

THE SHIFTING SANDS OF PROPERTY RIGHTS, FEDERAL
RAILROAD GRANTS, AND ECONOMIC HISTORY: *HASH V.*
UNITED STATES AND THE THREAT TO RAIL-TRAIL
CONVERSIONS

BY
DANAYA C. WRIGHT*

This Article is an analysis of a federal circuit case from 2005 that has spawned some disturbing precedents in the area of federal transportation and railbanking policy. Specifically, the National Trails System Act (NTSA) provides a mechanism for preserving unused railroad corridors for future reactivation while allowing interim recreational trail and mixed utility use along the corridor. Converting rail corridors to recreational trails is a very popular process and communities across the country are demanding more and more conversions, as people seek the amenities of linear parks and greenways.

Hash v. United States, however, deals with the property rights underlying the thousands of miles of railroad corridors that were granted directly to the railroads by the federal government out of public lands. The Court of Appeals for the Federal Circuit held that the government no longer had any interest in these lands, even though the railroads only received easements. This ruling effectively ordered that the application of the NTSA to federally granted corridors is a facial taking requiring compensation in all cases. However, the United States Supreme Court has never found that any federal law works a facial taking, and the Court upheld the railbanking act as permissible under Interstate Commerce. Yet, the effect of this case is to find a facial taking fifteen years after the Supreme Court said there was not one. The decision renders null a number of federal statutes enacted to dispose of these corridors and generally throws a wrench into the otherwise relatively stable jurisprudence of federal railroad property law. And although at least one successor case is on appeal, it is critical that this decision be revisited in a thorough manner. Even if successive courts adopt the property determinations of the Hash decision, there

* Professor of Law, University of Florida Levin College of Law. I wish to thank Michael Wolf and Christine Klein for their helpful comments and analysis as I worked through these ideas. I also wish to thank Andrea Ferster at Rails-to-Trails Conservancy for her comments and ever-sensible guidance, and the Levin College of Law for its generous research grants that have allowed me the time to focus on this case.

are a number of ancillary issues that are critical to railbanking, corridor preservation, and interim trail use that need to be resolved before we lose these corridors forever.

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I. INTRODUCTION

Rarely does a single case, especially out of a circuit court, threaten to undermine an entire area of well-established (and correct) case law interpreting numerous federal statutes. But that is precisely the situation arising in the context of the conversion of federally-granted railroad rights-of-way (FGROW)¹ to recreational trails under the railbanking statute.² In 2005, the Federal Circuit, in *Hash v. United States*,³ decided the question of whether the federal government retained any underlying interest in FGROW when it made subsequent land patents of the adjoining land. In holding that the government's servient fee interest⁴ in FGROW passed to patentees at the

¹ Federally-granted rights-of-way were donated to various railroads and states for construction of railroad lines. These rights-of-way were between 60 and 200 feet wide and originated in either individual acts of Congress to particular railroads, to states to pass through to railroads, or via two general right-of-way acts that granted rights-of-way to any charter railroad across the public lands if they filed a map of definite location with the Department of the Interior. See discussion of FGROW *infra* Part II.

² Railroads seeking to preserve their corridors for future reactivation while allowing interim trail use may railbank their corridor pursuant to 16 U.S.C. § 1247(d). They must follow the procedures established by the Surface Transportation Board (STB) regarding rail abandonments and the use of rights-of-ways as trails. See 49 C.F.R. §§ 1152.20–1152.37 (2007). See also Danaya C. Wright, *Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails*, in 11 POWELL ON REAL PROPERTY 78A-1 (Michael Allan Wolf ed., 2007).

³ 403 F.3d 1308 (Fed. Cir. 2005).

⁴ As discussed below, FGROW have been held to be grants of fee simple absolute, fee simple determinable, and easements; but the grant in this case was determined to be an easement and that issue was not contested by the government. The interest the government would have retained if an easement was granted to a railroad would be the servient fee and not a reversionary interest. See discussion of shifting interpretations of FGROW *infra* Part III.

time of original homestead patents, the court went against decades of precedents finding that the federal interest in railroad land grants was excluded from subsequent patents.⁵ More worrisome, however, is that later courts have interpreted dicta in *Hash* to compel a finding that any preservation of FGROW for rail-trail conversion constitutes a taking requiring compensation.⁶ This decision, in conjunction with a handful of lower court rulings, threatens to seriously undermine this country's commitment to railbanking (the preservation of unused rail corridors for future reactivation)⁷ and its support of rail-trail conversions, and creates a windfall for private landowners at the expense of the public lands. And this is not just about hard cases making bad law;⁸ these cases misuse history, distort legal principles, and upset well-established precedents in a way that profoundly undermines our commitment to the rule of law.

Since the 1830s, the federal government has granted to railroads a right-of-way across public lands for the location of their roads.⁹ Between 1852 and 1862 this right-of-way was granted pursuant to a general statute giving charter railroads a right-of-way 100-feet wide, plus timber, gravel, and the right to build suitable drains.¹⁰ Between 1862 and 1871 the government granted 100-foot or 200-foot rights-of-way to the transcontinental railroads via individual acts of Congress, in addition to alternating sections of land on either side of the roadway for sale to raise construction funds.¹¹ This lavish land grant policy, combined with grants to the states which were to be transferred to the railroads, resulted in the transfer to private railroads of over 130 million acres of public land.¹² After 1871, dissatisfaction with the railroads and their delays in bringing this public land to market led Congress to discontinue the checkerboard grants, and to pass another general right-of-way act in 1875 to grant to any railroad a 200-foot right-of-way through the

⁵ See discussion of homestead precedents and 43 U.S.C. § 912 precedents ignored in *Hash* *infra* Parts VI, VIII.

⁶ See *Hash v. United States*, No. CV-99-324-S-MHW, 2007 WL 1309548, at *1, *4 (D. Idaho Feb. 1, 2007); *Blendu v. United States*, 75 Fed. Cl. 543, 547–48 (Fed. Cl. 2007); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 392–96 (Fed. Cl. 2007), *cert. for interlocutory appeal granted*, 2008 WL 586408 (Fed. Cir. Feb. 7, 2008) (Misc. No. 867); *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 738–39 (S.D. 2007); *Home on the Range v. AT&T Corp.*, 386 F.Supp.2d 999 (S.D. Ind. 2005); see also discussion on the impact of these cases *infra* Part X.

⁷ Railbanking is a process of preserving rail corridors from complete abandonment established by the Surface Transportation Board pursuant to 16 U.S.C. § 1247(d). See discussion *infra* Part IV and sources cited *supra* note 2.

⁸ GEORGE HAYES, CROGATES'S CASE: A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM (1854), *reprinted in* 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 423 (3d ed. 1944). See also *N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (presenting Justice Holmes's first dissenting opinion).

⁹ See *infra* note 35 and accompanying text.

¹⁰ Act of Aug. 4, 1852, ch. 80, 10 Stat. 28.

¹¹ See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 341–86 (1968); THOMAS E. ROOT, RAILROAD LAND GRANTS: FROM CANALS TO TRANSCONTINENTALS 21–25 (1987); JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 51–59 (2001).

