests based on environmental or historic preservation concerns may be filed at any time but must be filed sufficiently in advance of the effective date for the Board to consider and act on the petition before the notice becomes effective. Offers to subsidize or purchase the line must be filed within 30 days after the Federal Register publication.

In addition, parties may ask the Board to reject the notice or reconsider the exemption as it applies to a particular line. Petitions to reject or reconsider may be filed within 20 days after the Federal Register notice. After the exemption takes effect, parties may ask the STB to revoke the exemption. Petitions to revoke may be filed at any time.

The STB will reject the notice if the information contained in the request is false or misleading. Therefore, if local traffic has moved on the line within the last 2 years, the exemption will be rejected.

Although environmental concerns, public need for continued service, and other issues can be raised in a petition to reconsider or revoke, the Board will disallow the exemption only in extraordinary cases.

If use of the class exemption is disallowed for a line, the railroad is still free to apply for abandonment of the line under the regular application procedures discussed above (or seek an individual exemption under the procedures discussed below). The complete regulations applying to this class exemption are found at 49 CFR 1152.50. Also see the attached STB Timetable for class exemption proceedings at Appendix II.

B. Individual Exemptions under 49 CFR 1152.60

As with the out-of-service lines exemption, no Notice of Intent to abandon or system diagram map or narrative notice is required when a request for an individual exemption is filed. The only notice a railroad must give before filing an individual exemption request is an environmental notice to the designated State agency in each state where abandonment is proposed. To obtain the name and address of the designated agency in your State call the Board's Section of Energy and Environment at (202) 565-1538.

The Board must publish notice of the proposed exemption in the Federal Register 20 days after it is filed. No further public notice is given even if the petition is denied. Carriers frequently will serve a copy of their petition on any shippers on the line but are not required to give notice when the petition is granted or denied. Interested persons can be notified individually by the Board, if they ask that their names be placed on the Board's service list in a particular case. Parties of record (applicants and protestants) are placed on the service list

automatically, but other interested persons should notify the Board's Office of the Secretary, 1925 K Street, N.W., Washington, D.C. 20423 of their desire to be served with copies of all decisions in a particular case.

A petition for an exemption generally will include only a brief description of the relevant facts. It need not be, and typically is not, accompanied by detailed financial or other information.

Persons opposing an exemption must file an opposition within 20 days after publication of the Federal Register notice. Offers to purchase or subsidize the line must be filed 120 days after the filing of the petition or exemption or 10 days after the service of the Board's decision granting the exemption, whichever occurs sooner. To receive a copy of that decision, you must have notified the Office of the Secretary of your interest in the case and have asked to be put on the service list as instructed, *supra*.

Petitions to stay the effective date of the decision may be filed in either "Petition" (Individual exemption) or "Notice" (class exemption cases). It should be noted that administrative agencies, like the Courts, have developed firm criteria for staying administrative action. To justify a stay, a petitioner must demonstrate that:

- (1) there is a strong, and the emphasis is on strong, likelihood that it will prevail on the merits;
- (2) it will suffer irreparable harm in the absence of a stay;
- (3) other interested parties will not be substantially harmed by the issuance of a stay; and
- (4) the public interest supports the granting of the stay.

The Board, as do the Courts, gives very careful consideration to each of the above criteria and has required a strong substantive showing on all of the four factors. While the showing of irreparable injury may vary from case to case, the key consideration is irreparable, and injuries that can be corrected later (however substantial in terms of money, time and energy) may not be enough to justify a stay. Similarly, in determining the public interest factor, the interests of private litigants must give way to the realization of public purposes. The burden of making a strong showing on all four of the above factors rests with the petitioner to convince the Courts or the Board that such extraordinary relief is warranted.

Where possible, parties opposed to the exemption should file an opposition or a protest with the Board before it acts on the exemption request. Even in the absence of a formal notice requirement, community leaders and shippers often are aware of a railroad's plan to seek an exemption before the carrier files its petition.

Protests and petitions for reconsideration of individual exemptions should include essentially the same kind of facts that would be included in a regular abandonment case. For instance, shippers should explain their business operations, quantify their use of the involved rail line, discuss the availability and

any additional cost of alternative transportation services, and explain the impact loss of the rail service would have on their businesses and the community. To the extent possible, protestants also should try to critically evaluate any financial information and traffic projections submitted by the railroad.

If the Board denies a carrier's request for an exemption, the carrier is free to file for authority to abandon under the regular application procedures discussed earlier.

IV. ALTERNATIVES TO ABANDONMENT

Users and interested parties should consider alternatives to abandonment at the first sign a carrier may be contemplating abandonment. The fact that the existing railroad believes the line is no longer economically viable does not necessarily mean the line cannot continue operations under other arrangements. There are many examples of small "short line" railroads operating on lines that the main line railroad sought to abandon. Congress and the STB have made it easier to preserve rail service by acquiring or subsidizing rail lines. These options will be briefly outlined below.

A. Forced Sales and Subsidies

To encourage continued service, Congress and the STB have adopted procedures that make it possible to force the sale or subsidy of lines slated for abandonment where the parties cannot agree on the price or terms of a subsidy.

1. Lines Approved For Abandonment

Under the offer of financial assistance (OFA) procedures, any financially responsible party seeking to continue service on a line approved for abandonment (or exempted) may compel the railroad to sell or conduct subsidized operations over the line. The statutory requirements and STB regulations concerning offers of financial assistance are contained at 49 U.S.C. 10904 and 49 CFR 1152.27, respectively.

Parties may request data on subsidy and acquisition costs from applicants in abandonment proceedings as soon as the Notice of Intent to abandon is filed. This includes (1) an estimate of the minimum purchase price or annual subsidy needed to keep the line in operation, (2) reports on the physical condition of the line, and (3) traffic and other data necessary to determine the amount of annual financial assistance needed to continue service. Any one who believes subsidy or acquisition is a possibility should request this information immediately and begin a thorough feasibility study. Often the State will assist the railroad by providing substantial money for rehabilitation of the line.

In class exemption cases, where the railroad files a Notice of Exemption,

Offers of Financial Assistance must be filed within 10 days of the publication of the Notice of Exemption in the Federal Register. In individual exemption cases where the carrier files a Petition for Exemption and in cases where the carrier files a full abandonment application and OFA must be filed within 10 days of the service date of the Board's order granting the exemption or abandonment application or within 120 days after the application or petition for exemption is filed, whichever is sooner. It is very important for a potential offeror to be aware of both the filing date and the date of the Board's decision. To do this, the potential offeror should ask to be placed on the Board's service list⁽²⁾ for the relevant abandonment proceeding, so that the offeror will be advised as soon as any decision is in the case is served.

Each OFA is reviewed by the Board to determine whether the offeror is financially responsible and whether the offer itself is reasonable. A copy of the offeror's annual report or other financial statements should be submitted with the offer to show its financial responsibility. The STB assumes a State or local government entity to be financially responsible.

As to the reasonableness of the offer, a subsidy should cover the railroad's avoidable operating losses on the line, plus a reasonable return on the value of the line. An offer to purchase should equal the acquisition cost of the line (the net liquidation or going concern value of the line, whichever is higher). The offeror should explain how its offer was calculated and explain any disparity between its offer and the carrier's estimate.⁽³⁾ If the Board finds that the offeror is financially responsible and the offer is reasonable, it will postpone the abandonment and give the parties an opportunity to negotiate.

If negotiations are successful and the parties voluntarily enter into a purchase (or subsidy) agreement which will result in continued rail service, the Board is required to approve the transaction and dismiss the abandonment application.

Should the parties fail to agree on the amount or terms of subsidy or purchase, either party may ask the STB (within 30 days after the offer is filed) to establish terms and conditions. The Board must issue a decision setting the terms and conditions, within 30 days after the request is made. The offeror then has 10 days to accept or reject the STB's terms and conditions. If the offeror chooses to accept them, then the railroad by law is forced to comply with them.

When a railroad receives more than one OFA, it can select the offeror with whom it wishes to transact business. Moreover, if the STB establishes terms and conditions at the request of an offeror who subsequently withdraws, then any other qualified offeror may take its place, forcing the railroad to go through with the subsidy or sale under those terms and conditions.

Certain conditions apply to sales under Section 10904(f)(4)(A). A purchaser may not transfer the line or discontinue service over the line for at least 2 years after consummation. After that time period, the purchaser may transfer the line back to the selling carrier, but it must wait at least 5 years before it can sell

the line to others.

The financial assistance provisions of Section 10904 also apply where the Board exempts an abandonment from the formal application process. There are some differences however, particularly as to timing. For example, in exemption proceedings, persons interested in purchasing or subsidizing the line must first submit to the STB and the railroad a written expression of their intent to make such an offer. This expression of intent must be received within 10 days after notice of the exemption is published in the Federal Register. Once the expression of intent is received, the exemption will be automatically stayed for 40 days. The offer itself is due 30 days after the Federal Register notice. For more information on these procedures see the STB's regulations at 49 CFR 1152.27.

2. Purchase of Lines Potentially Subject to Abandonment

The feeder railroad development program was designed as an alternative to abandonment. Congress envisioned it as a method of allowing shippers, communities, or other interested parties to acquire rail lines before an abandonment application is filed. If a rail line has been listed on a carrier's system diagram map as potentially subject to abandonment, a financially responsible person can compel the Board to require a railroad to sell it the line⁽⁴⁾. The price for such a sale is either agreed to by the parties or set by the Board. The statutory procedures for this program are found at 49 U.S.C. 10907 and the STB's regulations are detailed at 49 CFR 1151.

In short, a proceeding commences upon the filing of a feeder line application with the Board. The applicant must show, among other things, that it can (1) pay the net liquidation value of the line or its going concern value, whichever is higher, and (2) provide adequate service for at least 3 years. The Board has 15 days to reject the application if it does not contain the prescribed information or to accept it by filing a Notice in the Federal Register no later than 30 days after the application is filed. Within 30 days after the application is accepted, any other interested party may file a competing application to acquire all or any portion of the same line. The owning railroad and other interested parties may submit verified statements containing their evidence and arguments within 60 days after the initial application is accepted. Within 80 days after the initial application is accepted, offerors may file verified replies. The STB must publish its decision in the Federal Register. Within 10 days of the service date of the decision, the offeror must file a notice with the STB and the owning railroad either accepting or rejecting the Board's terms. If two or more offerors accept the STB's terms, the owning railroad has 15 days from the service date of the Board's decision to select the offeror with whom it wishes to transact business and to notify the STB and offerors. If the parties agree on a price then that price will be the final sale price.

In theory, this program has two major advantages. It allows the parties to

save the time and expense involved in the abandonment process, and it allows the new owners to take over operation of a line before further downgrading occurs. The program however, has not lived up to its potential, in part because it places the railroad and new short line owner in an adversarial relationship from the outset. It forces the railroad to sell at a price it may not agree upon and requires the newly created shortline to then develop a relationship with the railroad (with whom it must interchange traffic to reach the main line) in order to function in its new venture.

B. Voluntary Sales and Operations

Parties interested in preserving rail service need not wait until abandonment is approved to negotiate a voluntary purchase of a line proposed for abandonment or for that matter any active rail line. To make purchases of lines that might otherwise be abandoned more attractive to potential buyers, the STB has exempted these purchases from regulation. Special provisions have also been adopted to encourage continued service on abandoned lines acquired by States.

1. Class Exemptions

The statutory standards for voluntary acquisitions are found in 49 U.S.C. 10901, 10902, and 11323. Section 10901 applies only when (1) a non-carrier acquires a rail line, and (2) an existing carrier acquires an inactive line (a line that is already lawfully abandoned). Acquisitions of active rail lines by existing carriers fall under Section 10902 or 11323. These formal application procedures are seldom used to preserve rail service on lines threatened with abandonment. Instead, voluntary purchases of lines subject to abandonment are almost always consummated under exemptions to the formal acquisition procedures. These exemptions are discussed below.

a. Section 10901 Acquisitions

Following the Staggers Act and deregulation of the railroads, large Class I carriers began to sell or abandon unprofitable or marginally profitable lines. Requests to acquire and continue service over these lines were usually unopposed and were almost always approved because they were in the public interest. This led the ICC to promulgate broad class exemption procedures in 1986.⁽⁵⁾ The current rules are found in 49 CFR 1150 Subpart D. Most non-carrier acquisitions and operations are now exempt from formal regulation under Section 10901, as are all carrier acquisitions of abandoned lines. When a Class II or Class III carrier acquires a line, it is governed by 49 U.S.C. 10902.

To invoke the class exemption, the acquiring party must file a verified notice including general information about the transaction, and a caption

summary which will be used to provide public notice of the transaction. The exemption procedures differ depending on the carrier's size (in terms of gross revenue). If the transaction will create a Class III (smallest size) railroad, the exemption will be effective 7 days after the notice is filed.

b. Section 11323 Transactions

Class exemptions have also been established for seven kinds of transactions that would otherwise require approval under 49 U.S.C. 11323 -- the statute applicable to carrier acquisitions of active rail lines. The most important for our discussion here are (1) acquisition of a line which has already been approved for abandonment and would not constitute a major market extension, (2) acquisition of nonconnecting lines, and (3) acquisition of trackage rights. (The last two categories do have some qualifications not relevant here.) See 49 CFR 1180.2(d).

To invoke these exemptions, the carrier must file a verified notice, at least one week before the transaction is to be consummated, containing the information listed in the Board's regulations at 49 CFR 1180.4(g)(1). To qualify for an exemption for acquisition or renewal of trackage rights agreements, a caption summary must be filed as well. See 49 CFR 1180.4(g)(2)(i).

2. Individual Exemptions

Where no class exemption applies, an individual exemption may be sought for almost any small rail acquisition or operation, under the Board's general exemption authority at 49 U.S.C. 10502. Such requests for individual exemptions should be tailored to the particular situation involved.

The statute itself exempts some types of rail operations and transactions from STB regulation. The acquisition or use of spur, industrial, team, switching or side tracks is exempt under 49 U.S.C. 10906. These statutory exemptions are defined narrowly and the facts of each situation must be carefully examined to determine if the exemption applies.

V. LABOR ISSUES

No discussion of the acquisition and abandonment of rail lines would be complete without recognizing the increased importance rail labor plays in many of these cases. Labor witnesses often take an active role in opposing abandonment applications and other proceedings. In addition, the ICC Termination Act provides certain protection for employees of railroads engaging in some major changes in operations. It requires railroads to protect their employees from financial loss for a period of up to 6 years and to provide other protection relating to benefits and seniority.

Labor issues may arise in any rail transaction. The STB imposes labor protective conditions (LPC's) in most abandonments.

The conditions have been crafted differently for each situation. Generally there are the Oregon Short Line conditions imposed in abandonment cases, the Mendocino Coast conditions imposed in lease transactions, and the New York Dock conditions imposed in line sales to existing carriers⁽⁶⁾

When imposed, these conditions obligate the selling or abandoning railroad and, in some cases, can also be imposed on the acquiring railroad. When the acquiring entity is an established railroad or is a wholly owned subsidiary that is not independent from its rail parent, conditions may be imposed on both the acquiring and selling carriers. But where there is an acquisition of a line by a non-carrier or a Class III carrier, the employees are not entitled to any labor protection. Moreover, LPC's are not imposed for forced sales under the offer of financial assistance provisions of Section 10904 and are imposed only on the seller when there is a forced sale under the Feeder Railroad Development Program.⁽⁷⁾

The Board is not allowed to use its exemption powers under 49 U.S.C. 10502 to excuse carriers from providing employees with the LPC's they are due.

It is important at the beginning of any abandonment or acquisition proceeding to determine what position, if any, rail labor intends to take. There are some abandonments which will have minimal or no effect on rail jobs. In those cases, rail labor often decides not to participate. There are other situations in which labor witnesses play an active role, challenging railroad costing testimony and providing conflicting data in such areas as labor costs, track maintenance, and the current condition of the track and rolling stock.

VI. ALTERNATIVE USES FOR RAIL RIGHTS-OF-WAY

The ICC Termination Act and the National Rails to Trails Act, along with the STB's regulations give interested parties the opportunity to negotiate *voluntary* agreements to use a railroad right-of-way that otherwise would be abandoned for recreational or other public use, such as a commuter rail service or a highway. These methods of preserving a railroad corridor are known as "rail banking" meaning that the right-of-way is preserved for potential future use as a railroad. Many railroads do not own the land on which their tracks lie. Rather, they have easements over the land of adjoining property owners. Unless those easements are "rail-banked" by converting them to a trail or other public use, they are extinguished.⁽⁸⁾ Some rights-of-way which were "banked" have been reactivated. The rules for filing a request for a public use condition are slightly different from those which apply to the filing of a trails use request. The sample request which appears in this bulletin as Appendix III is a request for both types of conditions.

Proponents often ask for both conditions in the same request in order to take advantage of the benefits of each type of condition. This disadvantage of this approach is that the request for a trails use condition has a filing fee, while a request for public use condition does not.

Since filing fees for all types of cases change at least once a year, it is advisable to contact the Board's Office of Public Services at (202) 565-1592 to determine the current fee, if any, before filing any pleading.

A. Public Use Conditions

Under the terms of the ICC Termination Act at 49 U.S.C. 10905, when the Board approves or exempts an abandonment it must determine whether the rail line is suitable for alternative public use, such as highways, other forms of mass transit, conservation, energy production or transmission, or recreation. If it is, the Board may prohibit the railroad from selling or otherwise disposing of the rail corridor for up to 180 days after the effective date of the decision or notice authorizing abandonment. During the 180 day period, interested persons may negotiate with the railroad to acquire the property for public use. The railroad's consent is unnecessary for the imposition of this negotiating period. If the parties fail to reach an agreement within the 180 day period⁽⁹⁾, the Board must allow the railroad to fully abandon the line and dispose of its property. It cannot *require* the railroad to sell its property for public use.

The Board will only impose a public use condition when it has received a request to do so pursuant to 49 CFR 1152.28. The request must:

1. state the condition sought;
2. explain the public importance of the condition;
3. state the period of time for the condition (which cannot exceed 180 days); and
4. provide justification for the requested period of time.
5. A "Certificate of Service" indicating that a copy of the public use request has been served on the carrier seeking abandonment at its address of record.

A sample request for Public Use Condition is provided in Appendix III. An original and 10 copies must be submitted to the Board.

Timing is important. In an application for abandonment, the public use proponent must file the request within 45 days of the filing of the application, i.e. 25 days after the notice of the application appears in the Federal Register. In exemption cases, whether the exemption is a class exemption (notice) or an individually sought exemption (petition), the public use condition request must be filed within 20 days after the Federal Register publication appears.

B. Request for Trail Use Conditions

To begin the trail use process, a trail proponent must file a trail use request in the proceeding initiated by the railroad to abandon the line. A trail use request has no effect on the Board's decision whether to give a railroad permission to abandon. It is considered only after the Board has decided to permit the abandonment.

Under 49 CFR 1152.29, the trail use request must include:

1. A map which clearly identifies the rail corridor (including mileposts) which is proposed for trail use,
2. A statement of willingness to accept financial responsibility which indicates the proponent's willingness to manage the trail, pay property taxes on the trail and accept responsibility for any liability arising from the use of the rail corridor as a trail, and,
3. An acknowledgment that trail use is subject to the user's continuing to meet the above obligations, and the possibility of future reactivation of rail service on the corridor.
4. A "Certificate of Service" indicating that a copy of the trails use request has been served on the carrier seeking abandonment at its address of record.

A sample public use condition/trails use request appears at Appendix III. An original and 10 copies of the request must be filed with the Board and a copy served on the railroad.

Unlike the public use condition, the trail use condition will only be imposed if the railroad consents. If the railroad does agree, then a condition is imposed which prohibits the rail carrier from otherwise disposing of the rail corridor for 180 days while the parties negotiate an agreement. The Board has granted an extension of that 180 day period in cases where the parties jointly request it indicating that they are close to agreement.

As with the public use condition request, timing is very important. In an abandonment application, trail use requests must be filed within 45 days of the filing of the application i.e., 25 days after the publication of the application in the Federal Register. The rail carrier seeking abandonment authority then has 15 days to notify the Board whether and with whom (if more than one proponent has submitted a request) it intends to negotiate a trail use agreement. In class exemption cases, a trails use request must be filed within 10 days of the appearance of the notice in the Federal Register. Note that this is 10 days earlier than a public use condition request is due. In an individual exemption case (petition), a trails use request must be filed with 20 days of the appearance of the Federal Register notice. In both types of exemption cases the carrier has 10 after the trails use request is received to notify the Board whether and with whom it intends to negotiate a trails use agreement.

Note: Appendices referred to in this booklet are only available by mail. To request the appendices call the Office Public Services at 202 565-1592 or write to: Office of Public Services, Surface Transportation Board, 1925 K Street, N.W., Washington D.C. 20423

1. **NOTE:** *Oral Hearing* requests must be filed within *10 days* of receipt of the application. The Board must act on those requests within *15 days* of the filing of the application. See time line in Appendix I.
2. Write to the Office of the Secretary, Surface Transportation Board, 1925 K Street, N.W., Washington, D.C. 20423 and identify the docket number of the proceeding .
3. Any carrier seeking abandonment authority from the Board must provide certain information to a party considering making an offer of financial assistance, including an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation. See 49 U.S.C. 10904(b)(1) and OPS's information bulletin entitled "So You Want to Start a Small Railroad" which provides a more detailed discussion of the OFA process.
4. Even if a line is not shown on the carrier's system diagram map as a candidate for potential abandonment, shippers and communities may seek to compel the Board to require a railroad to sell the line by proving that the "public convenience and necessity" requires or permits the sale. This test, however, is more difficult to satisfy.
5. The STB has modified these rules by decision served November 18, 1996 at Ex parte 529, Class Exemption for Acquisition or Operation of Rail Lines by Class III Rail Carriers under 49 U.S.C. 10902.
6. These conditions are set forth in Oregon Short Line R. Co.-- Abandonment -- Goshen, 360 ICC 91 (1979); Mendocino Coast Ry., Inc. -- Lease and Operate, 354 ICC 732 (1978) and 360 ICC 653 (1980), as clarified in Wilmington Terminal RR, Inc. -- Pur. and Lease -- CSX Transp., Inc., 6 ICC 2d 799 (1990), aff'd subnom, Railway Labor Executives' Ass'n v. ICC, 930 F2d 511 (6th Cir. 1991) (Wilmington Terminal); and New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 ICC 60 (1979), as clarified in Wilmington Terminal, supra. They are all variations of the original LPC agreement hammered out between labor and management in 1936, the Washington Job Protection Agreement.
7. Feeder line purchasers are required to use the existing employees on the line to

the extent possible. See 49 U.S.C. 10910 (e) and (j).