¹² See GATES, *supra* note 11, at 384–85. Direct grants to the railroads constituted almost 95 million acres and grants to the states, to pass on to the railroads, constituted another 37 million acres. *Id.*

public lands but no additional lands for sale (1875 Act).¹³ The 1875 Act has remained unchanged as 43 U.S.C. §§ 934–39, even though there are no modern railroads engaged in new construction.¹⁴

In 1916, railroad mileage in this country reached its peak of 270,000 miles, only to dwindle to half that amount by the present day.¹⁵ Competition from trucking and airlines, in addition to consolidations and mergers, has caused the majority of these railroad miles to disappear, primarily to the adjacent landowner who absorbs the abandoned corridor land under a variety of statutory and common law mechanisms.¹⁶ Pursuant to a 1922 statute, the federal interest in abandoned FGROWs would pass to either a municipality, be transferred for a public highway, or pass to adjacent landowners.¹⁷ In 1983, however, a growing environmental and alternative transportation movement successfully urged passage of amendments to the National Trails System Act (NTSA)¹⁸ to save these railroad corridors for future reactivation and interim trail use.¹⁹ If the proper federal process is followed, a railroad can “railbank” its corridor for future use while transferring its ownership (and liabilities) to a trail sponsor for linear trail and greenway use.²⁰ In 1988 Congress realized that its policy of disposing of abandoned FGROW was inconsistent with the railbanking policy, and thus it enacted further amendments to the NTSA providing that the federal interest in FGROW would be retained and railbanked, rather than given away to adjoining landowners.²¹ These 1988 amendments harmonized the government’s dual policies of promoting railroad corridor preservation and recreational trail use.²²

¹³ General Railroad Right-of-Way Act of 1875, ch. 152, §§ 1–6, 18 Stat. 482 (1875) (codified as amended at 43 U.S.C. §§ 934–939 (2000)).

¹⁴ *Id.*

¹⁵ Andrea C. Ferster, *Rails-to-Trails Conversions: A Review of Legal Issues*, PLAN. & ENVTL. L., Sept. 2006, at 3–4 (stating that between 1980 and 1990 anywhere from 4,000 to 8,000 miles were lost each year).

¹⁶ Some states have statutory or common law rules that adjacent landowners will own up to the centerline of abandoned railroad corridors even if their own deeds do not include the corridor land. See Wright, *supra* note 2, at 78A-64. Other landowners simply absorb the land and then allege adverse possession if the railroad challenges their possessory rights. Other states, however, more strictly protect the railroad’s rights from incursions by adjacent landowners, denying the latter standing to question the title of the railroad unless they have deeds with actual descriptions of the corridor land. See, e.g., *Keife v. Logan*, 75 P.3d 357, 360 (Nev. 2003); *Brown v. Washington*, 924 P.2d 908 (Wash. 1996); *Smith v. Malone*, 742 N.E.2d 785 (Ill. App. Ct. 2000).

¹⁷ Act of Mar. 8, 1922, Pub. L. No. 67-163, 42 Stat. 414 (codified at 43 U.S.C. § 912 (2000)).

¹⁸ National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241–1251 (2000)).

¹⁹ See National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, 48 (1983) (codified at 16 U.S.C. § 1247(d) (2000)).

²⁰ *Id.*

²¹ National Trails Systems Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281, 2281 (1988) (codified at 16 U.S.C. § 1248(c) (2000)).

²² The United States Supreme Court in *Preseault v. Interstate Commerce Commission* discussed at length the dual purposes of the railbanking statute (interim trail use and corridor preservation) when affirming its constitutionality. 494 U.S. 1, 17–18 (1990). And, as Judge Feinberg said in the Second Circuit decision in *Preseault v. Interstate Commerce Commission*,

Courts have been remarkably inconsistent in their treatment of FGROW, holding that some grants conveyed fee simple absolute to the railroads with no retained interest by the federal government, that others conveyed fee simple determinable with an implied possibility of reverter upon abandonment, and that others conveyed an easement.²³ Both the defeasible fee and easements entail a retained interest in the government which would be subject to disposal only upon the railroad's abandonment. In 1922, Congress adopted 43 U.S.C. § 912²⁴ to dispose of its retained interest in FGROW held as defeasible fee, but it was unclear whether it would also apply to FGROW held as easements, especially since the courts did not adopt the easement interpretation until twenty years after section 912 was passed.²⁵ Despite the uncertainty in the terminology of the abandonment statute, however, courts have consistently applied it to all retained interests, whether possibilities of reverter or servient fee interests, on the assumption that whatever interests the government retained in these railroad grants should be disposed of consistently with Congress's clear mandate.²⁶ At no time, however, did Congress think that its retained interest in FGROW had transferred to homestead patentees, either before or after 1922, and was therefore not available for disposal under section 912.²⁷

The challenge made on behalf of successors to homestead patentees²⁸ is based on the argument that the government's interest in FGROW passed to patentees at the time of their original patent.²⁹ Under this theory, the only parties with interests in FGROW are the railroads and the adjacent landowners, and the government has no property sticks left in the public lands it has given away. Thus, the 1922 abandonment act and the 1988 NTSA amendments disposing of the federal interest in FGROW were a waste of Congress's time because there is no federal interest in FGROW where the adjoining land has been patented to a private individual. Congress cannot subsequently pass an act to dispose of or retain interests in land that it no

"[railbanking] seems a remarkably efficient and sensible way to achieve both goals." 853 F.2d 145, 150 (2d Cir. 1988). See also Danaya C. Wright & Scott Andrew Bowman, *Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 581, 585-87 (2008) (discussing the dual purposes of the railbanking statute).

²³ See Wright, *supra* note 2, at 78A-66 to 78A-81 (discussing FGROW cases).

²⁴ Act of Mar. 8, 1922, Pub. L. No. 67-163, 42 Stat. 414 (codified at 43 U.S.C. § 912 (2000)).

²⁵ See discussion *infra* Part III.

²⁶ See Wright, *supra* note 2, at 78A-94.

²⁷ *Id.* at 78A-119.

²⁸ I use the term patentee and homesteader interchangeably, even though some adjacent landowners along some FGROW acquired their land through processes other than the 1862 Homestead Act. See, e.g., GATES, *supra* note 11, at 387-434 (discussing the different laws that allowed for purchase or free grants of land to settlers). The *Hash* court did not distinguish between adjacent landowners who acquired their land directly from the railroad and would not have an interest in the underlying fee of the corridor, though such land ownership would not exist with 1875 Act FGROW because the latter did not include the checkerboard grants. See, e.g., Bd. of Comm'rs of Weld County v. Anderson, 525 P.2d 478 (Colo. App. 1974).

²⁹ See Brief for Plaintiffs-Appellants at 12-15, *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (No. 03-1395), 2003 WL 25291551.

longer possesses, and if it does it is guilty of a taking without just compensation.³⁰

When the federal circuit in *Hash v. United States* upheld the claims of the homesteaders, it profoundly altered decades of precedents, including United States Supreme Court precedents, holding that the federal government had a retained interest in FGROW that could be disposed of or retained pursuant to federal statute, principally 43 U.S.C. § 912. Furthermore, because no federal interest was deemed to have passed to anyone until at least one year after the railroad had abandoned its FGROW, which must be determined only by act of Congress or decision of a court of competent jurisdiction, Congress could amend its policies of disposal and choose to retain the federal interests in order to preserve railroad corridors for future rail or other transportation purposes. The *Hash* decision, however, found that the federal property interest was transferred out of federal ownership at the time homestead patents were issued and that later statutes dealing with those interests have no effect.³¹

Since 2005 at least five other courts have followed the *Hash* decision on issues they believed followed from the finding that the government has no retained interest in FGROW,³² even though these ancillary issues were not briefed nor argued before the court. They felt the *Hash* court had mandated certain findings in an offhand remark.³³ For many reasons, this decision is problematic, and this Article explains why. After first giving a history of federal/railroad land relations (Part II), federal court interpretations of FGROW interests (Part III), and the mechanics of abandonment, railbanking, and takings (Part IV), I briefly summarize the *Hash* case and its resolution (Part V). I then analyze the case from a number of different perspectives: the rights of homesteaders under federal patents (Part VI), Congress's statutory responses to forfeited and abandoned FGROW (Part VII), the applicability of section 912 to all types of FGROW (Part VIII), and the scope of FGROW held as easements (Part IX). I then give a brief examination of the numerous judges who have felt compelled to follow *Hash*, even though they have not done so without criticism (Part X) and conclude by offering one way to limit the effects of this ill-reasoned decision in order to protect important federal transportation interests (Part XI). I only hope that a more scholarly and thoughtful look at this issue may help limit the damage of the *Hash* case and/or justify its reversal.

³⁰ *Id.* at 28–39.

³¹ *Hash v. United States*, 403 F.3d at 1317–18.

³² *Hash v. United States*, No. CV-99-324-S-MHW, 2007 WL 1309548, at *5–6 (D. Idaho Feb. 1, 2007); *Blendu v. United States*, 75 Fed. Cl. 543, 545–49 (Fed. Cl. 2007); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 393–95 (Fed. Cl. 2007), *cert. for interlocutory appeal granted*, 2008 WL 586408 (Fed. Cir. Feb. 7, 2008) (Misc. No. 867); *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 736–40 (S.D. 2007); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1016–24 (S.D. Ind. 2005).

³³ *See, e.g., Blendu v. United States*, 75 Fed. Cl. at 546.

II. FEDERAL RAILROAD LAND-GRANT POLICIES

Throughout the nineteenth century, the federal government actively facilitated railroad construction.³⁴ In 1834, Congress began granting to individual railroads rights-of-way through public lands for a width of 60–100 feet for road construction to aid the fledgling railroads all along the eastern seaboard and into the southern territories.³⁵ By the 1850s, the railroads had emerged as the most efficient investment in transportation infrastructure, beating out canals and plank roads, as they were far more economical to build and easier to control and maintain.³⁶ As demands by railroads for free land increased, Congress passed a general right-of-way act in 1852 (1852 Act) giving to any charter railroad a 100-foot right-of-way across the public lands, plus the right to use earth, stone, and timber on adjacent public land in railroad construction, and to take additional land for depots and water tanks.³⁷ The 1852 Act avoided the necessity of having to pass individual acts each time a railroad sought access across federally-owned public lands.

But with the California gold rush and frantic development in the Midwestern states throughout the 1850s, people were pouring into new territories west of the Mississippi River that had little infrastructure, no railroads, and no revenues to fund construction.³⁸ Beginning in 1850, the federal government became involved in a clever scheme by which alternate sections of land on each side of a right-of-way would be granted to the states to pass to the railroads,³⁹ who would, in turn, sell this excess land to raise

³⁴ See ELY, *supra* note 11, at 19–30, 32–40. See also ROOT, *supra* note 11, at 25–35; GATES, *supra* note 11, at 341–42.

³⁵ The first federal railroad grant was in 1834. Resolution of June 25, 1834, ch. 3, 4 Stat. 744. For further discussion of federal railroad grants, see GATES, *supra* note 11, at 357. Other early grants included, for example, Act of Jan. 31, 1837, ch. 9, 5 Stat. 144; Act of June 28, 1838, ch. 150, 5 Stat. 253; Act of Sept. 20, 1850, ch. 61, 9 Stat. 466. These grants generally conveyed a right-of-way across the public lands along a broadly defined route. For example, one early grant authorized “certain rail-road companies to construct railroads through the public lands in the Territory of Florida.” Act of Jan. 31, 1837, ch. 9, 5 Stat. 144. These grants also included the right to take timber, gravel, and water along the routes, as well as the rights to alter the drainage and build embankments. *Id.*

³⁶ See, e.g., DAVID AMOTT, ERIC GOLLANER & DAVID AKERS, A HISTORY OF DELAWARE ROADS AND A GUIDE TO RESEARCHING THEM 13 (2006), available at <http://dspace.udel.edu:8080/dspace/bitstream/19716/2673/1/History%20of%20Delaware%20roads%20and%20guide%20for%20research.pdf> (“Steam driven locomotives rapidly eclipsed road and water transportation for the efficient movement of passengers and goods across long distances.”).

³⁷ Act of Aug. 4, 1852, ch. 80, 10 Stat. 28 (including the right to take earth, stone, and timber alongside the corridor to aid in road construction).

³⁸ See, e.g., JAMES R. RASBAND, QUESTIONING THE RULE OF CAPTURE METAPHOR FOR NINETEEN CENTURY PUBLIC LAND LAW: A LOOK AT R.S. 2477, 35 ENVTL. L. 1005, 1016–17 (2005) (“The right-of-way alone proved insufficient to stimulate entrepreneurs to undertake the great task of extending railroads across the antion.”)

³⁹ This pass-through policy was necessitated by state constitutions that prevented states from building the railroad itself; thus, federal grants had to be passed from the states to the railroads. See GATES, *supra* note 11, at 359 (describing Illinois Constitution). Additionally, there was considerable opposition to the donation of public lands to private entities for internal improvement. See *id.* at 352 (describing the Jackson Administration’s reduction in federal aid for internal improvements).

money to aid in the construction of the road.⁴⁰ By 1858, federal land grants to the states to pass to the railroads totaled almost 28,000,000 acres for over 8,600 miles of road in Michigan, Wisconsin, Iowa, Missouri, Arkansas, Alabama, and Florida.⁴¹ Even still, the policies were somewhat haphazard, and the legality of and the commitment to these grants in aid were subject to political flux until the early 1860s.⁴²

When the disjointed railroad system throughout the South failed to meet the needs of both sides during the Civil War, and with the absence of southern lawmakers in Congress, the federal government finally stepped in to aid directly the construction of the transcontinental railroads, which could not have been funded through the traditional methods of private capital investment or statewide charters that had been used in building the eastern and southern railways.⁴³ The first transcontinental railroad, the

⁴⁰ These “grants in aid” involved transferring to the entity constructing the railroad fee simple title to alternate sections of land between 1 and 15 miles on each side, which would be removed from the public registry upon mapping by the entity, and then be sold to raise money for construction. See GATES, *supra* note 11, at 356; *Leo Sheep Co. v. United States*, 440 U.S. 668, 672–73 (1979). Legislators assumed that the value of the land retained by the government would at least double, thus eliminating any loss of revenue to the treasury but facilitating the development of public infrastructure that states and private entities could not undertake themselves. Thus, Congress reasoned that it could give away half of the land on either side of the proposed railroad, that the value of the land would increase simply because of the promise of imminent railroad construction, that the railroad could sell the land at the new value to fund construction, and that the federal government would retain half the land now worth more than twice its value, thus preserving the value of its federal land holdings. It was a win-win situation for everyone. See *Leo Sheep Co.*, 440 U.S. at 672–73; LLOYD J. MERCER, *RAILROADS AND LAND GRANT POLICY: A STUDY IN INTERVENTION* 3–4 (1982). The technique had been used successfully for construction of canals and highways in the 1830s and 1840s, and pressure inevitably arose to use the same technique for construction of railroads. See GATES, *supra* note 11, at 354–56.

⁴¹ GATES, *supra* note 11, at 361–62.