8. Because real estate law and practice differs from state to state, we refer to landowners along the rail line as "adjoining" property owners. Sometimes adjoining property owners may have what is commonly called a "reversionary" interest in the land, meaning that upon the termination of the easement, the land is then available for the full, unencumbered use of the landowner or fee holder. In some states, when a rail use terminates, the land on which the rail line sits passes, as a matter of state law, to the adjoining landowners even when those landowners had no title to the land prior to its use as rail property. In some cases, railroads do own the land on which the track sits in fee simple and can dispose of it as they wish.

9. Unlike trails use conditions, public use conditions cannot be extended beyond the statutorily imposed 180 day limit, even if the parties' consent.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

<p>AL 970930.1</p>	<p>On September 10, 1997, Norfolk Southern Railway Company (NSR) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Berry-Belk Line, extending from railroad milepost 862.8 at Berry, AL to railroad milepost 884.9 at or near Belk, (Covin), AL, a distance of 22.1 miles in Fayette County, AL. The line traverses U.S. Postal Service ZIP Code 35545 and includes the stations of Berry (milepost 862.8), Fayette (milepost 878.6), and Covin (Belk) (milepost 884.9).</p>
<p>AR 970604.1</p>	<p>The Kansas City Southern Railway Company (KCS) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 42.78-mile line of railroad between milepost 4.00 at or near Hope, and milepost 46.78 at the Arkansas-Louisiana State Line, in Hempstead, Lafayette and Columbia Counties, AR. The line traverses United States Postal Service Zip Codes 71860 and 71861.</p>
<p>CA 970116.1</p>	<p>Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon an approximately 0.44-mile line of railroad known as the San Jose Industrial Lead from milepost 22.45 (West Carlos Street) to the end of the line at milepost 22.89 (West San Fernando Street, near West San Jose, in Santa Clara County, CA</p>
<p>CA 970221.1</p>	<p>Tulare Valley Railroad Company (TVR) from the prior approval requirements of 49 U.S.C. 10903 to permit TVR to abandon an 18.5-mile line of railroad extending from milepost 47.2 near Lindsay to milepost 66.0 near Ultra, in Tulare County, CA, and to discontinue trackage rights over 25.7 miles of railroad owned by San Joaquin Valley Railroad Co. from SP milepost 287.1 near Ducor to SP milepost 308.7 near Famoso, including the branch line from SP milepost 295.0 near Richgrove to SP milepost 299.1 near Jovista, in Tulare and Kern Counties, CA</p>
<p>CA 970311.1</p>	<p>Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over a 1.845-mile portion of its line of railroad known as the Port Chicago Industrial Lead from the end of the line at milepost 37.06 near Clyde, to milepost 38.905 near Port Chicago, in Contra Costa County, CA</p>
<p>CO 971202.1</p>	<p>Colorado, Kansas & Pacific Railway Company (Colorado), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Union Pacific Railroad Company and to operate approximately 121.9 miles of rail line between milepost 747.5, near Towner, and milepost 869.4, near NA Junction, in Kiowa, Crowley, and Pueblo Counties, CO</p>

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR **Brief Description from the FR Notice of the Abandonment**
Date yy/mm/dd.# **filing/exemption.**

<p>FL 970113.1</p>	<p>Florida Central Railroad Company, Inc. (FCEN) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon approximately 0.2 miles of railroad between milepost F-1.1 and the end of the track at milepost F-0.9 in Forest City, Seminole County, FL</p>
<p>FL 971124.1</p>	<p>CSX Transportation, Inc. (CSXT) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon approximately 1.41 miles of its line of railroad between milepost AR-716.89 and milepost AR-715.48 at the end of track, in High Springs, Alachua County, FL. The line traverses United States Postal Service Zip Code 32643</p>
<p>ID 970103.1</p>	<p>Union Pacific Railroad Company (UP), a Class I rail carrier, has filed a notice of exemption under 49 CFR 1180.2 to acquire trackage and right-of-way owned by Idaho Northern & Pacific Railroad Company (INP) and previously authorized for abandonment, subject to negotiations for trail use, between milepost 1.0, near Weiser, and milepost 84.1 at Rubicon, in Washington and Adams Counties, ID (Line). UP notes that it has no plan to reactivate rail service on the Line at this time, although reactivation for rail service would be possible in the future if the Line were conveyed to a trail user under the Trails Act. In its notice, UP has stated that, if trail use negotiations are unsuccessful, UP will abandon the Line pursuant to the authorization granted in Docket No. AB-433 (Sub-No. 2X).</p>
<p>ID 970304.1</p>	<p>Blue Mountain Railroad, Inc., of three segments of its rail line located between: (1) milepost 19.0 at Kamiaken Street and milepost 19.30 at Pullman, WA; (2) milepost 19.75 at Pullman and milepost 25.50 near Moscow, ID; and (3) milepost 26.10 near Moscow and milepost 27.50 at Line Street in Moscow, totaling 7.45 miles, in Whitman County, WA, and Latah County, ID</p>
<p>ID 970522.1</p>	<p>Union Pacific Railroad Company (UP) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 and 10904 to abandon a segment of UP's Homedale Branch, extending from milepost 11.4 near Adrian, OR, to the end of the line at milepost 33.5 near Marsing, ID. The line traverses U.S. Postal Service Zip Codes 97901, 83628, and 83639, a distance of 22.1 miles, in Malheur County, OR, and Owyhee County, ID, and includes the non-agency stations of Napton, OR--milepost 16.90; Homedale, ID--milepost 24.50; Petty, ID--milepost 25.89; and Marsing--milepost 33.10.</p>
<p>IL 970429.2</p>	<p>Union Pacific Railroad Company of a 2.8-mile segment of its East Elgin Industrial Lead between milepost 41.0 near Elgin Junction and milepost 43.8 near East Elgin, in Kane County, IL</p>

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

<p>IL 971016.2</p>	<p>Track Tech, Inc. filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad located generally between Denrock, IL (milepost 25.15), and Lyndon, IL (milepost 28.35), a distance of 3.20 miles in Whiteside County, IL. The line traverses U.S. Postal Service ZIP Code 61261</p>
<p>IN 970516.1</p>	<p>Owensville Terminal Company, Inc. (OTC) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Browns-Poseyville line, extending from railroad milepost 205.0 near Browns, IL, to railroad milepost 227.5 near Poseyville, IN, which traverses U.S. Postal Service Zip Codes 62818, 62844, 47616, and 47633, a distance of 22.5 miles, in Edwards and White Counties, IL, and Gibson and Posey Counties, IN. The line includes the stations of: Browns, MP 205.0; Grayville, MP 213.5; Griffin, MP 219.9; and Stewartsville, MP 225.4.</p>
<p>IN 970623.1</p>	<p>CSX Transportation, Inc. (CSXT), filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a portion of its line of railroad known as the Monon Subdivision, extending from railroad milepost Q-217.67 at Hunters to railroad milepost Q-213.41 at the end of track at Ellettsville, which traverses U.S. Postal Service ZIP Codes 47427 and 47401, a distance of 4.26 miles, in Monroe County, IN. The line for which the abandonment exemption request was filed includes the station of Ellettsville, milepost Q-213.</p>
<p>IN 970723.1</p>	<p>Trustee of Indiana Hi-Rail Corporation, Debtor (IHRC) filed with the Surface Transportation Board, Washington, DC 20423, an application under the Bankruptcy Code, 11 U.S.C. 1170(b), to abandon two segments of a line of railroad known as the St. Mary's District Line. The line segments extend: (1) From milepost TS 65.5 near Douglas, OH, to milepost TS 73.7 at Delphos, OH (the Douglas Line Segment); and (2) from milepost TS 77.5 near Landeck, OH, to milepost TS 117.8 near Craigsville, IN (the Landeck Line Segment), a total distance of 48.5 miles, located in Putnam and Van Wert Counties, OH, and Adams County, IN. The line includes the stations of Wilshire, OH (milepost TS 99.5), Ohio City, OH (milepost TS 90.0), Ft. Jennings, OH (milepost TS 68.7), Douglas, OH (milepost TS 66.0) and Decatur, IN (milepost TS 108.0), and traverses U.S. Postal Service ZIP Codes 46731, 46733, 46780, 45898, 45874, 45894, 45833, 45844 and 45876.</p>
<p>IN 970811.1</p>	<p>Owensville Terminal Company, Inc. (OTC) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Cynthiana-Owensville line, extending from railroad milepost 277.0 north of Cynthiana to railroad milepost 271.0 north of Owensville, a distance of 6.0 miles, in Gibson and Posey Counties, IN. The line traverses U.S. Postal Service Zip Code 47665 and includes the station of Owensville at railroad milepost 271.5.</p>

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR **Brief Description from the FR Notice of the Abandonment**
Date yy/mm/dd.# **filing/exemption.**

<p>IN 971128.1</p>	<p>Owensville Terminal Company, Inc. (OTC) filed with the Surface Transportation Board (Board) a petition /1/ under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Browns-Poseyville line, between milepost 205.0 at or near Browns, IL, and milepost 227.5 near Poseyville, IN, a distance of 22.5 miles in Edwards and White Counties, IL, and Gibson and Posey Counties, IN. The line traverses U.S. Postal Service Zip Codes 62818, 62844, 47616, and 47633. The line includes the stations of Browns, milepost 205.0; Grayville, milepost 213.5; Griffin, milepost 219.9; and Stewartsville, milepost 225.4.</p>
<p>KS 970109.1</p>	<p>South Kansas and Oklahoma Railroad, Inc. (SKO) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 9.2-mile portion of its line of railroad between milepost 257.2, at Oxford, and milepost 266.4, near Wellington, in Sumner County, KS</p>
<p>KS 970328.1</p>	<p>Union Pacific Railroad Company to abandon its line of railroad known as the Plainville-Colby Line between milepost 102.0 near Plainville and milepost 201.0 near Colby, a distance of 99.0 miles, in Rooks, Graham, Sheridan and Thomas Counties, KS</p>
<p>KS 970404.1</p>	<p>Missouri Pacific Railroad Company, and the discontinuance of service by Kyle Railroad Company, of the 33.4-mile Burr Oak Branch line located between milepost 496.3 at Jamestown and milepost 529.7 (end of line) at Burr Oak, in Cloud and Jewell Counties, KS</p>
<p>KS 970523.1</p>	<p>South Kansas and Oklahoma Railroad, Inc. (SKO) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 19-mile portion of its line of railroad between milepost 130.0, near Chanute, and milepost 149.0, near Fredonia, in Neosho and Wilson Counties, KS. The line traverses United States Postal Service Zip Codes 66720, 66714, 66726 and 66710.</p>
<p>KS 970714.1</p>	<p>Southeast Kansas Railroad Company (SEK) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad extending from milepost 421.0 near Coffeyville, KS, to milepost 387.0 near Faulkner, KS, a distance of 34 miles in Montgomery, Labette and Cherokee Counties, KS. The line traverses U.S. Postal Service Zip Codes 67336, 67332, 67342, and 67337</p>
<p>LA 970528.1</p>	<p>Louisiana and Delta Railroad, Inc. (Louisiana and Delta), filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903-04 &lt;SUP&gt;l&lt;/SUP&gt; to abandon a line of railroad known as the Napoleonville Branch. This line extends from milepost 1.0, located at or near Thibodaux, Lafourche Parish, LA, to milepost 15.28, located at or near Supreme, Assumption Parish, LA, for a distance of 14.28 miles. The line traverses U.S. Postal Service Zip Codes 70301, 70302, 70372, and 70390.</p>

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

LA 970528.2	Louisiana & Delta Railroad, Inc. (L&D) has filed notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon 1.8 miles of its line of railroad known as the Houma Branch between milepost 0.20 to milepost 2.0, in Terrebonne Parish, LA. The line traverses United States Postal Service Zip Code 70395. The Terrebonne Parish Consolidated Government (TPCG) filed a request for issuance of a notice of interim trail use (NITU) for the line pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d).
LA 970606.1	The Kansas City Southern Railway Company (KCS) has filed a notice of exemption under 49 CFR 1152 subpart F--Exempt Abandonments to abandon a 61.62-mile line of railroad between milepost 83.02 at or near Sibley, and milepost 144.64 at or near Carla, in Webster, Bienville, Natchitoches and Winn Parishes, LA. The line traverses United States Postal Service Zip Codes 71039, 71045, 71002, 71070 and 71410
MI 970106.1	Ludington & Northern Railway, Inc. (L&N) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its entire line of railroad from the south line of Michigan Highway 116 in Hamlin Township south and east through Pere Marquette Township to terminus in the city of Ludington, in Mason County, MI, a distance of 2.54 miles
MI 970515.1	CSX Transportation, Inc. filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a portion of its line of railroad known as the Montague Subdivision, extending from railroad milepost 62.12 at Berry to railroad milepost 72.25 at the end of the track at Montague, including a 3.5-mile industrial lead track at Montague, which traverses U.S. Postal Service Zip Codes 49445, 49461, and 49437, a distance of 13.63 miles, in Muskegon County, MI. The line includes the station of Montague at milepost 72.00.
MI 970620.1	CSX Transportation, Inc. (CSXT) has filed a notice of exemption under 49 CFR 1152 subpart F--Exempt Abandonments to abandon 1.32 miles of its line of railroad between milepost CHC-2.11, near Grand Ledge, and milepost CHC-3.43, at the end of track at Eagle, in Clinton County, MI. The line traverses United States Postal Service Zip Code 48822.
MI 971017.1	Lake State Railway Company (Lake State) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its 8-mile line of railroad between milepost 0.0 near Alpena, and milepost 8.0 near Hillman, in Alpena County, MI. The line traverses United States Postal Service Zip Code 49707.
MI 971121.1	Wisconsin Central Ltd. (WCL) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon approximately 37.3-mile line of railroad on the Marquette-Munising Line, between milepost 154, at a point east of Marquette, and milepost 116.7 in Munising Junction, in Marquette and Alger Counties, MI. The line traverses United States Postal Service Zip Codes 49806, 49822, 49855 and 49862.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR **Brief Description from the FR Notice of the Abandonment**
Date yy/mm/dd.# **filing/exemption.**

MN 970818.1	Minnesota Northern Railroad, Inc. (MNN), filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Red Lake Falls-Strata Line, extending from railroad milepost 59.00 near Strata, MN, to railroad milepost 69.14 near Red Lake Falls, MN, which traverses U.S. Postal Service ZIP Code 56750, a distance of 10.14 miles, in Red Lake and Polk Counties, MN. The line includes the station of Red Lake Falls at railroad milepost 69.14.
MN 970818.2	Minnesota Northern Railroad, Inc. (MNN) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Redland Junction-Fertile Line, extending from milepost 65.7 near Redland Junction, MN, to milepost 45.1 near Fertile, MN, which traverses U.S. Postal Service Zip Codes 56540 and 56716, a distance of 20.6 miles in Polk County, MN. The line includes the station of Fertile at milepost 45.1
MN 971202.1	Soo Line Railroad Company (Soo) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon an approximately 3.0+-mile line of railroad known as the West Duluth Line, between milepost 465.43+ and milepost 468.43+ in West Duluth, in St. Louis County, MN. The line traverses United States Postal Service Zip Code 55802.
MS 970117.1	Illinois Central Railroad Company to abandon its 21.70-mile rail line between milepost H-0.20 at Aberdeen Junction and milepost H-21.90 at Kosciusko, in Holmes and Attala Counties, MS
MS 970121.1	Old Augusta Railroad Company of its entire 2.5-mile rail line located between milepost 0.0 at Augusta and milepost 2.5 at New Augusta, in Perry County, MS
MS 970429.1	Illinois Central Railroad Company (IC) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon 1.94 miles of its line of railroad, known as the Hattiesburg-Varnado Switch, between milepost MH-3.06 near Hattiesburg, and milepost MH-5.00 near Varnado Switch, in Forrest and Lamar Counties, MS
ND 971126.1	Track Tech, Inc. filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad located generally between Hamar, ND (milepost 98.0), and Warwick, ND (milepost 103.92), a distance of 5.92 miles in Eddy County, ND. The line traverses U.S. Postal Service ZIP Codes 58380 and 58381.
ND 971126.2	Track Tech, Inc. filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad located generally between Minot, ND (milepost 4.00), and Tatman, ND (milepost 16.70), a distance of 12.70 miles in Ward County, ND. The line traverses U.S. Postal Service ZIP Codes 58701 and 58702.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

NE 970225.1	Union Pacific Railroad Company from the prior approval requirements of 49 U.S.C. 10903 to abandon service over a portion of rail line known as the Gilmore Industrial Lead in Sarpy County, NE, subject to standard labor protective conditions. The line extends between milepost 11.76 and milepost 12.23, near Gilmore, NE, a distance of 0.47-mile
NE 970626.1	Union Pacific Railroad Company (UP) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a 1.88-mile segment of its Lincoln Branch, extending from milepost 492.88 near 33rd Street to milepost 494.76 near 10th Street in Lincoln, NE. The line traverses U.S. Postal Service Zip Code 68503 in Lancaster County, NE.
NE 971016.1	Track Tech, Inc. filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad located generally between Bladen, NE (milepost 96.30) and Hildreth, NE (milepost 119.34), a distance of 23.04 miles in Franklin and Webster Counties, NE. The line traverses U.S. Postal Service ZIP Codes 68928 and 68947.
OH 970401.2	CSX Transportation, Inc. (CSXT) and Wheeling & Lake Erie Railway Company (W&LE) have filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances for CSXT to abandon and W&LE to discontinue service over approximately 0.7 miles of railroad owned by CSXT and leased to and operated by W&LE between milepost 16.0 and milepost 15.3 in Canton, Stark County, OH
OH 970819.1	Warren & Trumbull Railroad Company, Inc. (WTRC) and Economic Development II Rail Corporation (EDRC-II) have filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances for WTRC to discontinue service over and EDRC-II to abandon, a 2.5-mile line of railroad from milepost 89.1 at the DeForest Junction Station to milepost 91.6 at the North Warren Station, in the city of Warren, Trumbull County, OH./1/ The line traverses United States Postal Zip codes 44481, 44482, 44483, 44484 and 44485
OH 970829.1	Wheeling & Lake Erie Railway Company (W&LE) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Massillon Branch, extending from milepost 22.05 at Run Junction, near Navarre, OH, to the end of the track at milepost 16.40, near Massillon, OH, which traverses U.S. Postal Service ZIP Codes 44647, 44618, 44662, and 44616, a distance of 5.65 miles, in Stark County, OH. The line includes the station of Massillon at approximately milepost 16.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

OH 971002.1	Wheeling & Lake Erie Railway Company (W&LE) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon an approximately 11.4-mile line of railroad on the Georgetown Branch, from milepost 0.0 in Adena to milepost 0.5 at AC&NA Junction and from milepost 0.0 at AC&NA Junction to milepost 10.9 at the former Georgetown Coal Preparation Plant, in Harrison and Jefferson Counties, OH./1/ The line traverses United States Postal Service Zip Codes 43901, 43989, 43981 and 43907
OH 971118.1	West Central Ohio Port Authority (Westco) and The Indiana and Ohio Central Railroad Company, Inc. (IOCR), have filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances for Westco to abandon and IOCR to discontinue service over a 5.6-mile line of railroad between milepost 123.86 at or near Glen Echo and milepost 129.46 at the north edge of Warder Street in Springfield, Clark County, OH. The line traverses United States Postal Zip Code 45502
OR 970318.1	Idaho Northern & Pacific Railroad Company of a 60.58-mile portion of its Joseph Branch line, in Wallowa and Union Counties, OR
WA 970304.1	Blue Mountain Railroad, Inc., of three segments of its rail line located between: (1) milepost 19.0 at Kamiaken Street and milepost 19.30 at Pullman, WA; (2) milepost 19.75 at Pullman and milepost 25.50 near Moscow, ID; and (3) milepost 26.10 near Moscow and milepost 27.50 at Line Street in Moscow, totaling 7.45 miles, in Whitman County, WA, and Latah County, ID
WA 970701.1	The Land Conservancy of Seattle and King County (TLC) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903-05 to abandon a line of railroad known as the Sammamish or Issaquah Branch, extending from milepost 7.30 near Redmond to the end of the line at milepost 19.75 in Issaquah, which traverses U.S. Postal Service ZIP Codes 98027, 98029, 98052 and 98053, a distance of 12.45 miles, in King County, WA
WA 970725.1	Burlington Northern Railroad Company /1/ of a 1.18-mile line of railroad referred to as the South Aberdeen trackage between mileposts 1.82 and 3.00 in South Aberdeen, WA
WI 970401.1	Wisconsin Central LTD. (WCL) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon approximately .64 miles of its line of railroad, known as the Abbotsford line, between milepost 303.37 and milepost 304.01, in Abbotsford, Clark County, WI.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

WI 970626.2	Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over 2.0 miles of the Clyman Branch extending from the end of the line at milepost 110.0 to milepost 112.0, near Fort Atkinson, in Jefferson County, WI. The line traverses United States Postal Service Zip Code 53538.
WI 970806.1	Wisconsin & Southern Railroad Co. (WSOR) has filed a notice of exemption under 49 CFR 1152 subpart F--Exempt Abandonments and Discontinuances to discontinue service over a 3.0-mile line of railroad known as the Menomonee Falls Branch, owned by the State of Wisconsin Department of Transportation, between milepost 101.1 in Granville and milepost 104.05 in Menomonee Falls, WI. The line traverses United States Postal Service Zip Codes 53224 and 53051.
WI 971020.1	Union Pacific Railroad Company (UP) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad known as the Hayward Industrial Lead, extending from milepost 83.32 near Trego to milepost 96.0 near Hayward Junction, in Washburn County, WI, which traverses U.S. Postal Service ZIP Codes 54888 and 54875, a distance of 12.68 miles./1/ The line includes the non-agency stations of Trego at milepost 83.3, Earl at milepost 87.3, and Spring Brook at milepost 91.4.
WI 971126.3	Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over a 1.40-mile line of railroad on the Waukesha Industrial Lead from milepost 18.16 to the end of UP's line at milepost 19.56 (Grand Avenue), near Waukesha, in Waukesha County, WI. The line traverses United States Postal Service Zip Codes 53186, 53187 and 53188.
WI 971212.1	Wisconsin Central Ltd. (WCL), filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its line of railroad known as the Dresser-Amery Line, extending between milepost 47.83 in Dresser and milepost 63.08 (the end of the line) in Amery, a distance of 15.25 miles, in Polk County, WI. The line traverses U.S. Postal Service Zip Codes 54001 and 54009, and includes the stations of Wanderoos at milepost 56.3 and Amery at milepost 62.9

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1997**

State & FR **Brief Description from the FR Notice of the Abandonment**
Date yy/mm/dd.# **filing/exemption.**

WY 970814.1	Union Pacific Railroad Company (UP) filed with the Surface Transportation Board, Washington, DC 20423, an application for permission for the abandonment of and discontinuance of service on a line of railroad known as the Casper Branch extending from railroad milepost 590.0 to the end of the line at milepost 607.8, near Casper (Air Base), a distance of 17.8 miles, in Natrona County, WY, and for discontinuance of UP's trackage rights over The Burlington Northern and Santa Fe Railway Company trackage from UP milepost 532.5 near Orin to UP milepost 600.0 near Casper, a distance of 67.5 miles in Natrona and Converse Counties, Wyoming. The line includes the non-agency stations of Strouds at milepost 595.0, Casper at milepost 599.7, and Air Base at milepost 607.5 and traverses through United States Postal Service ZIP Codes 82601-82609 and 82633.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1998**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

AL 980129.1	Birmingham Southern Railroad Company to abandon a portion of its line of railroad known as the Birmingham Branch, extending from BS milepost 146+97.22 near East Thomas Station to the end of the line near Birmingham Station, a distance of 3.869 miles, in Jefferson County, AL
AZ	
AR 980605.1	Union Pacific Railroad Company filed a notice of exemption to abandon and discontinue service over a 26.0-mile line of railroad on the Stuttgart Branch from milepost 236.0 near Ricusky to the end of the line at milepost 262.0 near Indiana, in Arkansas County, AR
CA 980305.1	San Joaquin Valley RR Company to abandon a 9-mile line of its railroad between milepost 295.2 near Richgrove & milepost 304.2 near Hollis in Tulare & Kern Counties, CA
CA 981026.	Union Pacific Railroad Company has filed a notice of exemption to abandon and discontinue service over a 2.2-mile line of railroad on the Torrance Branch extending from milepost 500.67 to the end of the line at milepost 502.87 in Torrance, Los Angeles County, CA.
CA 980911.	Union Pacific Railroad Company filed a petition to abandon a 3.84-mile line of railroad known as the Los Alamitos Branch extending from milepost 514.26 near Los Alamitos Junction to the end of the line at milepost 518.10 near Los Alamitos, in Orange County, CA., and includes the non-agency station of Los Alamitos at milepost 518.10.
CO 980310.1	Union Pacific Railroad Company filed to abandon a line of railroad known as the Templeton Gap Spur, extending from the end of the line at railroad milepost 602.70 (at North Academy Boulevard) to railroad milepost 605.77 (at Templeton Gap Road), in Colorado Springs, a distance of 3.07 miles, in El Paso County, CO
CO 980604.1	Union Pacific Railroad Company has filed a notice of exemption to abandon an approximately 1.8-mile portion of the Leadville Branch from milepost 274.3 near McWethy Drive to the end of the line at milepost 276.1 at the rail yard near U.S. Highway 24, in Leadville, Lake County, CO.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1998**

**State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.**

CO 980720.2	Roaring Fork Railroad Holding Authority filed to abandon its line of railroad known as the Aspen Branch, extending from milepost 360.22 near Glenwood Springs to the end of the line at milepost 393.66 near Woody Creek, a total distance of approximately 33.44 miles in Garfield, Eagle and Pitkin Counties, CO.
FL	
ID	
IL 980731.1	CSX Transportation, Inc. has filed a notice of exemption to abandon a 2.9-mile line of its railroad between milepost OOH-445.7 at Okawville and milepost OOH-448.6 at the end of the track at Venedy, in Washington County, IL.
IL 981106.	Norfolk Southern Railway Company filed a petition to abandon a 39.1-mile branch line of railroad known as the Madison-Sorento Line or the Madison Branch, extending between milepost TS-406.6 at Sorento, IL, and milepost TS-445.7 at Madison, IL, in Madison and Bond Counties, IL. and includes the stations of Madison, Stallings, Glen Carbon, Leclaire, Edwardsville, White (Town of Alhambra), New Douglas, and Sorento.
IN 980202.1	Central Railroad Company of Indiana to abandon a line of railroad known as the Shelbyville Line, extending from approximately railroad milepost 23.0, near Thatcher station and the town of Greendale, to approximately railroad milepost 81.0, near Shelbyville, a distance of approximately 58 miles, in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN
IN 980721.1	Perry County Port Authority d/b/a Hoosier Southern Railroad filed a petition to discontinue service on a line of railroad known as the Rockport Line extending from milepost 0.0 at Rockport Junction to milepost 16.2 at Rockport, a distance of 16.2 miles in Spencer County, IN.

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1998**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

MI 980706	Grand Trunk Western Railroad Incorporated has filed a notice of exemption to abandon a 0.73-mile line of its railroad on the Cass City Subdivision between milepost 0.72 and milepost 1.25 in Oakland County, Pontiac, MI.
MI 980807.	Grand Trunk Western Railroad Incorporated filed for exemption to abandon a 3.1-mile line of railroad known as the Jackson Spur extending between milepost 35.3 at Pontiac and milepost 38.4 at Sylvan Lake, in Oakland County, MI.
MN 980330.1	Soo Line Railroad Company, operating under the trade name Canadian Pacific Railway filed a petition for exemption to abandon its line of railroad known as the Hiawatha/Cedar Avenue Wye, extending from milepost 423.59 +/-, near the eastern edge of Cedar Avenue to mileposts 423.26+/- and 423.21+/-, respectively, near the eastern edge of Hiawatha Avenue, a total distance of approximately 1 mile, in Hennepin County, MN
MN 980717.	Soo Line Railroad Company has filed a notice of exemption to abandon an approximately .62+/--mile line of its railroad on the Farmington Minnesota Line between milepost 143.73+/-to milepost 144.35+/-in Farmington, Dakota County, MN.
MN 981130.	The Burlington Northern and Santa Fe Railway Company has filed a notice of exemption to abandon 2.43 miles of rail line between milepost 0.00 near East Minneapolis and milepost 2.43 near Rollins Oil, in Hennepin and Ramsey Counties, MN.
MN 980918.	Soo Line Railroad Company has filed a notice of exemption to abandon an approximately .10-mile line of its railroad known as the Minneapolis Terminal Line between milepost 4.09+/--near the western edge of Colfax Avenue North to milepost 4.19+/--near the western edge of Aldrich Avenue North, in Minneapolis, Hennepin County, MN.
MN 981224.	Soo Line Railroad Company has filed a notice of exemption to abandon an approximately 1.18+/--mile portion of the West Duluth Line between milepost 464.25+/- and milepost 465.43+/- in West Duluth, St. Louis, County, MN.
MS	
MO	

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1998**

State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.

WI 980324.1	Union Pacific Railroad Company filed a petition for exemption to abandon and discontinue service on a line of railroad known as the Harvard Subdivision, extending from railroad milepost 119.0 near Evansville to railroad milepost 134.0 near "MX" (a crossing of Wisconsin & Southern Railroad Company near Madison), a distance of 15.0 miles in Rock, Green and Dane Counties, WI
WI 980505.2	Fox Valley & Western Ltd. filed for exemption to abandon a line of railroad, known as the Luxemburg-Kewaunee Line, extending from milepost 18.9 near Luxemburg to milepost 35.6 at the end of the line near Kewaunee, a distance of 16.7 miles, in Kewaunee County, WI
WI 980508.1	Wisconsin Central Ltd. will abandon its line of railroad on Fox Valley & Western Line One between MP-175.85 near Dixie and Morris Street and MP-178.40 north of Scott Street, a distance of approximately 2.55 miles, and will also abandon its line of railroad on FVW Line Two between MP-145.58 near Guinette and Woodlawn Avenues and MP-146.24 north of Ninth Street where it connects with FVW Line One, a distance of approximately .66 miles, all in Fond Du Lac, WI;
WI 980720.1	Union Pacific Railroad Company has filed a notice of exemption to abandon and discontinue service over a 8.4-mile line of railroad on the Camp Douglas Industrial Lead from milepost 174.3 near Wyeville to the end of the line at milepost 182.7 near Camp Douglas, in Monroe and Juneau Counties, WI.
WI 981008.	Union Pacific Railroad Company has filed a notice to abandon and discontinue service over a 2.0-mile line of railroad on the Clyman Branch from the end of the line at milepost 110.0 to milepost 112.0 near Fort Atkinson, in Jefferson County, WI.
WI 981229.	Fox Valley & Western Ltd. filed a petition to abandon a 10.7-mile line of railroad known as the Manawa-Scandinavia Line, extending from milepost 50.3 near Manawa to the end of the line at milepost 61.0 in Scandinavia, in Waupaca County, WI., and includes the station of Scandinavia at milepost 61.0.
WI 980922.	Wisconsin Central Ltd. will abandon its line of railroad on the WCL Line from milepost 310.75, in Hermansville, to milepost 336.25, in North Escanaba, a distance of approximately 25.5 miles.
WY	

**ABANDONMENT ACTIVITY
CALENDAR YEAR 1999**

**State & FR Brief Description from the FR Notice of the Abandonment
Date yy/mm/dd.# filing/exemption.**

ID 990812.	Union Pacific Railroad Company to abandon and salvage its Wallace Branch line. The line extends 71.5 miles from milepost 16.5 near Plummer to milepost 80.4 and/or 0.00 near Wallace, and then to milepost 7.6 near Mullan, in Benewah, Kootenai, and Shoshone Counties, Idaho
ID 990708.	Union Pacific Railroad Company has filed a notice of exemption to abandon an 18.2-mile line of railroad on the Boise Subdivision, "Boise Cutoff" from milepost 424.80 near Orchard to milepost 443.0 near Hillcrest, in Ada County, ID.
IA	
IN 990115.	CSX Transportation, Inc. has filed a notice of exemption to abandon .35 miles of its line of railroad between milepost LQ-189.65 and milepost LQ-190.00 in Cloverdale, Putnam County, IN.
IL 990816.	Norfolk Southern Railway Company has filed a notice of exemption to abandon a 7.5-mile line of railroad between milepost A-13.0 at Bluffs Junction to milepost A-20.5 at Troy Junction, in Edwardsville, Madison County, IL.
KN 990326.	Central Kansas Railway Limited Liability Company has filed a notice of exemption to abandon an approximately 8-mile line of its railroad on the Spring Branch between milepost 69.0 at Anthony and milepost 77.0 at Spring, in Harper County, KS.
KN 990825.	Kansas Eastern Railroad, Inc. and South Kansas and Oklahoma Railroad, Inc. have filed a notice of exemption for KER to abandon and SKO to discontinue its trackage rights over a rail line between milepost 438.5, at Severy, and milepost 483.0 near Augusta, in Butler and Greenwood Counties, KS.

ILLUSTRATION 1

GRANT TO A STATE FOR A RAILROAD

Act of Sept. 20, 1850
9 Stat. 466

AN ACT GRANTING THE RIGHT OF WAY, AND MAKING A GRANT OF LAND IN THE STATES OF ILLINOIS, MISSISSIPPI, AND ALABAMA, IN AID OF THE CONSTRUCTION OF A RAILROAD FROM CHICAGO TO MOBILE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands be, and the same is hereby, granted to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with a branch of the same to Chicago, on Lake Michigan, and another via the town of Galena in said State, to Dubuque in the State of Iowa, with the right also to take necessary materials of earth, stones, timber, etc., for the construction thereof: *Provided,* That the tight of way shall not exceed one hundred feet on each side of the length thereof, and a copy of the survey of said road and branches, made under the direction of the legislature, shall be forwarded to the proper local land offices respectively, and to the general land office at Washington city, within ninety days after the completion of the same.

Sec. 2. *And be it further enacted,* That there be, and is hereby granted, to the State of Illinois, for the purpose of aiding in making the railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches; but in case it shall appear that the United States have, when the line or route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State, to select, subject to the approval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or to which the right of preemption has attached as aforesaid, which lands, being equal in quantity to one half of six sections in width on each side of said road and branches, the State of Illinois shall have and hold to and for the use and purpose aforesaid: *Provided,* That the lands to be so located shall in no case be further than fifteen miles from the line of the road: *And further provided,* That construction of said road shall be commenced at its southern terminus, at or near the junction of the Ohio and Mississippi Rivers, and its northern terminus upon the Illinois and Michigan Canal simultaneously, and continued from each of said points until completed, when said branch roads shall be constructed, according to the survey and location thereof: *Provided further,* That the lands hereby granted shall be applied in the construction of said road and branches respectively, in quantities corresponding with the grant for each, and shall be disposed of only as the work progresses, and shall be applied to no other purpose whatsoever: *And provided further,* That any and all lands reserved to the United States by the act entitle "An Act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan, approved March second, eighteen hundred and twenty-seven, be, and the same are hereby, reserved to the United States from the operation of this act.

Sec. 3. *And be it further enacted,* That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold.

Sec. 4. *And be it further enacted,* That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Sec. 5. *And be it further enacted*, That if the said railroad shall not be completed within ten years, the said State of Illinois shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, the title to the purchasers under said State remaining valid; and the tile to the residue of said lands shall reinvest in the United States, to have and hold the same in the same manner as if this act had not been passed.

Sec. 6. *And be it further enacted*, That the United States mail shall at all times be transported on the said railroad under the direction of the Post-Office Department, at such price as the Congress may by law direct.

Sec. 7. *And be it further enacted*, That in order to aid in the continuation of said Central Railroad from the mouth of the Ohio River to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile to a point near the mouth of the Ohio River, and that public lands of the United States, in the same extent in proportion to the length of the road, on the dame terms, limitation, and restrictions in every respect, shall be, and is hereby, granted to said States of Alabama and Mississippi respectively.

Approved, September 20, 1850

[9 Stat 466]

AN ACT TO AID IN THE CONSTRUCTION OF A RAILROAD AND TELEGRAPH LINE FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN, AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That [names] together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of "The Union Pacific Railroad Company;"

Sec. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

Sec. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Sec. 4. *And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: Provided, however, That no such commissioner shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president

of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

Sec. 5. And be it further enacted, That for the purposes herein mentioned the Secretary of the Treasury shall, upon the certificate in writing by said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: Provided, This section shall not apply to that part of any road now constructed.

Sec. 6. And be it further enacted, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

Sec. 7. And be it further enacted, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: Provided, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preemption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: Provided, That in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

Sec. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

Sec. 9. *And be it further enacted*, That the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas River, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Sec. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas River, as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first-named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines in this act hereinafter mentioned, through the Territories from the State of California to the Missouri River, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company, or either of them, on filing their assent to this act, as aforesaid, may unite upon equal terms, under this act, with the said Kansas company, in constructing said railroad and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; and in the case the first-named shall

complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

Sec. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: Provided, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

Sec. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line; and the companies herein named in Missouri, Kansas, and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all material required for constructing and furnishing said first-mentioned line between the aforesaid point, on the one hundredth meridian of longitude and western boundary of Nevada Territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

Sec. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions, in all respects, for one hundred miles in length next to the Missouri River, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose, use any railroad charter which has been or may be granted by the legislature of

Kansas: Provide, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from St. Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa, at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee, and Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

Sec. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for, in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: Provided, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

Sec. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act is shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

Sec. 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act.

Sec. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches

within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: Provided, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River, in California, by the first dy of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: Provided, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountain, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

Sec. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of way) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

Sec. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangements be entered into, and the transfer of said telegraph line be made in accordance therewith too the line of said railroad and branches, such transfer shall for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein.

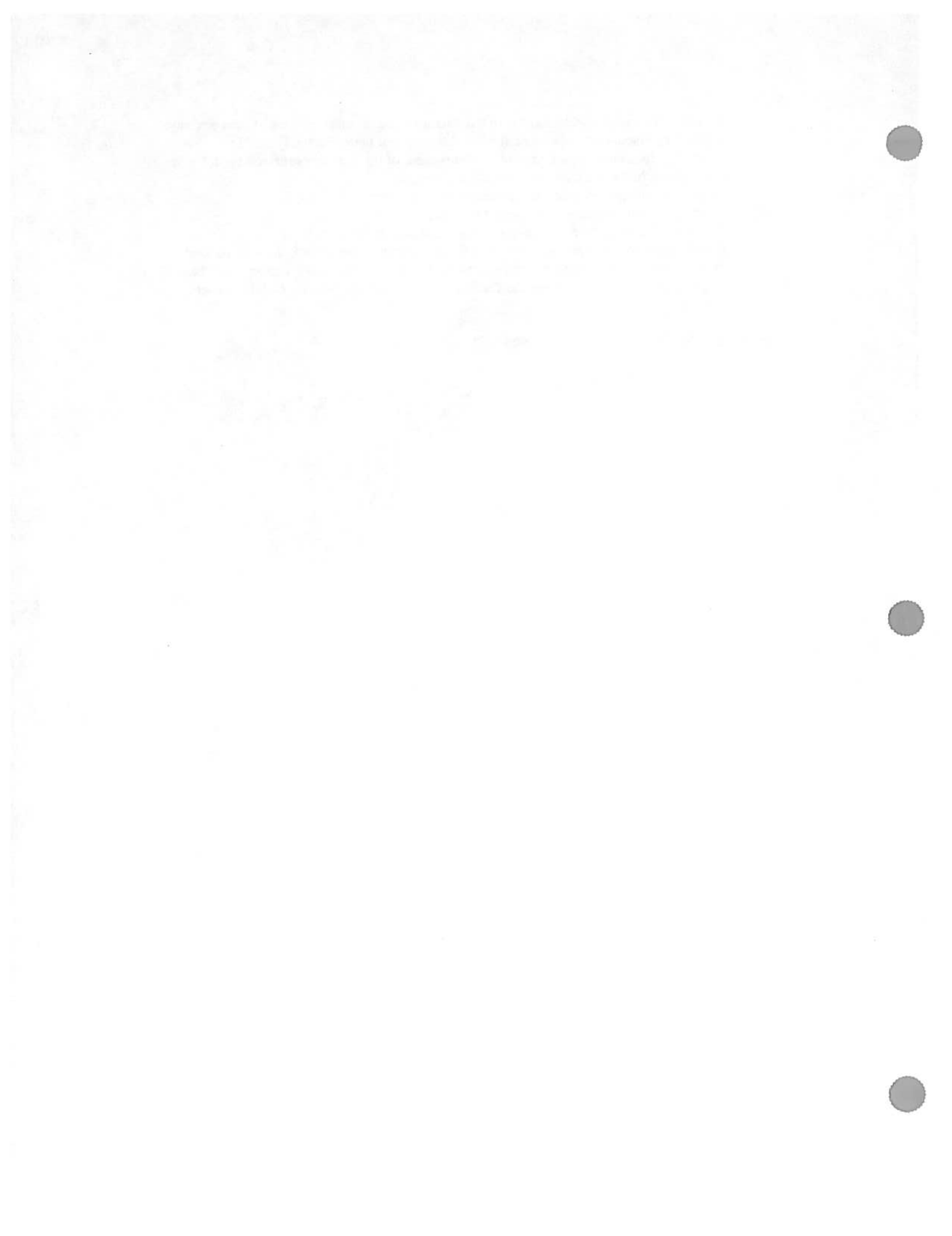
Sec. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report wherein shall be set forth --

First. The names of the stockholders and their places of residence, so far as the same can be ascertained;

Second. The names and residences of the directors, and all other officers of the company;
Third. The amount of stock subscribed, and the amount thereof actually paid in;
Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such surveys;
Fifth. The amount received from passengers on the road;
Sixth. The amount received for freight thereon;
Seventh. A statement of the expense of said road and its fixtures;
Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof. Which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved, July 1, 1862

[12 Stat 489]



One Hundred Third Congress
United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-fifth day of January, one thousand nine hundred and ninety-four

An Act

To validate conveyances of certain lands in the State of California that form part of the right-of-way granted by the United States to the Central Pacific Railway Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Railroad Right-of-Way Conveyance Validation Act'.

SEC. 2. VALIDATION OF CONVEYANCES.

Except as provided in section 5, the conveyances described in section 3 (involving certain lands in Nevada County, State of California) and section 4 (involving certain lands in San Joaquin County, State of California) concerning lands that form parts of the right-of-way granted by the United States to the Central Pacific Railway Company in the Act entitled 'An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and Other Purposes', approved July 1, 1862 (12 Stat. 489), hereby are legalized, validated, and confirmed, as far as any interest of the United States in such lands is concerned, with the same force and effect as if the land involved in each such conveyance had been held, on the date of such conveyance, under absolute fee simple title by the grantor of such land.

SEC. 3. CONVEYANCES OF LANDS IN NEVADA COUNTY, STATE OF CALIFORNIA.

The conveyances of land in Nevada County, State of California, referred to in section 2 are as follows:

(1) The conveyances entered into between the Southern Pacific Transportation Company, grantor, and David G. 'Otis' Kantz and Virginia Thomas Bills Kantz, husband and wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15995 in the official records of the county of Nevada.

(2) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Antone Silva and Martha E. Silva, his wife, grantees, recorded June 10, 1987, as instrument number 87-15996 in the

official records of the county of Nevada.

(3) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Charlie D. Roeschen and Renee Roeschen, husband and wife as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15997 in the official records of the county of Nevada.

(4) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Manuel F. Nevarez and Margarita Nevarez, his wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15998 in the official records of the county of Nevada.

(5) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Susan P. Summers, grantee, recorded June 10, 1987, as instrument number 87-15999 in the official records of the county of Nevada.

* * * * *

(42) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and John David Gay and Elizabeth Jean Gay, as Trustees of the David and Elizabeth Gay Trust, grantees, recorded October 3, 1991, as instrument number 91-30654 of the official records of the county of Nevada.

SEC. 4. CONVEYANCES OF LAND IN SAN JOAQUIN COUNTY, STATE OF CALIFORNIA.

The conveyances of land in San Joaquin County, State of California, referred to in section 2 are as follows:

(1) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Ronald M. Lauchland and Lillian R. Lauchland, grantees, recorded October 1, 1985, as instrument number 85066621 in the official records of the county of San Joaquin.

(2) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Bradford A. Lange and Susan J. Lange, his wife, as to an undivided one-half, and Randall W. Lange and Charlene J. Lange, his wife, as to an undivided one-half interest, grantees, recorded October 1, 1985, as instrument number 85066623 in the official records of the county of San Joaquin.

(3) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Leo G. Lewis and Vasiliki L. Lewis, and Billy G. Lewis and Dimetria Lewis, grantees, recorded October 1, 1985, as instrument number 85066625 in the official records of the county of San Joaquin.

(4) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Louis J. Bennett, grantees, recorded

October 1, 1985, as instrument number 85066627 in the official records of the county of San Joaquin.

(5) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Joe Alves Correia and Leontina Correia, his wife, grantees, recorded September 1, 1970, instrument number 33915, in book 3428, page 461, of the official records of the county of San Joaquin.

(6) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Willard H. Fike, Jr., and Dorla E. Fike, his wife, grantees, recorded January 7, 1988, instrument number 88001473 of the official records of the county of San Joaquin.