⁴² Although few questioned Congress’s power to authorize construction of these railroads directly, many criticized this plan for subsidizing private construction of national infrastructure, asserting the federal government lacked the power to turn federal lands over to private ownership for internal improvements. Presidential administrations responded to these critics differently, and Andrew Jackson’s administration drastically curtailed the liberal policies of John Quincy Adams’s administration. See GATES, *supra* note 11, at 352. When the federal government retreated, many developing states stepped up to the plate to make their own state land grants, pass state right-of-way acts, and grant the railroads broad eminent domain powers. See *id.* at 356–59. There were obvious questions about the appropriateness of eminent domain when private land was being turned over to private ownership, even for an arguably public use. See *id.* at 356–65 (describing early history of land grants for railroads); see also Robert W. Swenson, *Railroad Land Grants: A Chapter in Public Land Law*, 5 UTAH L. REV. 456, 457 (1956–1957) (describing opposition to federal subsidies for railroads based on “feeling that such grants for internal improvements were unconstitutional”).

⁴³ Parochial attitudes had made interconnection between railroads across state lines very difficult. Some states required railroads in their boundaries to use a different gauge to prevent interconnection, thus requiring that freight passing through the state would have to be unloaded and reloaded on its own local railroads. See ELY, *supra* note 11, at 43–44. Ironically, the first transcontinental land grant was made possible only by the cession of the southern congressmen who had advocated for a southern route to the Pacific Ocean. Thus, in the midst of the war, Congress finally mustered the support to create a more northerly line from Nebraska to the Nevada border, where it would meet up with the Central Pacific Railroad that was already chartered under California law. See *id.* at 51–53; see also STEPHEN AMBROSE, *NOTHING LIKE IT IN*

Union Pacific, would link Omaha, Nebraska, with San Francisco, California, traversing states and territories that had inadequate legal and economic resources to attract a private railroad.⁴⁴ This grant was followed in 1864 by the Northern Pacific grant to link Lake Superior with Puget Sound;⁴⁵ in 1866 by the Southern Pacific grant to link Springfield, Missouri, with southern California;⁴⁶ and in 1871 by the Texas Pacific grant to link El Paso, Texas, with San Diego, California.⁴⁷ These transcontinental grants all involved generous donations of land to be sold to aid in construction, along with 200- to 400-foot rights-of-way across federal lands, rights to place telegraph lines, and access to timber, gravel, water, and other resources a distance of ten, twenty, or even forty miles from the corridor.⁴⁸

Through the checkerboard grants-in-aid and pass-throughs from the states, Congress gave the railroads over 130 million acres of public lands on which to construct their roads or to sell to fund the construction, most of which was granted between 1862 and 1867.⁴⁹ The federal land that was promised to the railroads, however, could not be acquired and converted into cash until the road had been surveyed and built.⁵⁰ If portions of the road were not built, the adjacent sections of land were forfeited.⁵¹ To this day, a

THE WORLD: THE MEN WHO BUILT THE TRANSCONTINENTAL RAILROAD 1863–1869 63–82 (2000) (describing historical events leading to congressional authorization of the Central Pacific railroad).

⁴⁴ Act of July 1, 1862, ch. 120, 12 Stat. 489, 493–94, *amended by* Act of July 2, 1864, ch. 216, 13 Stat. 356. The statute authorized a capitalization of \$100 million from stock subscriptions, authorized loans of \$16,000 per mile in 30-year government bonds for construction, and granted the railroad a 400-foot right-of-way through the public lands. *Id.* at 490–92. It also granted 10 odd-numbered sections of land for each mile of road constructed, amounting to a checkerboard belt of land extending 5, 10, or 20 miles wide on both sides of the road. *Id.* at 492. This act created the Union Pacific Railroad, which would begin building eastward out of San Francisco, and the Central Pacific Railroad, which would build westward out of Omaha, meeting somewhere in the middle. *Id.* at 493.

⁴⁵ Act of July 2, 1864, ch. 217, 13 Stat. 365, *amended by* Act of May 31, 1870, 16 Stat. 378, 378–79 (1870).

⁴⁶ Act of July 27, 1866, ch. 278, 14 Stat. 292. The Southern Pacific grant was actually made to the Atlantic & Pacific Railroad, which went bankrupt in 1875, after which a variety of other railroads, including the Atcheson, Topeka, the St. Louis, and The Atlantic & Pacific Railroad Company Inc., picked up construction. *See* ROOT, *supra* note 11, at 45–50 (describing history of the southern grants).

⁴⁷ Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, 578.

⁴⁸ For instance, the Union Pacific grant included a 400-foot right of way. Act of July 2, 1862, ch. 120, § 2, 12 Stat. 489, 491.

⁴⁹ The federal government granted some land directly to the railroads, and granted some land to the states for sale to aid the construction. *See* GATES, *supra* note 11, at 384–85. Roughly 37,000,000 acres of land were given to states to aid the railroads, and 94,000,000 acres were given directly to the railroads. *See* FRANK WILNER, RAILROAD LAND GRANTS: PAID IN FULL, U.S. OFFICE OF INFORMATION AND PUBLIC AFFAIRS 8, 24–25 (1984).

⁵⁰ A complex system existed to give the railroads indemnity lands or lieu lands if land within their primary grant had been previously transferred to homesteaders or was a section set aside for schools, thus leading to railroad land holdings 40 and 80 miles away from the actual roadbed. ROOT, *supra* note 11, at 59–61.

⁵¹ Numerous statutes and cases in the last half of the 19th and early half of the 20th centuries attempted to resolve questions of forfeitures and indemnity lands. *See, e.g.*, Act of Mar. 3, 1887, ch. 376, 24 Stat. 556; Act of Sept. 29, 1890, ch. 1040, 26 Stat. 496 (codified at 43

significant portion of the checkerboard land is still retained by the railroads.⁵² For purposes of rail-trail conversions, however, the only lands that raise important legal issues are the 100-, 200-, or 400-foot “rights-of-way” across the public lands that were granted for the actual road construction, although shifting attitudes toward the railroads that were heavily influenced by the land grants were critical in later judicial decisions resolving disputes over the corridor land.⁵³

Even before the lavish land grants had begun, however, complaints against the granting of public lands to private entities spurred opposition to the checkerboard grants.⁵⁴ By the late 1860s labor strikes, the complaints of western settlers that railroad land was not being brought to market quickly enough, the Granger movement, and economic depressions led the charge against all railroad privileges, including the privilege of setting their own rates and mapping routes.⁵⁵ Following growing dissatisfaction with the liberal land grants in the early 1870s, Congress stopped all land grants-in-aid of railroad construction, did not directly charter a federal railroad after the 1871 Texas Pacific Railroad, and passed a law in 1875 granting to all railroads a 200-foot right-of-way across all public lands but no other assistance.⁵⁶ The next seventy-five years would be spent settling claims with the railroads over forfeitures and compliance with the terms of their grants.⁵⁷

The decade of the 1880s saw the greatest construction of railroad mileage, yet competition drove many of the decisions made by railroad companies and politicians. Ultimately, competition became so destructive as to spur the creation of the Interstate Commerce Commission (ICC) in 1887 to regulate railroad rates and services⁵⁸ and the Sherman Antitrust Act of

U.S.C. §§ 904–07). See also the forest lieu lands “last chance” statutes: Act of June 4, 1897, ch. 2, 30 Stat. 11; Act of Mar. 3, 1905, ch. 1495, 33 Stat. 1264; Act of Sept. 22, 1922, ch. 404, 42 Stat. 1017; Act of Apr. 28, 1930, ch. 219, § 6, 46 Stat. 256; Act of July 7, 1960, Pub. L. No. 86-596, 74 Stat. 334; Act of July 2, 1993, Pub. L. No. 103-48, 107 Stat. 234. See also the forfeiture acts on which the *Hash* case relies: Act of June 26, 1906, ch. 3550, 34 Stat. 482; Act of Feb. 25, 1909, ch. 191, 35 Stat. 647. For a discussion of the lieu land statutes, see *Strickland v. United States*, 199 F.3d 1310, 1311–13 (Fed. Cir. 1999). For efforts to get the railroads to release claims to public lands in exchange for the right to collect increased rates, see Transportation Act of 1940, ch. 722, 54 Stat. 898, 954 (1940).