(7) The conveyance entered into between Central Pacific Railway, Grantor, and Nettie M. Murray and Marie M. Hallinan, Grantees, dated May 31, 1949, recorded June 14, 1949, in volume 1179 at page 394 of the official records of the county of San Joaquin.

(8) The conveyance entered into between the Central Pacific Railway Company, a corporation, and its Lessee, Southern Pacific Company, a corporation, Grantor, and Lodi Winery, Incorporated, Grantee, dated August 2, 1938, recorded May 23, 1940, in volume 692, page 249, of the official records of the county of San Joaquin.

SEC. 5. LIMITATIONS ON VALIDATION OF CONVEYANCES.

(a) SCOPE- Nothing in this Act shall be construed to--

(1) diminish the right-of-way referred to in section 2 to a width of less than fifty feet on each side of the center of the main track or tracks maintained by the Southern Pacific Transportation Company on the date of enactment of this Act; or

(2) legalize, validate, or confirm, with respect to any land that is the subject of a conveyance referred to in section 3 or 4, any right or title to, or interest in, such land arising out of adverse possession, prescription, or abandonment, and not confirmed by such conveyance.

(b) MINERALS- (1) The United States hereby reserves any federally-owned minerals that may exist in land that is conveyed pursuant to section 2 of this Act, including the right of the United States, its assignees or lessees, to enter upon and utilize as much of the surface of said land as is necessary to remove minerals under the laws of the United States.

(2) Any and all minerals reserved by paragraph (1) are hereby withdrawn from all forms of entry, appropriation, and patent under the mining, mineral leasing, and geothermal leasing laws of the United States.

Speaker of the House of Representatives.
Vice President of the United States and
President of the Senate.

Faint, illegible text, possibly bleed-through from the reverse side of the page. The text is arranged in several paragraphs, but the characters are too light and blurry to be transcribed accurately.

[Federal Register: March 5, 1998 (Volume 63, Number 43)]
[Notices] [Page 10966]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr05mr98-135]

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board
[STB Docket No. AB-398 (Sub-No. 5X)]

San Joaquin Valley Railroad Company--Abandonment Exemption--in Tulare and Kern Counties, CA

San Joaquin Valley Railroad Company (SJVR) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 9-mile line of its railroad between milepost 295.2 near Richgrove and milepost 304.2 near Hollis in Tulare and Kern Counties, CA. The line traverses United States Postal Service Zip Codes 93261 and 93250. SJVR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on April 4, 1998, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues, \1\; formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), \2\; and trail use/rail banking requests under 49 CFR 1152.29 must be filed by March 16, 1998. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by March 25, 1998, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423.

\1\ The Board will grant a stay if an informed decision on environmental issues

(whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25). This fee is scheduled to increase to \$1000, effective March 20, 1998.

A copy of any petition filed with the Board should be sent to applicant's representative: Fritz R. Kahn, Suite 750 West, 1100 New York Avenue, N.W., Washington, DC 20005-3934.

If the verified notice contains false or misleading information, the exemption is void ab initio.

SJVR has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by March 10, 1998. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565-1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), SJVR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by SJVR's filing of a notice of consummation by March 5, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Decided: February 24, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.
Vernon A. Williams,
Secretary.
[FR Doc. 98-5301 Filed 3-4-98; 8:45 am]
BILLING CODE 4915-00-P

State of Idaho v Oregon Short Line RR Co., 617 F. Supp. 213 (D.C. Idaho 1985)

In this case the court concluded:

“... the statutory test of abandonment contained in 43 U.S.C. §912, as opposed to the common-law rule, governs in this case on the question of whether an abandonment has occurred under the particular facts before the Court.”

* * *

“As the Court reads §912, the test regarding the abandonment is that “use and occupancy” of the railroad right-of-way for railroad purposes must cease in order for abandonment to occur. As the Court views the record in this case, neither use nor occupancy of the Ketchum Branch right-of-way has ceased, and thus, no abandonment has occurred.

“Unfortunately, there is little case law construing §912; that which does exist deals with issues not before the Court at this time. ... The court is not aware of any case in which the terms ‘use’, ‘occupancy’ and ‘[railroad] purposes’ have been construed. In such circumstances, long-established principles of statutory construction dictate that the language used by Congress in this statute be given its plain and apparent meaning.

“The record shows that Ketchum Branch is being ‘used’ for railroad purposes. [Storage of 600-700 cars awaiting repair, sale or further use. Storage of railroad related material - ties, rails, ballast and fill, etc.]

“The undisputed facts show that the Ketchum Branch is also ‘occupied’ for railroad purposes. ... [No removal of rails, ties, etc.; railroad continues to pay taxes.]

“[1] In reaching its decision, the Court has also looked for guidance to the case law dealing with common-law principles of abandonment. The classic statement of the rule is that for abandonment to occur there must be (1) present intent to abandon, and (2) physical acts evidencing clear intent to relinquish the property interest. ...

“The record, when viewed as a whole, shows no present intent to abandon the Ketchum Branch. ...

“Plaintiffs and intervenors argue, however, that the defendants’ application to the ICC for authorization to discontinue service ... is prima facie evidence of intent to abandon. A fair number of courts have rejected this argument

“In addition to finding no intent to abandon, the Court also finds a corresponding absence of sufficient physical acts to constitute an abandonment. In a majority of cases reviewed by the Court, abandonment was generally found only where all or most of the following acts had occurred:

1. Railway service had been discontinued;
2. Trackage and other railroad structures had been removed;
3. Right-of-way had not been used for any railroad purpose;
4. Maintenance of the line had been discontinued. See 65 Am.Jur.2d §§ 82-83 at pp. 391-93 (1972 and 1984 Supp.) And cases cited therein.

Likewise, if some or all of the following occurred, abandonment generally was not found:

1. The railroad had paid taxes on the right-of-way;
2. The right-of-way was used for some railroad purpose even if railroad service had been discontinued;
3. Trackage was left intact along with other railroad structures such as bridges, ballast, and barricades. See *id.*”

* * * *

“In accordance with the views expressed in this memorandum decision, the Court makes the following partial declaration of the rights and legal relations of the parties under 28 U.S.C. 2201:

1. No abandonment ... has occurred in the present case;
2. In order for abandonment ... to occur in the future the Court declares that the following must occur:
 - a. The railroads must cease paying taxes;
 - b. The railroads must take up the tracks and other railroad structures or the line must become completely unusable, even for side track purposes;
 - c. The railroads must have the intent to abandon - as evidenced by statements and conduct;
 - d. The railroads must cease using the line for any railroad purpose;
 - e. This Court or Congress must decree that abandonment has occurred.”

PROPOSED INSTALLATION OF MCI FIBER OPTIC
COMMUNICATIONS LINE WITHIN SOUTHERN PACIFIC
TRANSPORTATION CO.'S RAILROAD RIGHT-OF-WAY*

M-36964

January 5, 1989

Rights-of-Way: Act of January 27, 1866--Rights-of-Way: Act of March 3, 1875--
Rights-of-Way: Jurisdiction Over--Rights-of-Way: Nature of Interest Granted

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Memorandum

To: Assistant Secretary--Land and Minerals Management

From: Acting Solicitor

Subject: Proposed Installation of MCI Fiber Optic Communications Line within
Southern Pacific Transportation Co.'s Railroad Right-of-Way

This opinion memorializes and expands upon the guidance we have previously provided you as to whether MCI Telecommunications Corp. (MCI) or Southern Pacific Transportation Co. (SPT) must obtain right-of-way grants or permits from the Bureau of Land Management (BLM), in addition to those currently possessed by SPT, in order for MCI to install a fiber optic communications line and associated facilities (i.e., equipment shelters) within existing railroad rights-of-way of SPT which cross public lands.

On July 15, 1988, the Acting Assistant Secretary--Land and Minerals Management sent a letter to counsel for MCI, indicating that no additional right-of-way grant was necessary for installation of the line. We approved sending that letter, notwithstanding our ongoing review of the general issues implicated in this matter, because of our conclusion that even under the most stringent standard for the railroad's use of its right-of-way grant, the installation of the line would be deemed to be within the scope of the grant, in that it furthers railroad purposes.

* Not in chronological order.

The completion of our review has resulted in this opinion. Although this memorandum addresses the MCI-SPT situation in particular, it is intended to provide general guidance in similar situations.

Based on the information provided by MCI and SPT, and abased on our review of authorities describing the scope of the rights-of-way currently possessed by SPT, we conclude that installation of the line and associated facilities is within the scope of the railroad's existing grants.

BACKGROUND

MCI and SPT have entered into an agreement whereby SPT will grant MCI the right to install a fiber optic communications line within SPT railroad rights-of-way between Rialto, California, and Texas. MCI has described the fiber optic line as a single cable, five-eighths of an inch in diameter, which will be buried within the rights-of-way to a depth of 36 to 40 inches. In some areas, the cable will be sheathed in a conduit 2 inches in diameter. At approximately 20 mile intervals, surface electronic apparatus will be installed in shelters which will measure 11 by 18 feet. MCI will operate the line as a commercial trunk line, with a portion of the line's capacity dedicated to SPT's use for railroad communications purposes.

Segments of the SPT rights-of-way in question traverse public lands administered by BLM. The total length of the segments is approximately 185 miles. BLM state offices have advised MCI and SPT that, in order to cross these segments, MCI must obtain right-of-way grants from BLM, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§1761-1771. BLM has taken this position because of a memorandum and a letter issued by the Associate Solicitor--Energy and Resources in 1985 and 1986, respectively, concerning a similar situation.

The Associate Solicitor's memorandum to the Director, BLM, dated July 5, 1985, states that two circuit cases, *Energy Transportation Systems, Inc. v Union Pacific Railroad co.*, 606 F.2d 934 (10th Cir. 1979), and *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*, 619 F.2d 696 (8th Cir. 1980),² had construed the right-of-way granted by the Pacific Railroad Act of July 1, 1862, ch. 120, 12 Stat. 489, *as amended* by the Act of July 2, 1864, ch. 216, 13 Stat. 356, to be "a mere surface easement." From this premise, the memorandum reasoned that where such rights-of-way traverse public lands administered by BLM, the subsoil,

² Hereinafter referred to, respectively, as "ETSI-10" and "ETSI-8," and collectively as the "ETSI decisions."

or servient estate, beneath the right-of-way is unappropriated public land like land adjacent to the right-of-way. That being so, the subsoil was said to come within the operation of Title V of FLPMA, as public lands administered by BLM, and a right-of-way issued pursuant to Title V was viewed as being required in order to install a cable within the subsoil. The memorandum comes to the same conclusion with respect to the subsoil beneath rights-of-way granted by the General Railroad Right-of-Way Act of March 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§934-939 (1982).

The Associate Solicitor's letter, dated February 24, 1986, to Mr. Robert E. Walkley, General Contract Counsel, Union Pacific System, was written in response to Mr. Walkley's request that the memorandum be reviewed. The Associate Solicitor concluded that the memorandum was correct. He noted that the courts in the *ETSI* cases had held that the rights obtained by the railroad under the 1862 Act extend only to the use of the surface of the land for railroad right-of-way purposes, and that such rights extend in some degree to the subsurface as well, for tunnels, cuts, fills, and structures necessary for railroad purposes. He stated that the railroad unquestionably could install electronic cables within its right-of-way for railroad purposes, but that it could not authorize a third party to install a commercial cable within the right-of-way.³

For the reasons specified herein, the memorandum and letter are overruled.

DISCUSSION

In order to determine whether the scope of SPT's rights-of-way permits installation by MCI of the fiber optic communications line and associated facilities, it is necessary to examine the statutory terms of SPT's rights-of-way grants. Then we must turn to the Supreme Court and lower court authority interpreting the scope of railroad rights-of-way. Finally, we must examine whether the Department's administrative practice assists in resolving this issue.

Review of Statutes Granting SPT's Rights-of-Way.

SPT's rights-of-way were granted to SPT's predecessors in interest by the United States pursuant to the Act of March 3, 1871, ch. 122, 16 Stat. 573, and the General Railroad Right-of-Way Act of March 3, 1875, *supra*. The Act of March 3, 1871, authorized the Texas Pacific Railroad Co. To construct a railroad and

³ We note that neither the memorandum or letter of the Associate Solicitor contained a comprehensive, in-depth review of the case law concerning the scope of railroad grants.

PROPOSED INSTALLATION OF MCI FIBER OPTIC COMMUNICATIONS LINE
96 I.D. 439-451
January 5, 1989

telegraph line from Marshall, Texas, to San Diego, California. Section 23 of the Act, 16 Stat. 579, provided:

That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the Act of July Twenty-seven, eighteen hundred and sixty-six .

The Act of July 27, 1866, ch. 278, 14 Stat. 292, is one of a class of similar railroad right-of-way grant statutes, enacted by Congress between 1850 and 1871, which are commonly referred to as "pre-1871 grants." The 1866 Act authorized the Atlantic and Pacific Railroad Co. To construct a railroad and telegraph line from Missouri and Arkansas to the Pacific coast. Section 18 of the Act, 14 Stat. 299, provided that the Southern Pacific Railroad was authorized to connect with the Atlantic and Pacific near the California boundary to construct a railroad line to San Francisco. Section 18 further provided, that to aid in its construction, the SPT "shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for." Section 2 of the Act, 14 Stat. 294, which granted the right-of-way to the Atlantic and Pacific, therefore made a like grant to the Southern Pacific. It provided:

That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations ...

Section 5 of the Act, 14 Stat. 295, provided:

That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be

PROPOSED INSTALLATION OF MCI FIBER OPTIC COMMUNICATIONS LINE
96 I.D. 439-451
January 5, 1989

constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line . . .

Section 7 of the Act, 14 Stat. 296, authorizes the railroad company to purchase or condemn any lands necessary for the construction and working of the road, up to 100 feet on each side of the road, and also any lands that might be necessary for "turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road."

The only express condition on the grants of land made by the Act is, in essence, the construction and continued use of the railroad line. *Cf.* Sections 8 and 9. The Act states only two significant limitations on the railroad's use of the land. First, "mineral lands" are excluded by section 3 from the operation of the Act, except that the word "mineral" by definition does not include iron or coal. Section 3. Second, Section 11 of the Act requires the line to be subject to "use of the United States for postal, military, naval and all other government service."

The statute granting the remainder of the pertinent SPT rights-of-way is the General Railroad Right-of-Way Act of March 3, 1875, ch. 152, 18 Stat. 482; 43 U.S.C. § 934 (1982).⁴ Section 1 of that Act provides that:

[T]he right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turnouts, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten mile of its road.

Section 3 of the 1875 Act specifies a condition on the grants similar to that stated in the 1866 Act, namely, that failure to complete the railroad results in forfeiture of the grant.

Section 4 of the Act, 18 Stat. 483, 43 U.S.C. § 937, provides that, upon approval by the Secretary of the Interior of the profile of a company's road, the right-of-way shall be noted on the land office plats "and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

⁴ The 1875 Act was repealed effective Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands in the National Forest System by sec. 706(a) of FLPMA, Pub. L. 94-579, 90 Stat. 2793. Sec. 701(a) of FLPMA, 90 Stat. 2786, provides that the repeal did not affect rights-of-way previously granted.

Another relevant statute is the Railroad Right-of-Way Abandonment Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. §912. It provides for the disposition of erstwhile public lands granted to railroads for rights-of-way or as sites for railroad structures when such lands are abandoned or forfeited by the railroad. The statute becomes operable when the railroad's use and occupancy of the land ceases by forfeiture of abandonment decreed by a court of competent jurisdiction or by an act of Congress. It provides that in such event:

all right, title, interest and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid . . . and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever.

The statute provides that where such a transfer occurs, title to the minerals shall be reserved to the United States. Where these lands are within a municipality, title to them is transferred to the municipality. It further provides that it does not affect conveyances made by railroads to third parties which, before forfeiture or abandonment, have been or may be confirmed by Congress.

Supreme Court and Lower Court Authority

Not long after the passage of the 1866 Act, the Supreme Court, in *New Mexico v. the United States Trust Co.*, 172 U.S. 171 (1898), had occasion to consider whether that Act granted a fee interest or a mere right of passage to the railroad. The Court noted that in an earlier decision, *Missouri, Kansas & Texas Railway v. Roberts*, 152 U.S. 114 (1893), the Court had held that a similar grant conveyed a fee interest.⁵ The Court referred approvingly to the opinion in the *Roberts* case, rejecting the suggestion of the appellant in the *United States Trust* case that the issue of fee-versus-easement had not been faced in *Roberts*. The Court then proceeded to confirm that the interest possessed by the railroad amounted to a fee, even if the appellant disagreed with labeling it as such:

But if it may not be insisted that the fee was granted, *surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee*, and, like it, corporeal, not incorporeal property.

⁵ In the *Roberts* decision, the Court stated: "*The title to the land for the two hundred feet in width thus granted vested in the company . . . That grant was absolute in terms, covering both the fee and possession . . . 152 U.S. at 116-17 (italics added).*"

152 U.S. at 183 (italics added).

Several years later, in the landmark case of *Northern Pacific Railway v. Townsend*, 190 U.S. 267 (1903), the Supreme Court held that another pre-1871 grant, under the Act of July 2, 1864, ch. 217, 13 Stat. 365 (similar to the 1866 statute at issue here), conveyed a "limited fee" interest in the right-of-way. The Court described the grant as follows:

Following decisions of the court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico v. United States Trust Co.*, 172 U.S. 171, 181; *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, it must be held that the fee passed by the grant made in section 2 of the Act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case) "to those necessarily implied, such as that the road shall be . . . used for the purposes designed." Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as through the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. *In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.*

190 U.S. at 271 (italics added). Thus, the "limit" in the "limited fee" refers to the condition of reverter, not to the physical extent of the land to which the fee attached.

In the following year, in *Western Telegraph Co. v. Pennsylvania Railroad*, 195 U.S. 540 (1904), the Court made the following statement:

A railroad right of way is a very substantial thing. It is more than a mere right of passage. *It is more than an easement.* We discussed its character in *New Mexico v. United States Trust Co.*, 172 U.S. 171. We there said (p. 183) that *if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property."*

* * *

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given . . .

195 U.S. at 570 (italics added). Although this case dealt with the right-of-way

(apparently stated-granted) of the Pennsylvania Railroad, and did not involve a Federal railroad right-of-way grant, the Court's reliance on *New Mexico v. United States Trust Co.* confirms the Supreme Court's consistent view of the scope of pre-1871 Federal railroad grants.

More recently, in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Supreme Court considered whether the pre-1871 grant to the railroad company made by the Pacific Railroad Act of July 1, 1862, 12 Stat/ 489, included mineral rights. The Court held that it did not. The Court reached this result by reviewing the Federal mineral policy at the time of the grant, holding that the exception for "mineral lands" contain in the Act's section 3, which made "checkerboard" land grants, applied as well to section 2 of the Act, which granted the right-of-way. The Court found its prior cases inapt, on the basis that none of these cases had involved a contest between the United States and the railroad-grantee over mineral rights underlying the right-of-way. As the Tenth Circuit pointed out in *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967), *cert. Denied*, 389 U.S. 985 (1967), the *Union Pacific* decision did not overturn *Townsend* or any other limited-fee decisions, and did not declare that pre-1871 rights-of-way are easements.⁶

We observe that *Union Pacific* left the limited-fee precedents in place, and acknowledge in *dicta* that under those precedents the railroad received *at least* all surface rights to the right-of-way and all rights incident to a use for railroad purposes. Moreover, the court did not rely on a "surface-only" view of the scope of the limited fee in order to reach its conclusion concerning mineral rights. Accordingly, the dissent of Mr. Justice Frankfurter, in which two other Justices joined, from the holding of the majority in *Union Pacific* that mineral rights could be viewed as specifically reserved to the United States by statute contains persuasive and uncontradicted guidance on the scope of pre-1871 rights-of-way:

To argue that the "limited fee" . . . granted a fee merely in the surface is to palter with language and with our decisions. "Surface could not, of course, mean merely the area that is seen by the eye. To say that it means the visual area and an indeterminate depth - x inches or x feet - necessary for support is to ask the Court to rewrite legislation and to cast upon it administrative tasks in order to accomplish a policy that seems desirable a hundred years after Congress acted on a different outlook.

353 U.S. at 131 (italics added). This reasoning clearly emphasizes the propriety of grantees' use of the non-mineral subsurface of rights-of-way.

⁶ See *Kunzman v. Union Pacific R.R. Co.*, 169 Colo. 374, 456 P.2d 743 (1969), *cert. Denied*, 396 U.S. 1039 (1970).

Mr. Justice Frankfurter's views on reading limitations into pre-1871 grants also provide useful guidance here:

The Townsend case also serves to refute the suggestion that the railroad in its use of the right of way is confined to what in 1957 is narrowly conceived to be a "a railroad purpose" . . . The Court [in Townsend] recognized that the land could revert to the grantor only in the event that it was used in a manner inconsistent with the operation of the railroad . . . Had Congress desired to make a more restrictive grant of the right of way, there would have been no difficulty in making the contingency for the land's reversion its use of any purpose other than one appropriately specified.

353 U.S. at 131-32 (italics added).⁷

This portion of Mr. Justice Frankfurter's dissent rightly focuses our attention on maintain a clear distinction between the *scope* and *duration* of the pre-1871 Act rights-of-way. The *scope* of these rights-of-way is a fee interest. A fee interest inherently encompasses surface and subsurface rights. The Supreme Court authority from *New Mexico* through *Townsend* and *Union Pacific* suggests only on limitation on the scope of these rights-of-way: the mineral rights are excluded from the estate possessed by the grantees. Further, another line of Supreme Court decisions confirms that the estate possessed by the grantees includes the power to authorize third parties (such as MCI, in the current matter) to use the rights-of-way for purposes which are not inconsistent with railroad operations.⁸

The *duration* of the pre-1871 rights-of-way is specified by the nature of the "limit" in the "limited fee." The Supreme Court authority reviewed previously is consistent in finding that a grantee's abandonment of a right-of-way for the operation of a railroad is the "limiting factor" which would lead to termination of the fee. In these circumstances, if a court decree or act of Congress determined that abandonment had occurred, the grant would become subject to operation of the previously discussed 1922 abandonment statute, 43 U.S.C. § 912.

As discussed previously, the other rights-of-way possessed by SPT and at issue

⁷ Here again, nothing in the majority opinion contravenes this view of the scope of rights-of-way.

⁸ See *Grand Trunk R.R. Co. v. Richardson*, 91 U.S. 454, 468-69 (1875). See also *Hartford Insurance Co. v. Chicago, M. & S.P. Ry.*, 175 U.S. 91, 99 (1899); *Union Pacific Ry. V. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 581 (1896). Other courts have applied this principle in a wide variety of contexts. See, e.g. *Mississippi Investments Inc. v New Orleans & N.e. R.R.*, 188 F.2d 245, 247 (5th Cir. 1951)(commercial warehouse); *Mitchell v. Illinois Central R.R.*, 51 N.E. 2d 271, 275 (Ill. 1943) (commercial gas station). It should be noted that the right-of-way statute themselves do not prohibit the railroad from authorizing third parties to use portions of its right-of-way. Compare Act of July 27, 1866, ch. 278, 14 Stat. 292; Act of Mar. 3, 1871, ch. 122, 16 Stat. 573; Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §934; with Act of Mar. 30, 1896, ch. 82, 29 Stat. 80; Act of Feb. 28, 1902, ch 134, 32 Stat. 43.

here are those granted pursuant to the General Railroad Right-of-Way Act of 1875. The Supreme Court has not addressed the scope of 1875 Act rights-of-way on as many occasions as it has the scope of the pre-1871 rights-of-way. In *Great Northern Railway Co. v. U.S.*, 315 U.S. 262 (1942), the Supreme Court considered whether an 1875 Act grant included the right to oil and minerals underlying the right-of-way. In holding that the grants did not include the right to oil and minerals, the Court noted that rights-of-way granted by the 1875 Act are "easements" and not fees. The Court distinguished the 1875 Act grants from grants made prior to 1871 which, it reiterated, did convey fee interests. *Id.* At 278. The Court did not elaborate as to the rights of railroads under 1875 Act grants, except to state that they have the right of use and occupancy but no right to the underlying oil and minerals.

For our purposes, the most important guidance provided by *Great Northern* is its confirmation of the significant rights of the 1875 Act grantees, *i.e.*, use and occupancy of the land. The Court did not limit the grantees' rights to those of a *common-law* easement (or limit grantees to surface use only) and, indeed, it is unjustifiable to force a unique estate created by Congress into a common-law label, especially when the term "easement" was well understood at the time and could have been used by Congress if it had so desired.

This approach to the 1875 Act grants and their scope was confirmed in a recent district court decisions, *Idaho v. Oregon Short Line Railroad Co.*, 617 F.Supp. 207 (D. Idaho 1985). A primary focus of the case was whether the 1922 railroad abandonment statute, 43 U.S.C. § 912, applied to 1875 Act grants. In reviewing the precedents, the court held that:

... Congress, in granting the 1875 Act rights-of-way, did not intend to convey to the railroads *a fee interest in the underlying lands*. Congress did, however, intend to give the railroads an interest suitable for railroad purposes - a right-of-way, which, by definition, carried with it the *right to exclusive use and occupancy of the land*.

617 F. Supp. At 212 (italics added).⁹ This holding can be fairly read as confirming that railroads possessing 1875 Act "easement" have exclusive use and occupancy (though not a fee interest in) the nonmineral subsurface (*i.e.*, "underlying") lands.

Clearly, however, the 1875 Act anticipated a retained interest in the United States in addition to the mineral rights. As stated by the court in *Oregon Short Line*:

⁹ See also *Puett v. Western Pacific R. Co.*, _____ Nev. _____, 752, P.2d 213 (1988).

In enacting these statutes, Congress clearly felt that it had some retained interest in 1875 Act rights-of-way. *The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law.*

Id. (italics added). The most logical characterization of this interest is a secondary right to use the subsurface of the rights-of-way.

The ETSI Decisions

The memorandum and letter issued by the Associate Solicitor-Energy and Resources in 1985 and 1986, respectively, reflect inappropriate reliance on the *ETSI-10* and *ETSI-8* decisions.¹⁰

These decisions involved the efforts of Energy Transportation Systems, Inc., to obtain transverse crossings of pre-1871 railroad rights-of-way in order to install a coal slurry pipeline. Reliance on the *ETSI* decisions is inappropriate when addressing the issues presented here because the decisions do not address the extent of the *affirmative rights* of a railroad to authorize uses of its rights-of-way, such as are at issue here.¹¹

Moreover, the vitality of the holding of the *ETSI* decisions (though inapplicable to the issue presented here) is called into clear question by a subsequent Tenth Circuit decision. In 1981, in *Missouri-Kansas-Texas Railroad co. v. Early*, 641 F.2d 856 (10th Cir. 1981), the Tenth Circuit considered the interest granted to the

¹⁰ *Energy Transp. Systems, Inc. v. Union Pacific R. Co.*, 606 F.2d 934 (10th Cir. 1979); *Energy Transp. Systems, Inc. v. Union Pacific R.R. Co.* 619 F.2d 696 (8th Cir. 1980). The Eighth Circuit opinion's reasoning is basically the same as the Tenth Circuit's. It should be noted that the United States was not a party in any of these cases.

¹¹ Moreover, the *ETSI* decisions may well have been influenced by the public policy considerations disfavoring a railroad's attempt to block a transverse right-of-way crossing not interfering with railroad operations. In *ETSI-10*, the opinion below (which was affirmed) states: "while this Court recognizes that the railroad has substantial rights which are entitled to protection, it cannot conclude that Congress created a 'Maginot Line' in the form of a limited easement through which the railroads' commercial rivals may not pass [citing *Townsend*, among other authorities]. 435 F.Supp. At 318. Moreover, the court's sympathy for the railroad's position may have been sorely tried by the fact that Union Pacific had allowed pipeline crossings (for non-competing pipelines) on numerous prior occasions. See 435 F.Supp. At 315. The *ETSI* decisions also appear to confuse, by misapplication of Union Pacific dicta, the duration of the railroad's estate with the scope of the estate. That is, a servient estate is postulated which gives an adjacent landowner *current* rights in the right-of-way subsoil. Adjacent landowners only have *future* rights in the right-of-way, *i.e.*, only upon abandonment. This servient estate is utilized by the *ETSI* courts as a vehicle for identifying a party who can and will affirmatively authorize a subsoil transverse crossing, thereby avoiding the "Maginot Line" problem. The equation of a reversionary ("limited fee") interest with a current subsurface interest appears to be based on the following *Union Pacific* dicta: "The most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to use for railroad purposes." 619 F.2d at 698; 606 F.2d at 937. However, neither the "limited fee" cases for the *Union Pacific* decision restricted the extent of subsurface rights, nor for that matter, defined "surface rights." Finally, the *ETSI* decision's minimization of the scope of the pre-1871 rights-of-way could be read as inconsistent with the Supreme Court authorities discussed previously.

Union Pacific Railroad Co. by the Acts of July 25, 1866, ch. 241, 14 Stat. 236, and July 26, 1866, ch. 270, 14 Stat. 289, which authorized a right-of-way across lands granted to the Creek Nation by the Treaty of July 19, 1866, 14 Stat. 785. Citing *Railroad Co. v. Baldwin*, 103 U.S. 426 (1881); *U.S. Trust Co.; Roberts*; and *Great Northern*, and ignoring the *ETSI* decisions, the court concluded that the railroad had been granted a fee interest and did not limit its holding to the surface interest. Although Indian lands rather than public lands were involved, the situation appears to have been indistinguishable from that in the *ETSI* decisions. Thus, the Tenth Circuit did not adhere to its earlier *ETSI-10* decisions. The broad scope of the interest, *i.e.*, the fee interest, recognized in the 1981 M-K-T decision is inconsistent with a limitation of the railroad's rights in the nonmineral subsurface.

Administrative Practice

Numerous administrative decisions of this department similarly hold that the lands within pre-1871 rights-of-way are, except for the mineral estate, the private property of the railroad, *A. Otis Birch & Estelle C. Birch (On Rehearing)*, 53 I.D. 340 (1931); *Abilene Oil Co. v. Choctaw, Oklahoma & Gulf R.R. Co.*, 54 I.D. 392 (1934), and are not subject to the administrative jurisdiction of this department. See *Townsend; Window Reservoir & Canal Co. v. Miller*, 51 L.D. 27 (1925); *E. A. Crandall*, 48 L.D. 556 (1915).

Historically, railroads have customarily allowed a wide variety of third-party uses of their rights-of-way,¹² a fact well known to, and sanctioned by, the Department.¹³

Accordingly, the administrative practice of this Department is consistent with the Supreme Court authority discussed herein.

Summary

In summarizing the case law and administrative practice concerning the scope of pre-1871 and 1875 Act grants, and applying it to the question at hand, we are guided by the principles set forth in the Supreme Court's decision in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), in which it surveyed the history and

¹² See generally *Use & Disposition of Railroad Right-of-Way Grants: Hearings on H.R. 663, et al., Before the Subcomm. On Public Lands of the House Comm. On Interior & Insular Affairs*, 87th Cong. 1st Sess. (1961); *Public Land Law Review Comm'n Report, One-Third of the Nation's Land 230-32* (1970).

¹³ See Solicitor's Opinion, M-36016 (Oct. 17, 1949); *Cvlear Water Short Line Ry. Co.*, 29 L.D. 569 (1900).

purpose of railroad grants. In so doing, the court referred to:

... the familiar canon of construction that when grants to Federal lands are at issue, any doubts "are resolved for the Government, not against it." [Citations omitted.] But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts.

440 U.S. at 682. Indeed, the *Leo Sheep* decision proceeded to expand on the nondispositive character of this canon in the context of railroad grants by quoting approvingly from its earlier opinion in *United States v. Denver & Rio Grande Railroad Co.*, 150 U.S. 1, 14 (1893):

"... When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individual or to corporations *as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character* in or though an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and *should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.*"

440 U.S. at 683 (italics added). This approach, as we have seen, is consistent with the Supreme Court authority reviewed with respect to the scope of the pre-1871 and 1875 Act grants.

With respect to the pre-1871 grants, the Supreme Court's ruling in *Townsend* is the controlling precedent. Under *Townsend*, the railroads have fee ownership of their pre-1871 rights-of-way. Under *Union Pacific*, where the mineral estate was reserved to the United States, it does not pass to the railroad.

The *scope* of these rights-of-way, consistent with the fee nature of the estate, includes the surface, subsurface (except minerals) and airspace. The *duration* of the rights-of-way is perpetual, subject to a possibility of reverter if the lands are no longer used for railroad purposes. Given the fee nature of the grantee's interest, the grantee may authorize third parties to utilize its right-of-way (sic) for activities and structures not inconsistent with the grantee's operation of a railroad. The United States may bring suit to recover title where it appears that the reverter has been triggered; but while title is vested in the railroad, the land within the right-of-way, being privately owned, except for reserved minerals, is not subject to the administrative jurisdiction of this Department.

Therefore, SPT possesses a fee interest in its pre-1871 rights-of-way. It may

utilize, and authorize MCI to utilize, for the fiber optic line and associated shelters, the surface and subsurface, without the grant of an additional permit or right-of-way from BLM.¹⁴ We note that installation of the fiber optic line does not interfere with SPT's continued operation of the railroad, and thus does not trigger the Government's reversionary interest.

Under the 1875 Act, railroads were granted an "easement." The scope of this easement, unlike an ordinary common-law easement, is an interest tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface, and airspace. The grantee's rights to use and occupy the surface are exclusive. Because the granting statute imposed no express limitation on its duration, this right-of-way continues in perpetuity, impliedly subject to termination if the easement is no longer used for railroad purposes.

Therefore, SPT possesses what is tantamount to a fee interest in its 1875 Act rights-of-way. It has exclusive use and occupancy of the surface, and has use and occupancy of the subsurface and airspace. Accordingly, it may utilize and authorize MCI to utilize the subsurface for a fiber optic line and the surface for associated shelters without the grant of an additional permit or right-of-way from BLM.¹⁵ See *Kansas City Southern Ry. Co. v. Arkansas Louisiana Gas Co.*, 476

¹⁴ FLPMA permitting requirements apply only to "public lands," as defined in 43 U.S.C. § 1702. Lands subject to pre-1871 grants are not subject to BLM's FLPMA permitting authority because they are not public lands within the meaning of FLPMA. The reversionary interest remaining in the United States is not a present interest subject to FLPMA authority. See generally *Northern Pacific Ry. v. Townsend*, *supra*; *Union Pacific Railroad Co.*, 72 I.D. 6, 81 (1965), *aff'd sub nom. Wyoming v. Udall*, 255 F.Supp. 481 (D. Wyo. 1966), *aff'd* 379 F.2d 635 (10th Cir. 1967), *cert. Denied* 389 U.S. 985 (1967); *E.A. Crandall*, 43 L.D. 556 (1915). See *Moore v. Robbins*, 96 U.S. 530 (1878); *Kirwin v. Murphy*, 83 F. 275, 280 (8th Cir. 1897), *appeal dismissed*, 170 U.S. 205 (1898).

Further, we note that although FLPMA supplanted preexisting statutes for future rights-of-way, 43 U.S.C. § 1770, it was not intended to infringe on the rights of those who held rights-of-way at the time of its enactment. Sec. 509(a) of FLPMA, 43 U.S.C. § 1769, states that: "Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." The point is reiterated at sec. 701(a) of FLPMA, 90 Stat. 2786, 43 U.S.C. § 1701, note, which provides that: "Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."

Also, sec. 701(f) of FLPMA provides that, "Nothing in this Act shall be deemed to repeal any existing law by implication," and sec. 701(h) provides that, "All actions by the Secretary [of the Interior] under this Act shall be subject to valid existing rights." The report of the conference committee, H.R. Rep. No. 174, 94th Cong. 2d Sess. 65 (1976), makes it clear that railroad rights-of-way are to be protected: "[The legislation] protects all valid rights existing on the date of its approval, including grants under the railroad right-of-way act of 1875 which have attached prior to that approval date."¹⁵

¹⁵ See not 13, *supra*, for a discussion explaining that FLPMA's coverage extends only to "public lands." SPT's interests in its 1875 Act grants are not "public lands," and thus are not subject to FLPMA. See generally *Stalker v. Oregon Short Line*, 225 U.S. 142, 153 (1912); *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893); *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 723 (10th Cir. 1980); *Rice v. United States*, 348 F.Supp. 254 (D. N.D. 1972), *aff'd* 479 F.2d 58 (8th Cir. 1973), *cert. Denied* 414 U.S. 858 (1973); *Union Pac. R.R. Co.*, 72 I.D. 76, n 81 (1965), *aff'd sum nom. Wyoming v. Udall*, 255 F.Supp. 481 (D. Wyo. 1966), *aff'd* 379 F.2d 635 (10th Cir. 1967), *cert. Denied* 389 U.S. 985 (1967).

PROPOSED INSTALLATION OF MCI FIBER OPTIC COMMUNICATIONS LINE
96 I.D. 439-451
January 5, 1989

F.2d 829, 834 (10th Cir. 1973).

CONCLUSIONS

Based on the foregoing discussion, we have reached the following conclusions:

1. The scope of the rights-of-way granted to SPT by the General Railroad Act of 1875 and the Acts of July 27, 1866 and March 3, 1971, allows SPT to permit MCI to install, without BLM permit of grant, the fiber optic line and associated equipment in and on the rights-of-way where they cross public lands.
2. The views of the prior Associate Solicitor-Energy and Resources, expressed in the memorandum of July 5, 1985, and the letter of February 24, 1986, referenced above, are overruled.

Howard H. Shafferman
Acting Solicitor

If BLM were approached directly by a third party seeking authorization to utilize the Government's retained subsurface or airspace interests in an 1875 Act grant, a FLPMA permit would be required and, subject to the requirements of Title V of FLPMA, could be issued if the grant would be consistent with the rights of the railroad (and its existing authorized users) as specified herein.

SECRET

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SECRET

Sent by: Rosa Taylor 7/7/1999 01.12 PM

To: Nolan Heath AKSO
Carol Kershaw AZSO
Robert Nauert CASO
Jenny Saunders COSO
Ed Ruda ESO
Jimmie Buxton IDSO
Thomas Lonnie MTSO
Karl Kipping CCFONV
Stephen Jordan NMSO
Kathy Eaton ORSO
Roger Zortman UTSO
Jim Paugh WYSO
Brenda Zenan AKSO
Ted Bingham AZSO
David McInay CASO
COSO
John Lancelot COSO
Nate Felton ESO
Cathie Foster IDSO
Ron Appel MTSO
Jim Stobaugh NVSO
Teodoro Rael NMSO
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LaVerne Steah UTSO
Mike Haskins AKSO
Carl Rountree CASO
Frank Salwerowicz
Walt Rewinski ESO
J David Brunner IDSO
Bil Weigand IDSO
Burrett Clay NTC
Dennis Samuelson
NVSO
Bill Bradley ORSO
Robert DeViney ORSO
Bob Bennett WYSO

cc:

Subject: Solicitor's Opinion, M-36964, Railroad ROW

Please see attachment regarding the Solicitor's Opinion, M-36964 (the MCI Opinion) dated 01/12/1989 as a guide in addressing various uses of railroad ROW.

Pete Culp

July 7, 1999

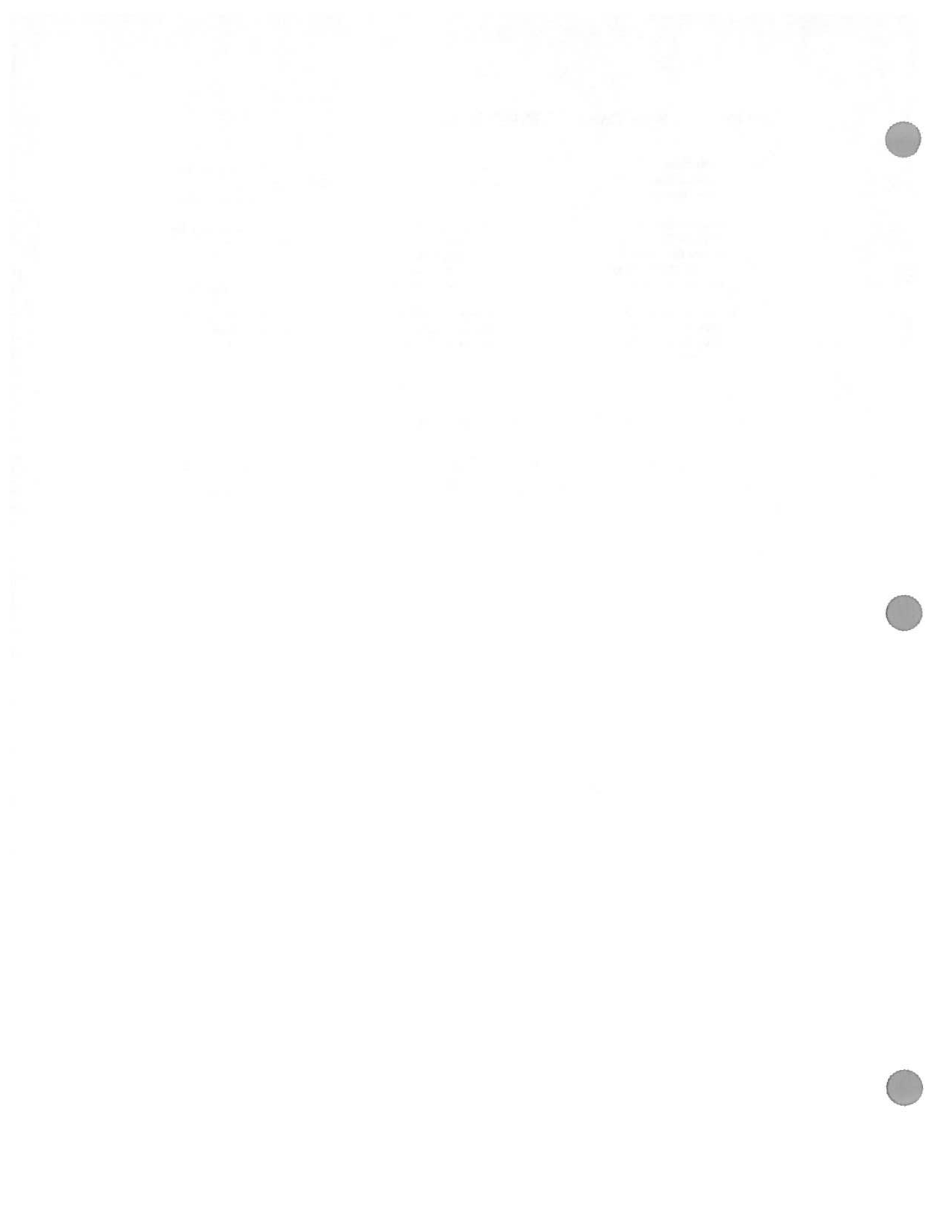
NOTE

TO: Nolan Heath (AK),
Mike Ferguson (AZ),
Carl Roundtree (CA),
Frank Salwerowicz (CO),
Walt Rewinski (ESO),
J. David Brunner (ID),
Bil Weigand (ID),
Burret Clay (NTC),
Dennis Samuelson (NV),
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Brenda Zenan (AK),
Carol Kershaw (AZ),
Robert Nauert (CA),
Jenny Saunders (CO),
Ed Ruda (ESO),
Jim Buxton (ID),
Thomas Lonnie (MT),
Karl Kipping (NV),
Steve Jordon (NM),
Kathy Eaton (OR),
Roger Zortman (UT),
Jim Paugh (WY),
Mike Haskins (AK),
Ted Bingham (AZ),
David McInay (CA),
John Lancelot (CO),
Nate Felton (ESO),
Cathie Foster (ID),
Ron Apple (MT),
Jim Stobaugh (NV),
Teodoro Rael (NM),
Priscilla McLain (OR),
LaVerne Steah (UT),

FROM: Pete Culp, Assistant Director - Minerals, Realty and Resource Protection (WO 300)

SUBJECT: Solicitor's Opinion, M-36964,(the MCI Opinion) dated 1/12/1989 as a guide in addressing various uses of railroad ROW

In the past year or so, there have been numerous questions forwarded to WO 350 regarding how BLM should handle ROW facilities being located within 1866,



1871 and 1875 Railroad Right-of-Way Act, ROW Grants (RR ROW's). BLM has used the direction provided in the MCI Opinion, dated 1/12/1989 as a guide in addressing these issues. Within the past year the Office of the Solicitor, (SOL) has informally reviewed the MCI Opinion for legal adequacy. This review was prompted by new ROW situations that have arisen on the public lands. The informal review of the MCI Opinion is complete and the SOL has not taken any action. Therefore, the MCI Opinion is still DOI policy and should be followed by BLM.

Using the guidance provided in the MCI Opinion, BLM acknowledges that the scope of the rights-of-way granted by the General Railroad Right-of-Way Act of 1875, and the Acts of July 27, 1866 and March 3, 1871 allows railroads to authorize the placement of any facility within their ROW for any purpose, without review or approval by BLM. This is the information we should be providing prospective applicants when they discuss these issues w/our Field Office personnel.

If there are any questions regarding the direction provided by the MCI Opinion, contact:

Ron Montagna, WO 350
Phone # 202-452-7782, Fax # 202-452-7708
E-Mail, ron_montagna@blm.gov & via Lotus Notes.