⁵² U.S. Dep’t of Interior, Bureau of Land Management, The Checkerboard, http://www.blm.gov/wy/st/en/programs/special_areas/Continental_Divide/ckrbrd.html (last visited July 20, 2008).

⁵³ See discussion *infra* Part III.

⁵⁴ See GATES, *supra* note 11, at 380.

⁵⁵ See *id.* Some railroads would take freight along a circuitous route to avoid interconnection problems. ELY, *supra* note 11, at 13–16.

⁵⁶ General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (codified as amended at 43 U.S.C. §§ 934–939 (2000)).

⁵⁷ ELY, *supra* note 11, at 60. For instance, some railroads ignored provisions in their grants that they were to sell only 20-acre parcels to homesteaders, especially when the land was most appropriate for timbering and not agriculture. However, after decades of noncompliance, the government was hard-pressed to justify enforcement against one railroad and not another. *Id.*

⁵⁸ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887). The Act explicitly preempted all local regulation of rates and services and established the ICC to oversee the national rail transportation system. *Id.*

1890⁵⁹ to control price gouging, monopolies, and other anti-competitive behavior. The Granger movement of the late 1870s and 1880s also played a key role in reining in the great railroad giants by bringing tremendous political pressure to curtail the single largest form of corporate welfare to date.⁶⁰ Ironically, congressional lawmakers from the grain-belt states of Illinois, Indiana, Ohio, Pennsylvania, Missouri, and Wisconsin, who had benefited greatly from federal land grants to aid the railroads in the 1850s and early 1860s, were some of the most outspoken opponents of the transcontinental grants.⁶¹

Even with federal regulation of minimum rates after 1887, however, railroads continued to engage in destructive competition and used consolidations and bankruptcies to further business, rather than national transportation, needs. The Hepburn Act of 1906⁶² allowed the ICC to set maximum and minimum railroad rates.⁶³ Even so, the ICC could not effectively regulate the railroads. In the second decade of the 1900s, railroad consolidation hit a new high. World War I (WWI) and the nationalization of the railroads placed a tremendous burden on a national rail system that was overbuilt in some areas and underbuilt in others.⁶⁴ With competition from trucking,⁶⁵ the mass production of the WWI years made possible by large-scale electricity generation, and the move toward international economies, the ICC simply could not effectively regulate the many railroad consolidations, location, and abandonments. With the end of nationalization, a comprehensive Transportation Act⁶⁶ was passed in 1920 (1920 Act) to deal with the fact that railroads were abandoning overbuilt lines at an alarming rate and the questions about what to do with railroad lands upon abandonment had begun to crowd the courts.⁶⁷

In an important element of the 1920 Act, Congress assigned the ICC jurisdiction over abandonments of rail lines as well as over rates and services.⁶⁸ With the 1920 Act, Congress gave the ICC direct control over the

⁵⁹ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–4 2000)).

⁶⁰ See GATES, *supra* note 11, at 380.

⁶¹ *Id.*

⁶² Hepburn Act of 1906, ch. 3591, 34 Stat. 584 (1906).

⁶³ GABRIEL KOLKO, RAILROADS AND REGULATION: 1877–1916 131 (1965).

⁶⁴ ELY, *supra* note 11, at 241–42.

⁶⁵ See KOLKO, *supra* note 63, at 230 (“The automobile and trucking industries, and not shippers or radical state legislatures, were to nullify the benefits to the railroads of the Transportation Act. Nothing could save the railroads from the impact of the revolution in American transportation that was beginning to roll off the assembly lines of Detroit.”).

⁶⁶ Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920).

⁶⁷ See *id.* at 477–78 (requiring railroad companies to first obtain from the ICC “a certificate that the present or future public convenience and necessity permit of such abandonment”).

⁶⁸ *Id.* at 476–77. If a railroad satisfactorily shows that the present or future public convenience and necessity require or permit the abandonment or discontinuance of a rail line, it has one year during which to “consummate” that abandonment by notifying the agency (first the ICC, now the STB) that it has fully abandoned the line. ICC Termination Act of 1995, 49 U.S.C. § 10903(d) (2000); 49 C.F.R. § 1152.29(e)(2) (2007). If it fails to notify the STB within one year, the certificate of abandonment or discontinuance expires and the line remains on the STB’s active carrier list. 49 C.F.R. § 1152.29(e)(2) (2007).

decision of whether or not a railroad was required to operate or was allowed to abandon a line, and the authority to determine the responsibilities the railroad had if it were granted permission to abandon it.⁶⁹ The criteria for granting approval to abandon a line are whether the public convenience and necessity permitted discontinuation of services.⁷⁰ Since 1920, a finding that public convenience and necessity permit abandonment has required consideration of “serious adverse impact[s] on rural and community development.”⁷¹ Notably, however, the imposition of federal jurisdiction over railroad abandonments, for railroads that had often acquired property rights under state law prior to 1920, meant that state-law property rights would be held in limbo during the period of federal control, and that not until abandonment occurred and the federal jurisdiction was lifted would railroad property rights again be determined under state law.⁷²

Further competition from trucking and airlines, and a shift in government subsidies from the railroads to automakers and interstate highways, resulted in another burst of railroad abandonments in the 1970s and early 1980s.⁷³ And, despite legislation in 1974 and 1976 with such

⁶⁹ *City of Auburn v. United States*, 154 F.3d 1025, 1027-31 (9th Cir. 1998) (preempting state and local land use and environmental regulations); *Preseault v. United States*, 27 Fed. Cl. 69, 76 (Fed. Cl. 1992) (noting that the Transportation Act of 1920 established ICC’s approval over abandonment and operation of railroad lines). Although the state-based property rights of the railroads were not directly affected by the Interstate Commerce Act of 1887, the regulatory control over services resulted in federal preemption of nearly all railroad matters. Thus, if a railroad had been constructed before 1887 pursuant to a state charter and was operating its line pursuant to the rights in place at the time the corridor was acquired, after 1887 federal control over services resulted in the holding in abeyance of all state property rights during the period of federal control. If a line was ultimately abandoned, and federal jurisdiction removed, then state laws governing the disposition of land and other property would become effective. And although the federal government never attempted to directly regulate the property rights of the railroads *vis-à-vis* adjoining landowners or state and local governments, the regulation of services could severely reduce the property rights that various parties thought existed under state law. *See Preseault v. United States*, 27 Fed. Cl. at 73-75, 90 (providing extensive discussion of the interplay of ICC jurisdiction and state property rights).

⁷⁰ ICC Termination Act of 1995, 49 U.S.C. § 10903(d) (2000).

⁷¹ *Id.*

⁷² In *Preseault v. Interstate Commerce Commission*, the United States Supreme Court rejected the view that the imposition of federal jurisdiction that potentially alters state-law property rights constituted a taking. 494 U.S. 1, 4-5, 8-9 (1990). However, there is great disagreement as to the effect of federal abandonment jurisdiction on the property rights of railroads and adjacent landowners. With regard to federally-granted property rights, however, the imposition of federal jurisdiction over abandonment has less effect. *See, e.g., Preseault v. United States*, 27 Fed. Cl. at 71, 77, 79-80 (discussing the interplay of federal jurisdiction with state property laws, and demonstrating one dispute as to the effect of federal abandonment on property rights). Assuming the property laws are creatures of federal law, the interplay will be necessarily different, though no cases have addressed that issue. *See Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979) (stating that federally-created property rights are still protected by the takings clause).

⁷³ *See Preseault v. United States*, 27 Fed. Cl. at 78 (discussing congressional recognition that increased railroad abandonments during the 1970s constituted a “significant problem”); *see also* Ferster, *supra* note 15, at 4 (stating that between 1980 and 1990 anywhere from 4,000 to 8,000 miles were lost each year); ASS’N OF AM. R.R.S., RAILROAD FACTS 5 (1992) (showing a 27 percent decrease in the miles of track from 1981 to 1991).

optimistic names as the Railroad Revitalization and Regulatory Reform Act that created the Consolidated Rail Corporation (CONRAIL) and reorganized the rail system,⁷⁴ the pressure for increased ability to abandon uneconomic rail lines to boost rail profitability persisted.⁷⁵ Indeed, the Staggers Rail Act of 1980⁷⁶ lifted many restrictions on railroad abandonment to allow the beleaguered industry to shed unprofitable lines with relatively little concern for public transportation or utility needs.⁷⁷ But rails-to-trails, or the conversion of abandoned railroad corridors to recreational trails, filled a much-needed double role. It preserved rail corridors intact for possible future transportation needs, and it provided valuable greenspace for cities that had grown too quickly to adequately preserve open space.⁷⁸

One of the most difficult issues involved in rail-trail conversions pertains to the property rights granted to the railroad, and for FGROW the rights retained by the federal government.⁷⁹ Despite the common view that property rights and property law are relatively unchanging, there has been a tremendous amount of inconsistency in congressional and judicial attitudes toward the railroads and their property rights.⁸⁰ The U.S. government was an active partner in railroad development from the earliest days. Its most consistent policy was to grant rights-of-way over public lands for location of the roads, just as it did for canals and highways. Notably, federal grants after 1832, including transcontinental grants from 1862–1871, and both the 1852 and 1875 right-of-way acts, repeatedly use the term “right-of-way” to describe the interest being conveyed to the railroads for their corridors.⁸¹

⁷⁴ Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (repealed 1994); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (repealed 1976); *see also* Preseault v. United States, 27 Fed. Cl. at 76 (discussing a brief history of these acts and their purposes).

⁷⁵ U.S. Dep’t of Transp. Staff, *Questions on Likely Effects of Reform, in* RAILROAD REVITALIZATION AND REGULATORY REFORM 86–91 (Paul MacAvoy & John Snow eds., 1977).

⁷⁶ Pub. L. No. 96-448, 94 Stat. 1895 (1980) (current version at 49 U.S.C. § 10101 (2000)).

⁷⁷ *See* Preseault v. United States, 27 Fed. Cl. at 79 (discussing how the 1980 amendments made it easier to abandon rail lines, particularly section 402(b) of the Act, which directed the Commission to permit abandonment if it received no protest within 30 days after the filing of an application for abandonment).

⁷⁸ *See id.* at 80.

⁷⁹ The retained interest when a fee simple determinable is granted is a reversion, which is a contingent future interest in the right to possession. The retained interest underlying an easement is, technically, fee ownership, which is a vested possessory right. *See, e.g.,* Wright, *supra* note 2, at 78A-39 to -47, 78A-120 (explaining the differences between fee interests and easement interests in the context of railroad corridor rights). *See also* A.E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973, 1024–26 (1966) (reviewing courts’ construction of deeds as conferring easements and not fee simple grants). Of course, the railroad easement is exclusive, so the fee ownership is nonpossessory, which makes it look an awful lot like a reverter, but under standard terminology it is not a future interest that would be subject to destruction under statutory and common-law marketable title acts. Danaya C. Wright, *Eminent Domain, Exactions and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 461–62 (2001).

⁸⁰ Wright, *supra* note 2, at 78A-43 to -47, 78A-120.

⁸¹ *See, e.g.,* Act of Mar. 3, 1837, ch. 49, 5 Stat. 196; Act of Mar. 3, 1849, ch. 116, 9 Stat. 771; Act of Sept. 20, 1850, ch. 61, 9 Stat. 466; Act of June 10, 1852, ch. 45, 10 Stat. 8; Act of Aug. 4, 1852, ch. 80, 10 Stat. 28; Act of Feb. 9, 1853, ch. 59, 10 Stat. 155; Act of June 29, 1854, ch. 72, 10

Yet, changing Supreme Court interpretations of the interest that passed to the railroads created profound rifts in the legal logic and basis of the federal railroad land grant policies, and those rifts have provided the space for the *Hash* case and its progeny to erode important federal transportation policies.

III. THE SHIFTING SANDS OF FGROW PROPERTY RIGHTS

In 1880, the Supreme Court in *St. Joseph & Denver City Railroad Co. v. Baldwin*,⁸² interpreted the right-of-way granted pursuant to the federal 1866 Kansas grant to aid the Northern Kansas Railroad and Telegraph⁸³ as creating a fee simple absolute. In 1894, the Court followed the *Baldwin* holding when interpreting the right-of-way interests conveyed under an 1866 Union Pacific grant in *Missouri, Kansas & Texas Railway v. Roberts*,⁸⁴ and followed up with *New Mexico v. U.S. Trust Co.*⁸⁵ regarding the Atlantic & Pacific grant of 1866.⁸⁶ This practice of defining “right-of-way” as a fee

Stat. 302; Act of June 3, 1856, ch. 91, 11 Stat. 18; Act of June 3, 1856, ch. 92, 11 Stat. 20; Act of Mar. 3, 1857, ch. 99, 11 Stat. 195; Act of July 1, 1862, ch. 120, 12 Stat. 489; Act of Mar. 3, 1863, ch. 98, 12 Stat. 772; Act of May 5, 1864, ch. 80, 13 Stat. 66; Act of July 2, 1864, ch. 216, 13 Stat. 356; Act of July 2, 1864, ch. 217, 13 Stat. 365; Act of July 4, 1866, ch. 165, 14 Stat. 83; Act of July 4, 1866, ch. 168, 14 Stat. 87; Act of July 23, 1866, ch. 212, 14 Stat. 210; Act of July 25, 1866, ch. 241, 14 Stat. 236; Act of July 25, 1866, ch. 242, 14 Stat. 239; Act of July 26, 1866, ch. 270, 14 Stat. 289; Act of Mar. 2, 1867, ch. 189, 14 Stat. 548; Act of May 4, 1870, ch. 69, 16 Stat. 94; Act of Mar. 3, 1871, ch. 122, 16 Stat. 573; General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (1875) (codified as amended at 43 U.S.C. §§ 934–939 (2000)).

⁸² 103 U.S. 426 (1880). The Court overturned a Nebraska Supreme Court decision holding a homesteader whose patent did not include mention of the railroad right-of-way was not subject to the railroad taking the land. *See St. Joseph & Denver R.R. Co. v. Baldwin*, 7 Neb. 247 (Neb. 1878). The U.S. Supreme Court reversed on the grounds that once the right of way was granted to the railroad, even if the company had not laid out its line exactly, that land was removed and could not be granted to homesteaders. *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. at 430–31.

But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.

....

... Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.

Id. at 429–430.

⁸³ Act of July 23, 1866, ch. 212, 14 Stat. 210.

⁸⁴ 152 U.S. 114, 117 (1894) (concerning a grant under the Act of July 26, 1866, ch. 270, 14 Stat. 289, and interpreting it as “absolute in terms, covering both the fee and possession”).

⁸⁵ 172 U.S. 171 (1898).