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Washington, D.C. 20240

<http://www.blm.gov>

2800 (350)

JUL 26 2001

Mr. Theodore G. Bingham
1026 North Skyview Street
Flagstaff, Arizona 86004-7287

Dear Mr. Bingham:

Thank you for your letter of May 25, 2001, to Secretary of the Interior Gale A. Norton, requesting, pursuant to 43 CFR 14.2, that the Department of the Interior consider issuance of regulations concerning the abandonment of railroad rights-of-way and the reversion of interests to the United States in such abandonments. Secretary Norton has asked the Bureau of Land Management (BLM) to respond to your petition request as required by 43 CFR 14.3.

Railroad abandonment issues are being handled on a case-by-case basis because of the complexity of the individual cases. Due to a variety of legal issues involved in these cases, the Office of the Solicitor and the Department of Justice have provided assistance to the BLM in addressing individual railroad abandonment actions. In some individual cases, it has been appropriate to pursue legislation to resolve the complex legal and title issues.

We appreciate your interest in this issue and for your time involved in writing the suggested regulations that would address your understanding of the associated problems. However, at this time, there are other priorities in the Washington Office that preclude us from initiating work on this project. Accordingly, a request for public comment and publication in the Federal Register, as provided by 43 CFR 14.4, is not deemed necessary to respond to your petition at this time.

By copy of this letter to the BLM Arizona State Director, we request that, as time permits, you be available to assist other offices on a case-by-case basis in addressing complex railroad abandonment issues. Any assistance provided should be coordinated with the appropriate Solicitor's Office

Thank you for your ideas.

Sincerely,

For Carson W. Culp, Jr.
Assistant Director, Minerals,
Realty and Resource Protection

cc: BLM Arizona State Director

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYS 441

LECTURE 10: QUANTUM MECHANICS

1. The wave function $\psi(x)$ is a complex-valued function of position x . It is normalized such that $\int_{-\infty}^{\infty} |\psi(x)|^2 dx = 1$. The probability density is $|\psi(x)|^2$.

2. The expectation value of an operator \hat{O} is $\langle \hat{O} \rangle = \int \psi^* \hat{O} \psi dx$.

3. The energy eigenvalues E_n are given by $\hat{H} \psi_n = E_n \psi_n$.

4. The wave function $\psi(x, t)$ evolves according to the Schrödinger equation $i\hbar \frac{\partial \psi}{\partial t} = \hat{H} \psi$.

5. The probability current $J(x, t)$ is given by $J = \frac{\hbar}{2mi} (\psi^* \nabla \psi - \psi \nabla \psi^*)$.

6. The continuity equation is $\frac{\partial \rho}{\partial t} + \nabla \cdot J = 0$, where $\rho = |\psi|^2$.

Theodore G. Bingham
1026 N. Skyview Street
Flagstaff, AZ 86004

25 May 2001

Hon. Gale Norton
Secretary of the Interior
U.S. Department of the Interior
Washington, DC 20240

Dear Secretary Norton:

Pursuant to 43 CFR 14.2, I petition you for issuance of regulations governing the Department, and its land managing Bureaus, concerning the abandonment of certain railroad rights-of-way, the retention of the interest of the United States in such abandoned right-of-way, the subsequent management of such lands, the use of such lands as part of the National Trails System, or the disposition of such lands in accordance with 16 U.S.C. 1248(e).

As the issue involves at least three if not five of the Bureaus within the Department, I believe the proposed regulations should be part of Subtitle A - Office of the Secretary of the Interior, of Title 43, Code of Federal Regulations.

AUTHORITY:

Under 43 U.S.C. 1201, the Secretary has the authority to issue regulations relating to the management of public lands of the United States. Authority for the Department to oversee the continuation or abandonment of certain railroad rights-of-way was provided by Congress in its 1988 amendment (16 U.S.C. 1248(c) through (e)) to the National Trails System. This 1988 amendment also provides for subsequent management, use, and possible disposition of the right-of-way lands of certain abandoned railroad rights-of-way.

SCOPE:

The regulations would cover all Congressionally granted railroad rights-of-way, including those 'grant in aid' made to States, from the first grant made in the early 1800's up to the General Railroad Act of 1875 (repealed 1976). It would also cover such grants of 'fee' railroad rights-of-way by Congress since the 1870's. (See, for example Higgins et al v Oklahoma City and Noble v Oklahoma City; 297 US 481; March 2, 1936; Churchill v Choctaw Ry; 46 Pac 503; September 4, 1896 (OK)).

These railroad right-of-way grants are found in most of the contiguous 48 States, although of lesser occurrence in the northeast.

NEED:

Confusion abounds among agency personnel, the public, railroad owners, State and local governments, recreational trail proponents, adjacent landowners and innocent purchasers of abandoned railroad rights-of-way, as to the ownership and status of the land involved in these

Congressionally granted railroad rights-of-way. Agency personnel are either unaware of their role or do not know how to proceed when a railroad abandonment is occurring within their management area.

As the railroad owner moves to abandon the right-of-way, he sells parts or all of the right-of-way to individuals, adjacent landowners, cities, etc. These purchasers are normally not aware that upon abandonment, the title to the right-of-way reverts to the United States and their title is worthless. If there is sufficient public interest, the Congress often steps in and enacts legislation to validate the railroads transfers of title; thus the railroad owner benefits from the sale of property belonging to the United States. In other cases, the interests of the United States in an abandoned railroad right-of-way has passed to the adjacent land owner and the railroad owner has sold the right-of-way to a third party.

In some situations where the abandoned (to be abandoned) railroad is within a Federal area - National Forest, Park, BLM area - the railroad owner proceeds to sell the right-of-way to an individual or among many individuals. When the United States asserts its ownership, ill-will develops NOT between the purchasers and the railroad BUT between the purchasers and the Federal agency involved. In a number of cases, the Federal agency has sought to purchase the "Federal portion" of the right-of-way from the railroad owner.

In some 'current' abandonment cases, the courts are still making decisions based on outdated laws as the interest of the United States are not appearing in the formal court action. See, for example, City of Maroa v Illinois Central; 592 NE2d 660 (Ill Ct App 1992).

There is a definite need for an Executive Agency involvement in this issue. "Such questions as to whether title to property, which had belonged to the United States, has passed must be resolved by US laws." Wilcox v Jackson; 13 Peters 498 (1839).

BACKGROUND:

The Supreme Court has held that these Congressional grants gave the railroad owners a fee title subject only to the possible future reversion when no longer used for railroad purposes, or otherwise alienated - what is commonly referred to as a "limited fee." (See Northern Pacific Ry v Townsend; 190 US 267 (1903), Missouri, Kansas & Texas Ry v Roberts; 152 US 114 (1893))

The courts have also found that where the Congressional grant was made to a State, the State providing the right-of-way to the railroad owner, that such "pass through" grants also contained a future reversion to the United States. (See US v Illinois Central RR; 89 F Supp 17 (Ed Ill 1949); Schulenberg v Harriman; 21 Wall 44 (1875).)

The courts have further found that, when the railroad grant was made, the right-of-way was severed from the public domain and title to the right-of-way could not pass with an aliquot part entry, selection, grant or sale. Thus, once the grant of right-of-way was made, title to the land within the right-of-way would revert to the United States upon abandonment regardless that a State may have subsequently been granted the section involved as part of it School Land grant (See Wyoming v Andrus; 602 F2d 1379 (10th Cir 1979); Aff'm 83 ID 365 (1976)); or the half-section containing the right-of-way was subsequently entered and patented under the Homestead Act. (See Kunsman v Union Pacific Ry Co; 169 Colo 374 (1969); 456 P2d 743 (1969); cert denied 396 US 1039 (1970); Northern Pacific RR v Ely; 197 US 1; February 20, 1905; Rice v US; 414 US 858 (1972); D ND (1972); 348 F Supp 254; cert denied 94 SCt 66, 38 Led2 108, 9/29/1972.)

Over the years, as railroad rights-of-way were modified, discontinued or abandoned, the Congress has enacted special acts to accommodate or resolve the issue of ownership of the lands within the right-of-way. In 1922 Congress enacted a general Railroad Abandonment Act (43 U.S.C. 912) that provided where use and occupancy of said lands has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, that the interests of the United States would reside with the adjacent landowner unless the right-of-way was embraced in a public highway or located within the limits of a municipality (in this later case, title to go to the municipality).

The National Trails System amendment of 1988 essentially repealed this 1922 Act by providing that the United States would hereafter retain any interest it had in the forfeited or abandoned railroad right-of-way. The exception involving a public highway remains today.

Thank you for your attention,

Theodore G. Bingham

Attachment - draft regulations

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**PART ____ CONGRESSIONALLY GRANTED RAILROAD RIGHTS-OF-WAY;
FORFEITURE; ABANDONMENT; NATIONAL TRAILS**

Sec.

1. Authority
2. Jurisdiction
3. Purpose
4. Definitions
5. Liaison With Other Governmental Agencies
6. Inventory & Records
7. Forfeiture & Abandonment
8. Management of Abandoned or Forfeited Rights-of-Way
9. Recreational Use - States, Local Government, Qualified Entities
10. Disposition

§1 Authority

The Secretary is authorized to promulgate regulations affecting the public lands under 43 U.S.C. 1201. The Secretary of the Interior shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands. (43 U.S.C. 2)

§2 Jurisdiction

Jurisdiction over the public lands resulting from the forfeiture or abandonment of Congressionally granted railroad rights-of-way shall be exercised under 16 U.S.C. 1248 (c) through (e) by the respective agencies as follows:

- (a) By the Secretary of Agriculture, as that agency determines, over such right-of-way lands located within the boundaries of a unit of the National Forest System;
- (b) By the Director, Fish & Wildlife Service, over such right-of-way lands located within a unit of the National Wildlife Refuge System;
- (c) By the Director, National Park Service, over such right-of-way lands located within a unit of the National Park System.
- (d) By the Director, Bureau of Land Management, over all other such right-of-way lands.

§3 Purpose

The purpose of this part is to provide a basis for the inventory, and maintenance, of railroad rights-of-way meeting the Congressional grant criteria and that have or may revert to the United States in the future. In addition, it provides direction and procedure for the subsequent management or disposition of such reverted right-of-way lands.

§4 Definitions

As used in this part, the term:

- (a) *Conservation system unit* means any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument
- (b) *National Park System* means all federally owned or controlled areas administered by

the Secretary of the Interior through the National Park Service.

(c) *National Wildlife Refuge System* means those lands and waters administered by the Secretary of the Interior through the National Fish and Wildlife Service as wildlife refuges, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any statute, proclamation, executive order, or public land order.

(d) *National Forest System* means the national forests, purchase units, national grasslands, land utilization project areas, experimental forest areas, experimental range areas, designated experimental areas, other land areas, water areas, and interests in lands that are administered by the US Department of Agriculture through the Forest Service.

(e) *Congressionally granted railroad rights-of-way* means those grants of public land for railroad right-of-way made by Act of Congress, generally prior to 1875, which the courts of the United States have classified as a grant in fee subject only to a possible future reversion - called "limited fee" title. It also includes the right-of-way portion of those grants of public lands to States, by Act of Congress, with subsequent grant of right-of-way to specific railroad companies..

(f) *Court of competent jurisdiction* means a United States District Court, Circuit Court of Appeals, or the Supreme Court. It does not include Bankruptcy Court or Courts of the individual States or local government.

(g) *Right-of-way* means the strip of public land occupied by the railroad and related facilities.

(h)

§5 **Liaison With Other Governmental Agencies**

The Surface Transportation Board (STB)(formally the Interstate Commerce Commission) has a responsibility to review the public service factor in railroad operations and must "approve" any abandonment of railroad service before the right-of-way may be legally abandoned.

(a) Before action is taken by an agency to seek a determination of forfeiture or abandonment by a court of competent jurisdiction by an agency, that agency shall communicate with the STB. To the extent feasible, the agency shall allow completion of any necessary action by the STB to review and resolve any public service factors affected by the proposal to seek a determination.

(b) In cases where STB advises that abandonment of service has been approved, the agency may proceed to seek a determination of forfeiture or abandonment without further communication with the STB.

(c) In cases where the railroad right-of-way falls within the area of jurisdiction of more than one of the agencies in §2 above, the agencies should communicate among themselves and agree on any mutual concerns.

§6 **Inventory & Records**

(a) Each agency in §2(b), (c) & (d) above shall inventory all railroad rights-of-way within their respective areas of jurisdiction. The agency shall determine whether the right-of-way is (1) a Congressionally granted railroad right-of-way or (2) some other grant of right-of-way.

(b) For each such right-of-way, determine whether it has been determined to be forfeited or abandoned by an act of Congress or a court of competent jurisdiction, or properly relinquished to the United States.

(c) For each such right-of-way determined to be a Congressionally granted railroad right-of-way that had not been determined to be forfeited or abandoned, prior to October 4, 1988, each agency shall develop and maintain records that:

(1) Whether any portion of the right-of-way had been transferred or conveyed to a State or local government pursuant to 23 USC 316 or 43 USC 913. Any such identified transfer shall be treated, by itself, as another Congressionally granted railroad right-of-way;

(2) Ownership of the right-of-way;

(3) Whether any portion of the right-of-way has/is legally established as a public highway under State or local law;

(4) Whether any portion of the right-of-way has been transferred to non-railroad use, other than paragraph (1) above, and, if so, whether such transfer has been validated by act of Congress;

(5) Actions by the railroad owner to forfeit or abandon the right-of-way;

(6) Include an annual determination of the general condition of the right-of-way and whether the railroad is running traffic over the right-of-way;

(7) Other appropriate information.

§7 Forfeiture & Abandonment

(a) Forfeiture is the loss of the right-of-way for failure to construct and operate a railway on the right-of-way or the alienation of the right-of-way. If the agency finds that there is a failure to construct and operate or that all or a portion of the right-of-way has been improperly alienated, it shall

(1) Discuss its findings, and intent to seek such a determination, with the Surface Transportation Board;

(2) Resolve any differences, if any, brought forth by the Surface Transportation Board;

(3) Request assistance from the appropriate US Attorney's Office to seek a court determination of forfeiture.

(b) Abandonment is the conscious giving up through cessation of use of the right-of-way. The railroad owner may voluntarily abandon or a third party may seek a determination that abandonment has occurred.

(1) Actions that indicate abandonment may have occurred include

(i) Cessation of operations;

(ii) Non-payment of local taxes on the right-of-way;

(iii) Removal of rails, ties and other improvements.

(2) Voluntary abandonment is usually shown by the railroad owner filing with the Surface Transportation Board. In such cases, the agency involved should participate in the activities before the Board; without good reason otherwise supporting any activity for 'railbanking' pursuant to 16 U.S.C. 1247(d); and expressing the interests of the United States in the right-of-way.

(3) Where the agency believes that the railroad owner has involuntarily abandoned the right-of-way, it shall

(i) Discuss its findings, and intent to seek such a determination, with the Surface Transportation Board;

(ii) Resolve any differences, if any, brought forth by the Surface

Transportation Board;

(iii) Request assistance from the appropriate US Attorney's Office to seek a court determination of abandonment.

§8 Management of abandoned or forfeited rights-of-way

(a) Where the right-of-way is within the boundaries of a conservation system unit or the National Forest System, the right-of-way lands shall be included in the system and managed in a similar manner giving due regard to the possible designation of the right-of-way as a recreational trail.

(b) All other right-of-way lands shall be managed by the Director, Bureau of Land Management, pursuant to the Federal Land Policy and Management Act and other applicable law. Lands determined to be suitable for use as a public recreational trail may not be removed from trail use by dedication to another use. Any right-of-way lands may be made available for recreational purposes to States, local governments, and qualified entities.

§9 Recreational Use - States, Local Government, Qualified Entities

A unit of State or local government, or an entity that can demonstrate legal and financial capability to assume responsibility, may apply to the Director, Bureau of Land Management, for the transfer of retained rights-of-way, or a portion thereof, to be used for recreational purposes.

(a) Filing of Application. An application shall be filed with the proper Bureau of Land Management Office as listed in 43 CFR §1821.2-1(d).

(b) No specific form is required.

(c) A non-refundable fee of \$100 shall accompany the application.

(d) Each application shall include:

(i) The specific portion of the retained right-of-way being for which the application is being submitted;

(ii) The name, legal mailing address, and telephone number of the applicant;

(iii) In the case of a non-governmental applicant, information sufficient to show legal and financial capability to carry out the proposal;

(iv) Three copies of a statement describing the proposed recreational use of the land. The statement shall show that there is an established or definitely proposed project for such use of the land, present detailed plan and schedule for development of the project and a management plan;

(v) A statement that the applicant assumes full responsibility and holds the United States harmless for any legal liability, including any existing hazard or unsafe condition, which might arise with respect to the transfer, possession, use, release, or quitclaim of the right-of-way.

(e) Guidelines for conveyances:

(i) Right-of-way lands shall be conveyed only for an established or definitely proposed project for which there is a reasonable timetable of development and satisfactory development and management plans;

(ii) No right-of-way lands having national significance shall be conveyed;

(iii) No more lands than are reasonably necessary for the proposed use shall be conveyed;

(iv) Applications shall not be approved unless and until it has been determined that disposal under the act would serve the national interest following the planning requirements

of section 202 of the Federal Land Policy and Management Act (43 U.S.C. 1712).

(v) A notice of realty action which shall serve as a classification of public lands as suitable or unsuitable for conveyance shall be issued, published and sent to parties of interest by the authorized officer not less than 60 days prior to the proposed effective date of the classification action. Notices specifying public lands classified as suitable shall include: the use proposed and the terms, covenants, conditions and reservations which shall be included in the conveyance. The notice shall provide at least 45 days from the date of issuance for submission of public comments;

(vi) The notice of realty action shall be published once in the Federal Register and once a week for 3 weeks thereafter in a newspaper of general circulation in the vicinity of the lands covered by the notice.

(f) Conveyance document. Conveyance shall be by quitclaim deed and upon the following conditions.

(i) Any attempt to sell, convey, or otherwise transfer such right, title, or interest or attempt to permit the use of any part of such portion for any purpose incompatible with its use for public recreation, then any and all right, title, and interest released and quitclaimed shall revert to the United States.

(ii) Grantee shall assume full responsibility and hold the United States harmless for any legal liability which might arise with respect to the transfer, possession, use, release, or quitclaim of such right-of-way.

(iii) Notwithstanding any other provision of law, the United States shall be under no duty to inspect such portion prior to such release and quitclaim, and shall incur no legal liability with respect to any hazard or any unsafe condition existing on such portion at the time of such release and quitclaim.

§10 Disposition

(a) The Director, Bureau of Land Management may offer for sale any portion of a retained right-of-way that is:

(i) not adjacent to or contiguous with any portion of the public lands; or

(ii) determined, pursuant to the disposal criteria established by section 203 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1713), to be suitable for sale.

(b) Nominations or requests for sales of all or portions of retained rights-of-way may be made to the State Office of the Bureau of Land Management having jurisdiction over the area in which the right-of-way lands are located. Such nomination or request shall specifically identify the right-of-way of portion thereof being nominated or requested and the reason for proposing its sale.

(c) Prior to conducting any such sale, a unit of State or local government or any qualified entity shall be given an opportunity to seek to obtain such portion pursuant to §9 of this part.

(d) A notice of realty action which shall serve as a classification of public lands as suitable or unsuitable for sale shall be issued, published and sent to parties of interest by the authorized officer not less than 60 days prior to the proposed effective date of the classification action. Notices specifying public lands classified as suitable for sale shall include the date, place, time and conditions for the sale and the terms, covenants, conditions and reservations which shall be included in the patent. The notice shall provide at least 45 days from the date of issuance for submission of public comments;

(e) The notice of realty action shall be published once in the Federal Register and once a week for 3 weeks thereafter in a newspaper of general circulation in the vicinity of the lands covered by the notice.

(f) Sales shall be by competitive bid only in accordance with the procedures at §2711.3-1 of this Title. All proceeds from such sales shall be deposited and credited to the Land and Water Conservation Fund.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov/>
December 2, 2011

In Reply Refer To:
2800/2880 (350) P

EMS TRANSMISSION 12/20/2011
Instruction Memorandum No. 2012-038
Expires: 09/30/2013

To: All Field Office Officials

From: Assistant Director, Minerals and Realty Management

Subject: Interim Guidance Relating to the Scope of a Railroad's Authority to Approve Uses within Railroad Rights-of-Way Granted under the Act of March 3, 1875

Purpose: The purpose of this Instruction Memorandum (IM) is to provide interim guidance in light of the release of Solicitor's Opinion M-37025 on November 4, 2011, which withdraws those portions of Solicitor's Opinion M-36964 relating to the scope of a railroad's authority to undertake or authorize uses within railroad rights of way (ROW) under the Act of March 3, 1875 (1875 Act). Additional guidance that will address proposed and existing uses on public lands within 1875 Act ROWs will be developed and issued shortly.

Policy/Action: Based on a review of Opinion M-36964, *Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way of January 5, 1989* (the 1989 Opinion), the Solicitor recently issued a new Opinion, M-37025, that withdraws that part of the 1989 Opinion addressing a railroad's authority to undertake or authorize activities within railroad ROWs granted pursuant to the 1875 Act.[1] A copy of Opinion M-37025 is attached.

Opinion M-37025 concludes that the findings in the 1989 Opinion regarding the 1875 Act are erroneous because a railroad's authority to undertake or authorize activities within an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. Determining whether a particular activity derives from or furthers a railroad purpose requires a case-by-case evaluation. The guidance below broadly describes how such evaluations for uses proposed within 1875 Act railroad ROWs should be conducted.

Uses Proposed Within 1875 Act Railroad ROWs

The Bureau of Land Management (BLM) retains authority over proposed uses within 1875 Act ROWs across BLM-managed public lands which do not derive from or further a railroad purpose. Therefore, proponents of uses within an 1875 Act ROW that are not derived from or in furtherance of a railroad purpose will need authorization from the BLM.[2] Most, if not all, of such authorizations would fall under Title V of the Federal Land Policy and Management Act or Section 28 of the Mineral Leasing Act.

Thus, in those situations where a use is proposed within an 1875 Act ROW located on public lands, the BLM must first evaluate whether a railroad purpose will be served by the proposed use. To assist in that evaluation, the BLM will, among other things, solicit the input of the railroad holding the subject 1875 Act ROW. The BLM will additionally consider the following: 1) courts have interpreted "railroad purpose" to include activities incidental to train operations that also have a separate commercial purpose as being within the railroad's authority to undertake or authorize;[3] and 2) a railroad has the exclusive right to utilize the entirety of its ROW for the purposes of operating a railroad. Therefore, any activity undertaken or authorized by a railroad cannot otherwise interfere with railroad operations.