⁸⁶ Act of July 27, 1866, ch. 278, 14 Stat. 292.

simple absolute continued in 1926 in *Missouri, Kansas & Texas Railway v. Oklahoma*.⁸⁷ The Tenth Circuit followed suit in 1981 and 2001 with regard to the Union Pacific Railroad in *Missouri, Kansas & Texas Railway v. Early*,⁸⁸ and *Union Pacific Railroad Co. v. City of Atoka*.⁸⁹ These cases all involved federal grants pursuant to the 1862 and 1866 transcontinental acts, and provided guidance for lower court interpretations of the federal right-of-way interests conveyed pursuant to earlier and later grants.⁹⁰

By the turn of the twentieth century, however, faced with increasing numbers of abandonments and forfeitures and incursions by settlers on railroad lands, the Supreme Court reconsidered the parameters of the property right in situations involving abandonment of the rail corridor after the road was constructed.⁹¹ The Court in 1903 held, in *Northern Pacific Railway Co. v. Townsend*,⁹² that the interest granted to the railroad under the 1864 Northern Pacific Act⁹³ conveyed only a qualified or defeasible fee. The discussion in *Townsend* was narrowly focused on whether Congress could have intended that if the railroad failed, the railroad could sell the land outright for any nonpublic purpose.⁹⁴ Relying on the public character of the grant, the Court held the right-of-way contained an implied condition of reverter.⁹⁵ The Court subsequently held that a right-of-way granted under the

⁸⁷ 271 U.S. 303, 304, 309 (1926).

⁸⁸ 641 F.2d 856, 858–60 (10th Cir. 1981) (“The Act of July 26, 1866, when viewed in the light of the times, clearly expresses the intent of Congress to grant to the railway a fee interest . . .”).

⁸⁹ 6 Fed. Appx, 725, 733 (10th Cir. 2001) (“[W]e hold the July 25[, 1866] Act conveyed to Union Pacific a fee absolute title in its right-of-way with no right of reversion . . .”).

⁹⁰ See, e.g., *Barnes v. S. Pac. Co.*, 16 F.2d 100 (9th Cir. 1926) (citing *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880)); *City of Reno v. S. Pac. Co.*, 268 F. 751, 756–57 (9th Cir. 1920) (citing and quoting *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880)).

⁹¹ Pursuant to the federal statutes granting the right-of-way, title would not vest in the railroad until the line was built, though it would be removed from the federal land registry upon filing a map of definite location. Forfeiture and abandonment functioned quite differently. Once the line was surveyed the land was removed from the stock of land available for homesteaders. If the line was then not actually built, the land would be returned to the lists of that available for homesteaders. But once the line was built, the land was vested in the railroad, and only upon abandonment would the railroad’s interests be defeated. Of course, the checkerboard lands would remain in railroad ownership even if the railroad abandoned because the company had completed the terms of the contract necessary to obtain that land. Only the corridor right-of-way would be affected by abandonment, and only if the FGROW grant was deemed not to be a fee simple absolute. See, e.g., *Union Pac. R.R. Co. v. City of Greeley*, 189 F. 1, 3–5 (8th Cir. 1911); *Nielson v. N. Pac. Ry. Co.*, 184 F. 601, 602–03 (9th Cir. 1911); *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271–72 (1903).

⁹² 190 U.S. 267 (1903). 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. See also *N. Pac. Ry. Co. v. Ely*, 197 U.S. 1 (1905); *Clairmont v. United States*, 225 U.S. 551 (1912); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913).

⁹³ Act of July 2, 1864, ch. 217, 13 Stat. 365.

⁹⁴ *Townsend*, 190 U.S. at 271 (“The substantial 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.”).

⁹⁵ *Id.*

1875 Act was also a “limited fee made on an implied condition of reverter,” in the context of a possible abandonment in *Rio Grande Western Railway Co. v. Stringham*.⁹⁶ This reasoning was followed in many lower court cases involving abandonments, in which the courts assumed that the limited fee language of *Townsend* and *Stringham* was consistent with the fee simple language of *Baldwin*.⁹⁷ Because they were still interpreted to be fee interests, *Baldwin* was not reversed.

In 1922, in direct response to the decisions in *Townsend* and *Stringham*, Congress enacted 43 U.S.C. § 912 (1922 Act),⁹⁸ which provided that railroad abandonments of FGROW, if decreed by a court of competent jurisdiction or act of Congress,⁹⁹ would result in the “right, title, interest, and estate of the United States in said lands” being vested in the owner of the legal subdivision from which the lands were taken.¹⁰⁰ Two exceptions were provided, however. First, if a public highway is legally established on that right-of-way within one year of the abandonment, the federal interest would transfer to the legal entity owning the highway.¹⁰¹ Second, all right-of-way

⁹⁶ 239 U.S. 44, 47 (1915).

⁹⁷ See, e.g., *Denver & R. G. R. Co. v. Mills*, 222 F. 481 (8th Cir. 1915); *Crandall v. Goss*, 167 P. 1025 (Idaho 1917).

⁹⁸ Act of Mar. 8, 1922, ch. 94, 42 Stat. 414 (current version at 43 U.S.C. § 912 (2000)). The statute currently reads as follows:

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes 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, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment 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, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, 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

43 U.S.C. § 912 (2000).

⁹⁹ Notably, ICC/STB determinations of abandonment do not constitute a determination by a “court of competent jurisdiction or Act of Congress” for purposes of triggering section 912. *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726, 732 (S.D. 1992), *rev’d on other grounds*, *Brown v. N. Hills Reg’l R.R. Auth.*, 732 N.W.2d 732 (S.D. 2007); *Kaubisch v. South Dakota*, 507 U.S. 914 (1993); *Brown v. N. Hills Reg’l R.R. Auth.*, 732 N.W.2d 732 (S.D. 2007); *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377–78 (10th Cir. 1996) (describing that ICC authorization is a component of such a determination).

¹⁰⁰ General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 912 (2000).

¹⁰¹ *Id.*; *King County v. Burlington N. R.R. Corp.*, 885 F. Supp. 1419, 1423, 1425 (W.D. Wash. 1994); *Vieux v. E. Bay Reg’l Park Dist.*, 906 F.2d 1330, 1341 (9th Cir. 1990). Consent is also provided from the U.S. government to any railroad or canal company to transfer its property rights in any federally granted right-of-way to the state highway department of any state, or its nominee. Transportation Equity Act for the 21st Century, 23 U.S.C. § 316 (2000); 43 U.S.C.

lands within the corporate limits of a municipality would vest in that municipality.¹⁰² If neither exception applied or if no abandonment is declared by a court or act of Congress, then the reverted fee would transfer to the adjacent landowners who would be the successor in interest to the patentees of the legal subdivision through which the right-of-way passed, one year after abandonment.¹⁰³ Legislative history behind section 912 indicates that Congress saw no difference between the different eras of railroad land grants.¹⁰⁴ Those deemed to be fee simple absolute in the railroad were not subject to section 912, but those deemed to have an implied limitation of reverter would return to federal control upon abandonment, to be disposed of according to section 912.¹⁰⁵

The policy of section 912 was clear: if the railroad corridor could be put to public highway or public municipal use, it should remain in the public domain; but if another public use was unlikely, then it should be returned to the owner of the land from whom it was taken after the railroad use ceased and a determination was made that no subsequent public use was needed.¹⁰⁶ That policy accurately reflected federal land policies throughout most of the twentieth century, but would prove inconsistent with the dawning awareness that publicly funded transportation corridors, once destroyed, would be virtually impossible to reassemble. Hence, in 1988, the National Trails System Act¹⁰⁷ was amended to provide for the retention of the government's reversionary interests in these FGROWs.¹⁰⁸ It now states that any railroad right-of-way, upon abandonment, would be retained by the federal government if not converted to a public highway within one year.¹⁰⁹

§ 913 (2000) (allowing for transfers to states, counties, or municipalities for conversion to a public highway).