- If the BLM concludes that a railroad purpose would be served by the proposed use, then no further action would be required by the agency.
- If, however, the BLM concludes that the proposed activity does not derive from or further a railroad purpose, the proponent of the proposed use would have to submit an application to the BLM that would be processed in accordance with applicable laws, regulations and agency policies. Applications processed for uses within 1875 Act ROWs will be subject to the same fees and requirements that would be normally required for such use of public lands under applicable laws, regulations and policies, including but not limited to, cost recovery fees (processing and monitoring), rental fees and bonding requirements. As noted above, approval of any such use by the BLM within an 1875 Act ROW across BLM-managed public lands will require coordination with the railroad ROW holder to ensure such uses do not interfere with railroad operations.

State Offices should contact the Washington Office, Branch of Rights-of-Way (WO-350), for assistance with evaluating whether activities proposed within an 1875 Act ROW located on BLM-managed public lands derive from or further a railroad purpose, and therefore do not require authorization from the BLM.

Subsequent Guidance

Additional guidance will be issued addressing the evaluation of both proposed and existing uses within 1875 Act ROWs located on BLM-managed public lands.

To assist in developing this guidance, all State and Field Offices should conduct an in-office assessment of the BLM records by ensuring ROWs authorized under the 1875 Act are accurately recorded in LR2000 to facilitate WO-350 retrieval of records and identify the following, if known:

- 1) The types of existing facilities (water pipeline, fiber optic lines, power lines, etc.), names of the facility owners, and related BLM serial numbers (both for facility and railroad), within 1875 Act ROWs located on public lands;
- 2) Any proposed facilities and proponent names, within 1875 Act ROWs located on public lands; and
- 3) Any other relevant information that could inform the future policy.

For the identification of proposed facilities and proponent names, State and Field offices should rely on recent inquiries or other publicly available information, such as phone calls received, public meeting notices, or newspaper articles.

The results of the in-office assessments should be compiled by each State Office and a single response for each state transmitted to Lucas Lucero, Branch Chief, Rights-of-Way, in the Washington Office of the BLM no later than 90 days after the issuance of this IM.

Timeframe: This information and interim guidance is effective immediately.

Budget Impact: There is expected to be a minor budget impact, depending on the number of proposals that need to be evaluated for railroad use and the amount of work involved with information gathering related to existing uses of 1875 Act ROWs.

Background: On January 5, 1989, the Solicitor issued Opinion M-36964 which, among other things, concluded that railroads possessed "what is tantamount to a fee interest in [their] 1875 Act rights of way" allowing them to undertake or authorize any activities within these ROWs regardless of purpose. As a result of further review of the 1875 Act and applicable judicial decisions, the Solicitor issued Opinion M-37025 on November 4, 2011 withdrawing that part of Opinion M-36964 concerning ROW issued under the 1875 Act. As Opinion M-37025 explains, railroad companies have the authority to undertake or authorize activities within an 1875 Act ROW if those activities derive from or further a railroad purpose, while the BLM is responsible for authorizing activities that do not serve any railroad purpose.

Manual/Handbook Sections Affected: This IM transmits interim policy that amends and will be incorporated into the BLM Right-of-Way Manual Series 2800/2880 during the next revision.

Coordination: This IM was developed in consultation with WO-100 and coordinated with the Solicitor's Office and affected State Offices.

Contacts: If you have questions or need additional information, please contact me at 202-208-4201, or your staff may contact Kim Berns, Division Chief, Lands, Realty and Cadastral Survey (WO-350) at 202-912-7350; Lucas Lucero, Branch Chief, Rights-of-Way at 202-912-7324; or Beth Ransel, Linear ROW & Master Agreements Lead at 202-912-7213.

Signed by:
Timothy Spisak
Acting, Assistant Director
Minerals and Realty Management

Authenticated by:
Robert M. Williams
Division of IRM Governance, WO-560

2 Attachments

- 1 - Solicitor's Opinion M-37025 (13 pp)
- 2 - Q&As Pertaining to M-37025 (3 pp)

[1] Opinion M-37025 does not modify the findings of the 1989 Opinion relating to railroad ROWs issued under other railroad ROW statutes.

[2] Uses proposed within an 1875 Act ROW cannot interfere with a railroad's use of its ROW.

[3] An example might include a telephone line that is located within an 1875 Act ROW that provides both station communication and general commercial use.

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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

NOV - 4 2011

IN REPLY REFER TO:

M-37025

Memorandum

To: Secretary
Assistant Secretary for Land and Minerals Management
Assistant Secretary for Water and Science
Director, Bureau of Land Management

From: Solicitor

Subject: Partial Withdrawal of M-36964—*Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*

This memorandum addresses the scope of a railroad's authority to authorize activities within a right-of-way (ROW) granted pursuant to the General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482 (1875 Act). This issue was most recently addressed in Solicitor's Opinion M-36964—*Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 96 I.D. 439 (1989) (Opinion M-36964)—which opined upon what approvals, if any, a telecommunications company must obtain from the Bureau of Land Management (BLM) in order to install a fiber optic communications line and associated facilities within existing railroad ROWs granted pursuant to: (i) the Act of July 27, 1866, 14 Stat. 292; (ii) the Act of March 3, 1871, 16 Stat. 573; and (iii) the 1875 Act. While addressing that specific question, Opinion M-36964 also opined more generally about a railroad's authority to authorize activities within those ROWs.

Our review of Opinion M-36964 responds to (1) criticisms of the 1875 Act portion of Opinion M-36964 by a federal District Court in *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005), and (2) concerns raised in connection with a proposal by Cadiz, Inc., to construct the Cadiz Water Conservation & Storage Project (Cadiz Project), which includes the construction of a 42-mile water conveyance pipeline in the Mojave Desert within the Arizona & California Railroad Company's (ARZC) 1875 Act ROW.¹ The Acting Assistant Secretary, Water and Science, relied on Opinion M-36964 in 2009 to conclude that the ARZC "may allow others to use. [its 1875 Act] ROW for any purpose without the involvement of the

¹ See also Cong. Research Service, "Property Rights Related to Railroad Rights of Way Granted to Arizona & California Railroad Company," at 3-4 (Jun. 17, 2009) (questioning Opinion M-36964's conclusions regarding the scope of a railroad's authority within an 1875 Act ROW).

BLM and that no federal authorization or analysis would be required for the construction of the [Cadiz Project's] pipeline" within ARZC's ROW across BLM-administered lands.²

For the reasons set forth below, this memorandum withdraws the guidance provided by Opinion M-36964 as it relates to a railroad's rights within an 1875 Act ROW based on our findings that:

- Opinion M-36964's conclusions with respect to the activities that a railroad may undertake, or authorize others to undertake, within an 1875 Act ROW are not consistent with the Act, the relevant legislative history, prior interpretations of the Act, or the established rule that railroad ROW grants are liberally construed in favor of the purposes for which they were enacted, but otherwise are subject to the general rule that any ambiguities in grants of lands from the public domain are to be resolved in favor of the Federal government; and
- Within an 1875 Act ROW, a railroad's authority to undertake or authorize activities is limited to those activities that derive from or further a railroad purpose, which allows a railroad to undertake, or authorize others to undertake, activities that have both railroad and commercial purposes, but does not permit a railroad to authorize activities that bear no relationship to the construction or operation of a railroad.³

I. BACKGROUND

A. The 1875 Act

A railroad ROW is a unique property right; it is "a very substantial thing," that has "the attributes of the fee, perpetuity and exclusive use and possession." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 570 (1904) (internal citations omitted).⁴ Railroad ROW grants were created by Congress beginning in the 1850s to encourage railroad construction and, by extension, the settlement of the west. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 273 (1942). The nature of individual ROW grants, however, is not uniform and depends upon the specific statute authorizing a particular grant. Initially, Congressional policy was to provide lavish grants of lands from the public domain; however, by 1872 this policy "incurred great public disfavor" causing Congress to provide more limited grants to facilitate railroad construction. *Id.* at 273-74. The 1875 Act provides in pertinent part:

Sec. 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any

² The Acting Assistant Secretary's conclusion was contained in a letter, dated January 13, 2009, which responded to a letter from Senator Feinstein of California inquiring about what federal approvals or environmental analyses would be necessary to allow the construction, operation and maintenance of the Cadiz Project. On June 30, 2009, Senator Feinstein requested that the Department review Opinion M-36964.

³ Neither this memorandum nor Opinion M-36964 addresses the questions of: (i) what interest the United States retains in railroad ROWs granted pursuant to the 1875 Act, or (ii) what happens to such ROWs after they are no longer in active use. The focus of this memorandum is on a railroad's rights within an active 1875 ROW.

⁴ The Court in *Western Union Telegraph* looked at the interrelationship between a railroad ROW act and an act giving certain eminent domain authorities to telegraph companies, not the scope of the 1875 Act.

State or Territory ... or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. ...

Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way ...

18 Stat. at 482-83.

B. Canon Of Construction Applicable To Railroad ROW Grants

The established rule governing the interpretation of grants of federal lands holds that “public grants are construed strictly against the grantees” and that any doubts “are resolved for the Government, and not against.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979). However, the Supreme Court has cautioned that this canon does not “apply ... in its full vigor to grants under the railroad acts.” *Id.* Due to the unique nature of those grants, the Supreme Court has articulated a modified version of this familiar canon which states:

When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a *more liberal construction in favor of the purposes for which it was enacted.*

Id. at 683 (emphasis added). Nevertheless, while railroad ROW grants are to be liberally construed to carry out their purpose, they are still “subject to the general rule of construction that

any ambiguity in a grant is to be resolved favorably to a sovereign grantor – ‘nothing passes but what is conveyed in clear and explicit language.’” *Great Northern*, 315 U.S. at 272 (internal citations omitted); see also *United States v. Union Pacific*, 353 U.S. 112, 116 (1957) (“land grants are construed favorably to the Government, [such] that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.”).

C. Prior Interpretations Of The 1875 Act

Consistent with the approach to statutory interpretation outlined above, the Supreme Court concluded that the 1875 Act “clearly grants only an easement, and not a fee [interest].” *Great Northern*, 315 U.S. at 271.⁵ The Court observed that the purpose of the 1875 Act was to “permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement,” but expressly noted that “[t]he achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land ... [as] a railroad may be operated though its right of way be but an easement.” *Id.* at 272. The Court based its conclusion that the 1875 Act granted only an easement on two considerations.

First, the *Great Northern* Court looked to the text of the 1875 Act itself. It observed that “Section 1 [of the Act] indicates that the right is one of passage since it grants ‘the,’ not a, ‘right of way’ through the public lands.” *Id.* at 271. Similarly, the Court observed that Section 2 also supported the conclusion that the right conveyed by the 1875 Act was “one of use and occupancy only, rather than the land itself” based on its declaration “that any railroad whose right of way passes through a canyon, pass or defile ‘shall not prevent any other railroad company from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located.”” *Id.* (emphasis in original). Finally, the Court found “especially persuasive,” the statement in Section 4 that “all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way.” *Id.* (emphasis in original). The Court concluded that “[a]fter words to indicate the intent to convey an easement would be difficult to find,” because the “reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.” *Id.*⁶ The text of Section 4 is noteworthy because the railroad ROW statutes that preceded the 1875 Act contained no such provision. *Id.* at 278.

Second, the Court considered the legislative and policy changes that occurred contemporaneously with the passage of the 1875 Act. *Id.* at 272-77. The Court explained that prior to 1871 Congressional policy was geared towards “subsidizing railroad construction by lavish grants from the public domain.” *Id.* at 273. As a result, courts interpreting those pre-1871

⁵ See also *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171 (10th Cir. 1949) (same). The dispute in *Great Northern* was whether the railroad or the United States retained the rights to the mineral estate underlying an 1875 Act ROW. The Supreme Court held that those rights were retained by the United States, based in part on its conclusion that an 1875 Act ROW was merely an easement. Prior to *Great Northern*, the Supreme Court had indicated that the 1875 Act conveyed a limited fee. *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915). However, *Great Northern* explicitly overruled this interpretation, concluding that the *Stringham* decision was “inconsistent with the language of the [1875] Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation.” *Great Northern*, 315 U.S. at 279.

⁶ This interpretation is also consistent with the Act’s legislative history. *Great Northern*, 315 U.S. at 272 n3 (citing Cong. Globe, 42d Cong., 2d Sess., 2137 (1872)) (the 1875 Act “grants no land to any railroad company”).

railroad ROW statutes have concluded that they granted “limited fee” interests in the lands described by the ROWs. By the 1870s, however, “[t]his policy incurred great public disfavor,” and in 1872 the House adopted a resolution, dated March 11, 1872, which stated:

Resolved, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.

Id. at 273-74 (citing Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)). Based on this change, after 1871 “outright grants of public lands to private railroad companies seem to have been discontinued.” *Id.* at 274. In its place, post-1871, Congress encouraged the “development[] of the Western vastnesses” through the 1875 Act by “grant[ing] rights to lay track across the public domain,” *Id.* at 274-75, but that the “right[s] granted ... [were] of use and occupancy only.” *Id.* at 270 (observing that Section 2 of the 1875 Act confirms this conclusion) and 275 (“It is improbable that Congress intended by [the 1875 Act] to grant more than a right of passage.”).⁷

The *Great Northern* Court also observed that its conclusion about the nature of the 1875 ROW grants was confirmed by the Department’s first interpretation of the Act, contained in the general ROW circular of January 13, 1888, 12 L.D. 423. *Id.* at 276. That circular concluded that “[t]he act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the ‘right of way’ or the grounds selected for depot purposes. It is a *right of use only*, the title still remaining in the United States.” 12 L.D. at 428 (emphasis added). This interpretation was confirmed in regulations adopted by the Department on May 21, 1909. 37 L.D. 787, 788 (“A railroad company to which a right of way is granted [under the 1875 Act] does not secure a full and complete title to the land on which the right of way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose.”).⁸ Lower courts have recently affirmed the more limited nature of the 1875 Act ROW grants. See *Home on the Range*, 386 F. Supp. 2d at 1017 (observing that Section 4 of the 1875 Act is wholly inconsistent with the grant of a fee interest); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (same).⁹ And while the Supreme Court has questioned the need for *Great*

⁷ *Wyoming v. Andrus*, 602 F.2d 1379, 1382 (10th Cir. 1979) (“The 1875 Act is ... significant in that it reduced the quality of the grant to the railroads.”).

⁸ The *Great Northern* court did note that there had been a shift in the regulatory interpretation of the 1875 Act towards “describe[ing] the right as a ‘base or qualified fee’.” 315 U.S. at 276. The Court, however, dismissed that subsequent interpretation and did not “regard [it] ... as binding on the Department ... since it was impelled by what ... [the court] regard[ed] as inaccurate statements in [*Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915)].”.

⁹ Unlike the ROWs at issue in Opinion M-36964 and *Home on the Range*, the ROW at issue in *Hash* was found by the court to have been abandoned. See *Hash*, 403 F.3d at 1318; *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1370 (Fed. Cir. 2009). As a result, one of the questions addressed by the court in *Hash* was what interest was retained by the United States in the 1875 Act ROW at issue there. While that specific question is outside the scope of this opinion, see note 3, the Federal Circuit has narrowed the reach of the holding in *Hash* to the specific facts of that case. See *Ellamae Phillips*, 564 F.3d at 1373-74. As noted below, other courts confronted with the same question as the Federal Circuit in *Hash* and *Ellamae Phillips* have concluded that the United States retains a reversionary interest in an 1875 Act ROW. See, e.g., *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985); *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994).

Northern's "easement" versus "limited fee" distinction, it has only done so in the context of resolving the question of which party held title to the mineral estate under a ROW granted pursuant to the Act of July 1, 1862, 12 Stat. 489. See *Union Pacific*, 353 U.S. at 119. After the *Union Pacific* decision, *Great Northern's* distinction between pre-1871 and 1875 Act ROWs remains relevant to determining what rights a railroad received under the 1875 Act relative to the government grantor.¹⁰

Based on the preceding, we conclude that the rights conveyed by the 1875 Act are narrower than the pre-1871 acts, contrary to Opinion M-36964's conclusion that a railroad received "an interest tantamount to fee ownership" in the 1875 Act ROWs. The implication of this conclusion and analysis of the rights that accompany an 1875 Act ROW are discussed in Section II below.

II. ANALYSIS

A. The Conclusions In Opinion M-36964 With Respect To The 1875 Act Are Inconsistent With The Act, Its Legislative History, Prior Interpretations, And The Applicable Canons of Statutory Construction

Opinion M-36964 addressed the specific question of whether MCI Telecommunications Corporation ("MCI") had to obtain a ROW grant or permit from the BLM in order to install a fiber optic communications line and associated equipment shelters within existing railroad ROWs granted to the Southern Pacific Transportation Co. ("Southern Pacific"), or its predecessors, under various railroad ROW acts.¹¹ Although Opinion M-36964 addresses the specific question presented by MCI and Southern Pacific, per its terms "it is intended to provide general guidance in similar situations." 96 I.D. at 439.

Opinion M-36964 concluded that railroad ROWs granted pursuant to the two pre-1871 railroad acts at issue "conveyed a 'limited fee' interest in the [ROW],"¹² and as such that those pre-1871 ROWs were "privately owned, except for reserved minerals, [and] not subject to the administrative jurisdiction of th[e] Department." 96 I.D. at 444-45, 450.¹³ With respect to the 1875 Act grants, Opinion M-36964 concluded that those grants carried with them "the right to

¹⁰ Similarly, while the significance of the shift in Congressional policy identified in *Great Northern* has been questioned in the academic literature, see, e.g., Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"*, 82 U. COLO. L. REV. 85 (2011), the *Great Northern* court's analysis has not been rejected or questioned by subsequent courts.

¹¹ While MCI's line was primarily a commercial trunk line, a portion of its capacity was dedicated to the railroad.

¹² The limitations on the "limited fee" created by the pre-1871 grants are (i) that the mineral rights underlying them were reserved to the United States, and (ii) that they were subject to an "implied condition of reverter in the event that the company ceased to use or retain the land" for railroad purposes. 96 I.D. at 444.

¹³ Given the multitude of railroad ROW acts, especially pre-1871, it should be noted that the key factor in determining what rights a railroad has within a particular ROW is not determined by the date the ROW grant was issued, but rather by the terms and interpretation of the act establishing the grant. For purposes of this analysis, we do not disagree with the conclusions articulated by Opinion M-36964 with respect to the pre-1871 grants at issue there, but note that courts have found certain other pre-1871 grants to convey lesser interests. See, e.g., *Energy Transp. Sys., Inc., v. Union Pac. R.R. Co.*, 606 F.2d 934, 936-38 (10th Cir. 1979) ("*ETSI I*") (concluding that Section 2 of the Pacific Railroad Act of 1862 and 1864 conveyed a ROW only, while Section 3 conveyed a fee interest); *Energy Transp. Sys., Inc., v. Union Pac. R.R. Co.*, 619 F.2d 696 (8th Cir. 1980) ("*ETSI II*") (same).

exclusive use and occupancy of the land,” such that the rights conveyed by those grants were “unlike an ordinary common-law easement ... [and were] tantamount to fee ownership.” According to Opinion M-36964, the interest conveyed under the 1875 Act includes the right to authorize others to use the surface, subsurface, and airspace when not inconsistent with railroad operations, analogous to the authority available to the holders of the pre-1871 ROWs at issue. *Id.* at 447, 450, 451 (internal citation omitted). In reaching those conclusions, Opinion M-36964 overruled a July 5, 1985, memorandum and a February 24, 1986, letter by the Associate Solicitor, Energy and Resources, addressing a proposal by U.S. Telecom, Inc., to install a buried communications cable within railroad ROWs granted under the Act of July 1, 1862, and the 1875 Act. 96 I.D. at 440-41. The Associate Solicitor’s 1985 memorandum had opined that such ROWs were surface easements; that the subsoil was unappropriated public land; and that the railroad could not authorize third parties to install buried systems in the subsoil, especially where such systems were not railroad-related. 96 I.D. at 440-41.

Opinion M-36964’s conclusion with respect to the scope of an 1875 Act ROW grant has been the subject of some debate since its issuance, and was specifically criticized by the *Home on the Range* court. In that case, the court found that Opinion M-36964 “did not cite any law for th[e] proposition” that 1875 Act grants were tantamount to fee ownership and faulted the Opinion for “effectively ignor[ing] the Supreme Court’s decision in *Great Northern*, which took pains to distinguish between the ‘limited fee’ granted by the pre-1871 statutes and the easements granted by later statutes.” See *Home on the Range*, 386 F. Supp. 2d at 1022. To support its conclusions regarding the 1875 Act, Opinion M-36964 cited only two cases – *Great Northern*, 315 U.S. 262 and *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Opinion M-36964’s interpretation of those cases is incorrect.

Opinion M-36964 asserts that the Supreme Court in *Great Northern* confirmed “the significant rights of the 1875 Act grantees, i.e., use and occupancy ... [and] did not limit the grantees’ rights to those of a *common-law* easement.” 96 I.D. at 447 (emphasis in original). While we agree with the observation that an 1875 Act ROW is not akin to a common law easement, that observation does not, as M-Opinion 36964 concludes, mean that the rights in a ROW conveyed by the 1875 Act are the same as those conveyed by the pre-1871 railroad ROW acts. Without any analysis, Opinion M-36964 relies on *Great Northern*’s acknowledgment that a railroad ROW is a unique property right to support the proposition that the 1875 Act grants an interest tantamount to a fee. 96 I.D. at 447. This leap is directly at odds with one of the express holdings of the case, namely that the 1875 Act conveys an easement and not a fee interest.

Opinion M-36964’s reliance on *Oregon Short Line* is also misplaced. As the *Home on the Range* court explained, the *Oregon Short Line* case did not deal with the question of the scope of an 1875 ROW; rather, it addressed “only the use of the ... [ROW] itself.” *Home on the Range*, 386 F. Supp. 2d. at 1019. The court in *Oregon Short Line* was asked to determine whether the United States retained a reversionary interest in an 1875 Act ROW pursuant to 43 U.S.C. § 912. In concluding that the United States retained such an interest, the court also affirmed that the 1875 Act did not “convey to the railroads a fee interest,” but rather a ROW “suitable for railroad purposes,” *Oregon Short Line*, 617 F. Supp. at 212. This holding is at odds with Opinion M-36964’s characterization of the case as supporting its conclusion that the 1875 Act conveyed an interest “tantamount to a fee.” 96 I.D. at 447.

Opinion M-36964 also relies on the following statement by Justice Frankfurter in his dissent in *Union Pacific* to support its analysis of the 1875 Act:

[Northern Pacific Ry. v. Townsend, 190 U.S. 267 (1903)] ... also serves to refute the suggestion that the railroad in its use of the right of way is confined to what in 1957 is narrowly conceived to be "a railroad purpose" . . . The Court [in Townsend] recognized that the land could revert to the grantor only in the event that it was used in a manner inconsistent with the operation of the railroad . . . Had Congress desired to make a more restrictive grant of the right of way, there would have been no difficulty in making the contingency for the land's reversion its use for any purpose other than one appropriately specified.

96 I.D. at 446 (emphasis in original) (quoting *Union Pacific*, 353 U.S. at 131-32). While Justice Frankfurter's statement in isolation suggests that railroad ROW grants are broad, it was made in the dissent in reference to a pre-1871 ROW grant, as Opinion M-36964 acknowledges. 96 I.D. at 446. Moreover, in the same dissent, Justice Frankfurter observed that the 1875 Act "was significantly different from the Act of 1862 and its companions" in terms of what they granted a railroad. *Union Pacific*, 353 U.S. at 127-130; see also *Home on the Range*, 386 F. Supp. 2d. at 1022. Thus, Justice Frankfurter's dissent does not provide even implicit support for Opinion M-36964's conclusion with respect to the 1875 Act.

Finally, in addition to being unsupported by the case law, Opinion M-36964's construction of the 1875 Act is also inconsistent with the canons of construction holding that while railroad ROW grants are to be liberally construed with the respect to the purpose for which they were enacted, they are nevertheless still subject to the general rule that any ambiguities in grants of federal lands are to be resolved in favor of the United States. Opinion M-36964 reasoned that because 1875 Act grants carried with them "the right to exclusive use and occupancy of the land" that was "unlike an ordinary common-law easement," they therefore conveyed a property right "tantamount to fee ownership." 96 I.D. at 447, 450 (internal citation omitted). Opinion M-36964's interpretation of the scope of a railroad's "exclusive use and occupancy" of the surface and non-mineral subsurface of an 1875 Act ROW is inappropriate for two reasons. First, it impermissibly extends the scope of such ROW grants beyond the purposes for which the 1875 Act was enacted, namely the "construction of ... [a] railroad." 18 Stat. at 482. Second, Opinion M-36964's conclusion that a railroad's "exclusive use and occupancy" of an 1875 Act ROW allows it to undertake or authorize *any* activity that is *not inconsistent* with railroad purposes ignores judicial precedent which establishes that the railroad's "exclusive use and occupancy" is more limited – i.e., it extends only to activities that derive from or further a railroad purpose. By interpreting the 1875 Act as granting such broad rights, Opinion M-36964 construed it in a manner that is not favorable to the government in direct contradiction to the rule that grants of federal lands are to be construed strictly against the grantees. Moreover, Opinion M-36964's construction is inconsistent with the Act's text and legislative history. See Section I(C) above.

Based on the foregoing, we conclude that Opinion M-36964's interpretation of the 1875 Act is inconsistent with the Act itself, the applicable legislative history, Supreme Court precedents, and the applicable canons of statutory construction. As explained above, the purpose of the 1875 Act was to provide a ROW for "railroad purposes." Construing the 1875 Act, as we

must, in a manner most favorable to both the purposes for which it was enacted and to the Government, leads to the conclusion that a railroad's exclusive use and occupancy of such ROWs includes all those activities that either derive from or further a *railroad purpose* (see Section I above), but does not include, as Opinion M-36964 opines, rights that are "tantamount to a fee." See *Home on the Range*, 386 F. Supp. 2d at 1024. Therefore, we withdraw that portion of Opinion M-36964 that relates to the scope of the 1875 Act. The implications of this conclusion are addressed in the next section.

B. A Railroad's Authority To Authorize Other Activities Within An 1875 Act ROW Is Limited To Those Activities That Derive From or Further A Railroad Purpose

While the *Home on the Range* court confirmed that the scope of an 1875 Act ROW grant is limited to those activities that are "derived from or further a railroad purpose," 386 F. Supp. 2d at 1024, it did not attempt to define "railroad purpose." Section 1 of the Act sets forth a list of the rights accompanying the grant, including the "right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations." 18 Stat. at 482. While the general canon of statutory construction for grants of federal land would conclude that activities not expressly identified in that list would be prohibited, under the more liberal canon applied to railroad ROW grants courts have concluded that railroads were given as part of their authorization to construct, the right to conduct whatever activities would be necessary to construct and operate said railroad. Therefore, courts confronted with such questions examine the activity in question to determine whether it "derive[s] from or further[s] a railroad purpose"¹⁴ to determine whether it is within the scope of the ROW grant. *Home on the Range*, 386 F. Supp. 2d at 1024. Some courts and commentators refer to this inquiry as the "incidental use doctrine." See, e.g., *Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 230 (D. Tex. 1990).

This inquiry starts with the basic premise that a railroad has the exclusive right to utilize the entirety of its ROW for the purposes of operating a railroad, which means "the free and perfect use of the surface of the land ... and ... as much above and below its surface as may be needed [to] ... further[] the business of the railroad." 65 AM JUR 2D RAILROADS § 75;¹⁵ *Mellon*, 750 F. Supp. at 230 ("[A] railroad may make many uses of its right-of-way including the building of side tracks, building, telegraph lines, and other structures necessary for its business.")

¹⁴ This is in contrast to ROWs granted under Title V of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1761, *et seq.*, where the scope of the grant is explicitly defined in the ROW grant itself.

¹⁵ Railroad operations include "the right to tunnel the land, to cut embankments, to grade and make roadbeds, and to operate and maintain a railroad with one or more lines of track with proper stations, depots, turnouts, and other appurtenances of a railroad," unless a particular activity is specifically prohibited under the terms of the grant. 65 AM JUR 2D RAILROADS § 75; see also 10-78A POWELL ON REAL PROPERTY § 78A.14; see also Section 1 of the 1875 Act, 18 Stat. 482. They also include the right to take material, earth, stone, and timber from the public lands adjacent to the roadbed that are necessary for the construction of the railroad. See, e.g., 18 Stat. at 482. And, while generally such ROWs included exclusivity of use, there are limitations on that exclusivity in the 1875 Act context. See Section 2 of the 1875 Act, 18 Stat. at 482 (stating that a railroad with a ROW through a canyon, pass, or defile, "shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile.")

(internal citations omitted);¹⁶ *Union Pac. Ry. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 581 (1896); *ETSI v. Union Pacific R.R.*, 435 F. Supp. 313, 317 (D. Wyo. 1977), *aff'd*, 606 F.2d 934 (10th Cir. 1979) (a railroad may use its ROW for “all uses incidental to railroad purposes”). Determining whether an activity “derives from or furthers a railroad purpose” requires a fact specific case-by-case inquiry. Courts conducting such inquires have allowed railroads to:

1. Run telephone lines (and previously telegraph lines) to “provide for communications between stations.” 10-78A POWELL ON REAL PROPERTY § 78A.14; *Home on the Range*, 386 F. Supp. 2d at 1021 (observing in dicta that an 1875 Act ROW included the right to install “telegraph or other communication technology for the purpose of facilitating the operation of the railroad itself.”);¹⁷ *see, e.g., St. Louis, Iron Mountain & S. Ry. Co. v. Cape Girardeau Bell Tel. Co.*, 114 S.W. 586, 587 (Mo. Ct. App. 1908) (same);¹⁸ *Grand Trunk R.R. Co. v. Richardson*, 91 U.S. 454, 468 (1876) (observing that it does not matter if the activity in question “may also be for the convenience of others” in addition to the railroad);¹⁹
2. Construct structures, such as commercial warehouses, where convenient, to facilitate the delivery of freight that may ultimately be shipped on the railroad. *See, e.g., Miss. Inv. Inc. v. New Orleans & N.E.R. Co.*, 188 F.2d 245, 247 (5th Cir. 1951) (concluding that a warehouse for receiving freight constructed within a railroad ROW easement was “consistent with the purposes for which the easements were acquired [i.e., railroad purposes].”);²⁰

¹⁶ The court in *Mellon* addressed a challenge to another segment of the same MCI fiber optic line at issue in Opinion M-36964. While the court in *Mellon* did not specifically characterize the nature of the railroad ROW grant at issue there, it held that the railroad had the authority to authorize the installation of the fiber optic line within its ROW because the line was incidental to railroad operations as it was used, in part, to provide communication capacity to the railroad. *See generally Mellon*, 750 F. Supp. at 230; *see also Long Beach v. Pac. Elec. Ry. Co.*, 283 P.2d 1036, 1038 (Cal. 1955) (“railroads may use their rights of way for certain commercial activities,” so long as “they contribute to the railroad’s business.”) (internal citations omitted).

¹⁷ It should be noted that in *Home on the Range*, the court specifically observed that AT&T offered no evidence to suggest that its fiber optic line in any way furthered the purpose of the railroad itself. 386 F. Supp. 2d at 1021.

¹⁸ The court in *Cape Girardeau*, construing a railroad’s rights within a state railroad ROW that had been deemed to grant an easement, stated that “telegraph and telephone are conveniences so essential, if not indispensable to the purposes of a railroad, that a railroad company may establish and construct one or both along the line of its right of way, to be used in the prosecution of its business in operating the road, and such use, essential as it is, is not an additional servitude upon the fee,” *Cape Girardeau*, 114 S.W. at 587, and that “the mere commercial use of the telephone under the circumstances mentioned, is entirely consistent and in no manner interferes with the railroad ... easement.” *Id.* at 590.

¹⁹ Compare *The Am. Tel. & Tel. Co. of Baltimore City v. Pearce*, 18 A. 910, 912 (Md. 1889) (“a line of telegraph on a railroad right of way is an *additional burden*, unless constructed for the use of the railroad company in the operation of its road and dispatch of its business.”) (internal citations omitted; emphasis in original), and *W. Union Tel. Co. v. Nashville, C. & St. L., Ry. Co.*, 237 S.W. 64, 89 (Tenn. 1921) (observing that a railroad company operating within a ROW easement was not “entitled to operate a commercial telegraph along its right of way entirely disconnected from its own business.”).

²⁰ *Grand Trunk*, 91 U.S. at 468; *Or. Short Line R. Co. v. Ada County*, 18 F. Supp. 842 (D. Idaho 1937) (same); *see also Solicitor’s Opinion M-36016, Lease of Railroad’s Station Grounds at Parker, Arizona* (1949) (recognizing that warehouses for receiving freight constitute a use incidental to railroad purposes); *Railroad Right of Way – Lease for*

3. String power lines. *Long Beach v. Pac. Elec., Ry. Co.*, 283 P.2d 1036 (Cal. 1955) (power lines necessary for operation of electric railroad);²¹ and
4. Construct combined bulk and retail oil facilities. *Mitchell v. Ill. Cent. R.R. Co.*, 51 N.E.2d 271 (Ill. 1943) (affirming construction of a facility within a railroad ROW easement for the receipt and shipment of bulk oil via the railroad, where such facility also sold oil to retail customers).

These precedents establish that railroads have the right to undertake a range of activities within their ROWs, including commercial activities, so long as the activity is derived from or furthers a railroad purpose consistent with the discussion above. A railroad's right to undertake activities within an 1875 Act ROW includes the right to authorize other parties to undertake those same activities. See, e.g., *Grand Trunk*, 91 U.S. at 468 (“[I]f the [railroad] ... might have put up the buildings, why might it not license others to do the same thing for the same object ...?”). For example, in *Grand Trunk* the freight warehouse that was determined to be related to a railroad purpose was constructed by a third party under a license from the railroad. See also *Miss. Inv. Inc.*, 188 F.2d at 247 (a third party warehouse authorized by the railroad was “not so foreign to railroad purposes as to constitute [an] ... additional servitude not permissible under the right ... acquired for railroad purposes.”)²² Consistent with these cases, Opinion M-36964 affirmed that a railroad can authorize a third party to undertake any activity within a railroad ROW that the railroad itself would be able to undertake. 96 I.D. at 446;²³ see also Section II(C) below.

Based on the preceding, we conclude that Opinion M-36964's assertion that a railroad has the broad authority to approve any activity within an 1875 Act ROW so long as it is not inconsistent with railroad operations, 96 I.D. at 450-51, is incorrect because it does not require a demonstration that such activities derive from or further a railroad purpose. Therefore, Opinion M-36964's conclusion about the types of activities that may be authorized by a railroad in an 1875 Act railroad ROW is hereby withdrawn consistent with the analysis above. As a result, any activity undertaken or authorized by a railroad on public lands within an 1875 Act ROW that does not derive from or further a railroad purpose would require authorization from the Department.²⁴

Warehouse Purposes, 29 L.D. 569 (1900) (same); *Garry v. Atchison Topeka and Santa Fe Ry. Co.*, 378 P.2d 609 (NM 1889).

²¹ Compare with *Tompkins v. Atl. Coast Line. R. Co.*, 79 S.E.2d 41, 47 (Ga. Ct. App. 1953) (“The grant of an easement for railroad purposes does not include an easement for an electric-power transmission line, unconnected with the operation of the railroad.”) (internal citations omitted); *Muncie Elec. Light Co. v. Joliff*, 109 N.E. 433 (Ind. Ct. App. 1915) (same).

²² See also *Hartford Ins. Co. v. Chicago, M. & S.P. Ry.*, 175 U.S. 91, 99 (1899); *Chicago, R.I. & P. Ry.*, 163 U.S. at 581; *Mitchell*, 51 N.E.2d at 275.

²³ Opinion M-36964's conclusion with respect to the authorization of third party activities by a railroad is not affected by this withdrawal of the 1875 Act portion of that Opinion.

²⁴ See, e.g., *infra* notes 19 and 21; see also *ETSI II*, 619 F.2d at 700 (concluding that the State of Nebraska's interest in the subsurface of the servient estate underlying a railroad ROW was sufficient to “permit the state to convey to ETSI a pipeline easement” underneath the railroad ROW). We would note that in circumstances where the authority to undertake or authorize a specific activity lies with the servient estate owner, and not the railroad, such an activity

C. Implications Of This Memorandum For The Activities Specifically Referenced In Opinion M-36964

Based on this withdrawal of Opinion M-36964's conclusion with respect to the 1875 Act, we analyze the implications of the withdrawal on the activities specifically addressed in Opinion M-36964. As noted above, Opinion M-36964 considered the specific question of what approvals, if any, MCI had to obtain from the BLM in order to install a fiber optic communications line and associated facilities along Southern Pacific's railroad ROWs across BLM-administered lands, including ROWs granted pursuant to: (i) the Act of July 27, 1866, 14 Stat. 292; (ii) the Act of March 3, 1871, 16 Stat. 573; and (iii) the 1875 Act. As explained above, this Opinion does not alter the conclusions of Opinion M-36964 with respect to the 1866 or 1871 act ROWs.

With respect to the fiber optic line installed along Southern Pacific's 1875 ROW, we find that the outcome reached by Opinion M-36964 was correct, namely that the installation of the line was within the scope of the railroad's authority to authorize, but that the basis given for that conclusion, as set forth above, was incorrect. MCI demonstrated that its fiber optic line, in addition to providing commercial communication services, also furthered railroad operations. Prior to the issuance of Opinion M-36964, MCI provided a letter to the Department from Southern Pacific which stated that Southern Pacific "will use the fiber optic capacity it receives from MCI to improve the efficiency of its own communications systems, and thereby improve the safety of its operations."²⁵ Such evidence demonstrates that MCI's line furthered, at least in part, a railroad purpose, as required by the incidental use doctrine, and therefore, Southern Pacific had the authority to approve the installation of MCI's line in its ROW across BLM-administered lands without approval from the Department.

III. CONCLUSION

Based on the foregoing analysis, we withdraw that portion of Opinion M-36964 containing conclusions with respect to the scope of a railroad's authority within an 1875 ROW.²⁶ This withdrawal is based on our findings that:

- Opinion M-36964's conclusions with respect to the activities that a railroad may undertake, or authorize others to undertake, within an 1875 Act ROW are not consistent with the Act, the relevant legislative history, prior interpretations of the Act, or the

cannot interfere with the railroad's use of the ROW for railroad purposes. *See, e.g., ETSI I*, 606 F. 2d at 938; *ETSI II*, 619 F.2d at 696 n. 4, 697.

²⁵ Letter from Southern Pacific Transportation Company, Roger W. Pearson, to Steven P. Quarles, Crowell & Moring, counsel for MCI, dated Mar. 28, 1988; Memorandum from S. Quarles, Crowell & Moring, on Behalf of MCI, to the Solicitor of the Department of the Interior, "MCI's Buried Fiber Optic Line Use of the Southern Pacific Right-of-Way Requires No FLPMA Permit from Interior" (undated) (on file with author) (arguing, in part, that MCI's fiber optic line is allowed without BLM approval under the incidental use doctrine); *see also* 96 I.D. at 439 (observing that the MCI line "furthers railroad purposes").

²⁶ The subsurface/surface distinction in the Associate Solicitor's 1985 memorandum, which had been overruled by the 1875 Act portion of Opinion M-36964, has not been reinstated by this memorandum, because that distinction is not relevant to determining what can, or cannot, be undertaken within an 1875 Act ROW. As stated above, the key question is whether or not the activity in question has a railroad purpose or is derived from or furthers such a purpose.

established rules that railroad ROW grants are liberally construed in favor of the purposes for which they were enacted, but otherwise are subject to the general rule that grants of lands from the public domain are construed strictly against the grantee and that any doubts as to the scope of the grant are resolved for, and not against, the Government; and

- A railroad's authority to undertake or authorize activities within an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose.

The BLM should exercise its discretion under Title V of FLPMA to determine the extent to which development actions within 1875 Act ROWs have been taken in reliance on Opinion M-36964. The BLM should, in light of this Opinion, evaluate those prior actions on a case-by-case basis. Such evaluations should consider the relationship of those prior actions to railroad purposes, as outlined above, in order to determine what actions, if any, need to be taken with respect to such ROW activities. BLM may prioritize these evaluations through its ongoing inventory of resources on the public lands.²⁷


Hilary C. Tompkins

²⁷ This Opinion was prepared with the substantial assistance of Dylan Fuge and Michael Hickey in the Solicitor's Office.

ON NOVEMBER 4, 2011, THE SOLICITOR OF THE UNITED STATES DEPARTMENT OF THE INTERIOR ISSUED OPINION M-37025 WHICH PARTIALLY WITHDREW THE SOLICITOR'S 1989 OPINION M-36964 AND CLARIFIED THE SCOPE OF A RIGHT OF WAY ESTABLISHED UNDER THE GENERAL RAILROAD RIGHT OF WAY ACT OF MARCH 3, 1875 (1875 ACT). HERE ARE SOME QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

1. What is the General Railroad Right of Way Act of March 3, 1875?

The General Railroad Right of Way Act of March 3, 1875 (1875 Act) granted railroad companies a 100 foot right-of-way (ROW) on public land on either side of a railroad line subject to certain terms and conditions. Thousands of miles of 1875 Act ROWs are estimated to exist on public land in the western United States.

2. Were there other statutes that authorize the granting of ROWs on public land to railroad companies?

Yes. There were a number of acts pre-1871 that granted railroad companies ROWs. These pre-1871 acts were generally for specific companies or routes, and provided fee title to the lands over which the railroad was constructed, including to certain public land on either side of a railroad line subject to certain terms and conditions.

3. Are the pre-1871 acts and the 1875 Act still in effect?

No. In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). Title VII of FLPMA repealed the various railroad ROW statutes but recognized existing ROWs established under those statutes as valid existing rights.

4. What is an "M Opinion"?

An "M Opinion," which is short for "Memorandum Opinion," is a formal written opinion by the Solicitor that presents the official legal interpretation of the Department of the Interior on matters within the Department's jurisdiction. M Opinions are binding on all Department offices and officials and may be withdrawn, overruled, or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

5. What did Opinion M-36964 do?

Opinion M-36964 was issued by the Solicitor in 1989 and arose in the context of MCI Communication's request to install a fiber optic line within three different railroad ROWs across BLM land held by the Southern Pacific Railroad Company pursuant to (i) the Act of July 27, 1866; (ii) the Act of March 3, 1871; and (iii) the 1875 Act. With respect to the pre-1871 ROWs, Opinion M-36964 concluded that a Southern Pacific held a fee interest and therefore could authorize any activity within those ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations. With respect to the 1875 Act ROW, Opinion M-36964 concluded that Southern Pacific held an interest that was "tantamount" to a fee and thus could similarly undertake or authorize any activity within these ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations.

6. What does Opinion M-37025 do relative to the 1875 Act?

Opinion M-37025 was issued by the Solicitor on November 4, 2011. It withdraws those portions of Opinion M-36964 regarding the 1875 Act based on the fact that those portions are

inconsistent with a longstanding Supreme Court precedent – *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) – and two recent federal court decisions – *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005) (the latter questioned the legal basis for Opinion M-36964’s conclusion). Specifically, Opinion M-37025 rejects Opinion M-36964’s conclusion that the 1875 Act is “tantamount” to a fee. Rather, Opinion M-37025 states that the scope of an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. As result, Opinion M-37025 activities that are not related to railroad purposes are outside the scope of the ROW grant and that such activities require BLM authorization pursuant to applicable law. Approval of any such uses by the BLM will require coordination with the railroad to ensure such uses do not interfere with railroad operations within the ROW.

7. What does Opinion M-37025 do relative to the pre-1871 Acts?

Nothing. Opinion M-37025 specifically states that it does not alter the conclusions of Opinion M-36964 with respect to the pre-1871 Acts. Therefore, the conclusion of Opinion M-36964 that railroad companies possess a fee interest in these pre-1871 ROWs is unchanged.

8. What are examples of activities within a railroad ROW that derive from or further a railroad purpose?

Although each situation must be evaluated on a case by case basis, examples of activities within an 1875 Act ROW that may serve a railroad purpose include: telegraph, telephone and fiber optic lines that provide for both railroad and commercial communications; warehouses that provide for receipt of freight by the railroad while also providing other retail services; transmission lines that provide power to the rail line and commercially; and station grounds, maintenance yards, and related improvements.

9. What should the proponents of a new use within an 1875 Act ROW on BLM land do?

Proponents of new uses within an 1875 Act ROW should contact BLM for a determination of whether the proposed use serves a railroad purpose. As explained above, if BLM determines that a proposed use does serve a railroad purpose, BLM authorization is not required and the railroad company may undertake or authorize the use at its discretion, subject to any other applicable legal requirements. If, however, BLM determines that the proposed use does not serve a railroad purpose, BLM authorization is required and the proponent must submit an application to the agency for processing in accordance with applicable law, regulation and policy.

10. What actions, if any, will BLM undertake regarding uses that already exist within 1875 Act ROWs based on Opinion M-37025?

The BLM is currently developing guidance that addresses the relationship of Opinion M-37025 to existing uses within 1875 Act ROWs on BLM land and the actions, if any, that the agency should take to ensure compliance with the new Opinion.

11. Who should I contact for further information?

You may contact the BLM's Washington Office, Branch of Rights-of-Way at (202) 912-7342 if you have further questions concerning the applicability of Opinion M-37025 to 1875 Act ROWs on BLM land.