¹⁰² 43 U.S.C. § 912 (2000); *City of Maroa v. Ill. Cent. R.R.*, 592 N.E.2d 660, 667 (Ill. App. Ct. 1992); *City of Buckley v. Burlington N. R.R. Corp.*, 723 P.2d 434, 437 (Wash. 1986).

¹⁰³ 43 U.S.C. § 912 (2000).

¹⁰⁴ See H.R. REP. NO. 67-217, at 1-2 (1921) (stating that "[u]pon abandonment or forfeiture . . . of any portions of such right of way, the land reverts to and becomes the property of the United States," despite the fact that, "[i]n some cases a right of way was granted by the Government and later forfeited, while in other cases change in the location of the railroad resulted in the abandonment of the old right of way").

¹⁰⁵ This included the transcontinental grants like that in *Townsend* as well as the 1875 Act grants in *Stringham*. In fact, legislative history of the 1922 Act shows that Congress was responding to the newly-articulated defeasible fee interests from *Townsend* and *Stringham*. See H.R. REP. NO. 67-217, at 2 (1921) (including a letter from E.C. Finney, Acting Secretary of the Interior, to N.J. Sinnot, Chairman of the Commission on the Public Lands, referencing the *Townsend* and *Stringham* cases).

¹⁰⁶ S. REP. NO. 67-388, at 2 (1922); H.R. REP. NO. 67-217, at 2 (1921).

¹⁰⁷ Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241-51 (2000)).

¹⁰⁸ National Trails System Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (codified at 16 U.S.C. § 1248(c) (2000)).

¹⁰⁹ National Trails System Improvements Act of 1988, 16 U.S.C. § 1248(c) (2000) ("Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.").

These retained rights may be used for the location of recreational trails pursuant to a grant by the Secretary of the Interior.¹¹⁰ This provision also was necessitated by the awareness that the railbanking policy, which allowed corridors to remain intact for future reactivation, was contradicted by federal land policies that allowed the destruction of the very corridors Congress was trying to save.¹¹¹

All of this made perfect sense when one considers the Supreme Court's interpretations of the property rights granted under these federal right-of-way statutes at the time section 912 was passed. If they were fee simple absolute, then the federal government retained no interests and the railroad could freely sell the corridor for highway, trail, or any other private use; whereas if they were held as limited fees or defeasible fees, then the future interest retained by the government would ripen upon abandonment to fee ownership that could be transferred for use as a public highway or could be transferred to the patentee.¹¹² After 1988, with the change in policy toward protecting railroad corridors and in support of the National Trails System Act, the reverted FGROW would be retained for purposes of public trail development, or shifted to use as a public highway, all in a manner consistent with the public character of these grants and with an eye toward retaining corridors intact for future transportation uses.¹¹³

The entire logic of section 912 was called into question, however, when the Supreme Court reversed its interpretation of these rights-of-way in a series of cases involving challenges to control over mineral rights.¹¹⁴ In 1942, *Stringham* was reversed in *Great Northern Railway Co. v. United States* (*Great Northern*),¹¹⁵ where the Court held that an 1875 grant to the Great

¹¹⁰ *Id.* § 1248(a).

¹¹¹ *Dave v. Rails to Trails Conservancy*, 863 F. Supp. 1285, 1288 (E.D. Wash. 1994) (quoting the ICC's Notice of Interim Trail Use); *Beres v. United States*, 64 Fed. Cl. 403, 427–28 (Fed. Cl. 2005) (denying the government a reversionary interest in certain land). See also the legislative history of the 1988 Amendments where the Committee on Energy and Natural Resources, noting that these rights-of-way “may have continuing multiple use values, (e.g. utility corridors), which should be fully examined before the right-of-way is conveyed out of federal ownership,” sought to restrict the ability of the Secretary to dispose of these rights-of-way only to times in which such disposal “will serve important public objectives.” S. REP. NO. 100-408, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2607, 2609–10.

¹¹² See *Kirk v. Schultz*, 119 P.2d 266, 269–70 (Idaho 1941); *Wash. Wildlife Pres., Inc. v. Minnesota*, 329 N.W.2d 543, 545–46, 548 (Minn. 1983). But see *Pollnow v. Wis. Dep't of Natural Res.*, 276 N.W.2d 738, 744–47 (Wis. 1979) (finding that trail use was not consistent with public highway use).

¹¹³ S. REP. NO. 100-408, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2607, 2608 (noting that “Congress has acted on other occasions to promote other public uses of abandoned railroad rights-of-way”).

¹¹⁴ Section 912 speaks of vesting, and since an easement is not vested when it terminates, the language of section 912 became arguably inexact, though courts continued to apply section 912 to 1875 Act easements as well as 1862–1871 defeasible fee interests. See, e.g., *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335 (9th Cir. 1990); *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985); *Mauler v. Bayfield County*, 309 F.3d 997, 1001 (7th Cir. 2002); *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028, 1031 (10th Cir. 1994).

¹¹⁵ 315 U.S. 262 (1942).

Northern Railroad conveyed an easement and not a limited fee.¹¹⁶ This case is the first indication that federal rights-of-way might not be deemed fee interests, but rather mere easements when claims to subsurface mineral rights were involved.¹¹⁷ This change in interpretation was made possible in large part by the gradual recognition of a new property right, the robust exclusive railroad easement (as distinct from the common law non-exclusive easement that would have been inadequate for a railroad's needs).¹¹⁸ The Court also changed its interpretation of the railroad grant on the basis of changed legislative attitudes toward the railroads between 1871 and 1875, as signaled by the end of the checkerboard grants.¹¹⁹

There are numerous problems with the *Great Northern* decision, not least of which is its failure to acknowledge the fact that all federal railroad grants of right-of-way across the public lands had used the same term—a “right-of-way”—and so it made little sense to identify some as fee simple absolute, some as fee simple determinable, and others as easements. To justify a finding that different property rights were intended despite use of the same property terminology, the Court had to rely on changing legislative attitudes that somehow could be characterized as evidencing intent to create three distinct property interests. But of course, there is no such legislative history,¹²⁰ and the fact that Congress discontinued the checkerboard grants does not mean it intended to give a different property right to the railroads in their corridor grants, especially since Congress did know how to limit corridor grants to easements, which it routinely did in legislation pertaining to railroad access across Indian lands.¹²¹

The Court also failed to address the implications of its new decision on section 912. If the retained federal interest was now a servient fee and not a possibility of reverter, then there would be no reversion of the present estate in the federal government to trigger the application of section 912 when a railroad abandoned its FGROW grant.¹²² So a number of possibilities were

¹¹⁶ *Id.* at 271, 279.

¹¹⁷ Although railroad grants over Indian lands had been held to be easements according to *Smith v. Townsend*, 148 U.S. 490, 498 (1893), the federal courts had not held traditional FGROW to be anything less than a fee, though Department of the Interior decisions had been leaning toward easement interpretations. *See, e.g.*, *Pensacola & Louisville R.R. Co.*, 19 Pub. Lands Dec. 386, 388 (1894); *John W. Wehn*, 32 Pub. Lands Dec. 33, 34 (1903). *But see* *A. Otis Birch & M. Estelle C. Birch*, 53 Interior Dec. 340, 345–46 (1931) (holding that the government did not part with its interest when patenting the subdivisions traversed by the railroad corridor).

¹¹⁸ *See Great Northern*, 315 U.S. at 275–79. With the new railroad easement, the courts could protect a railroad's present possessory use while denying it the right to excavate minerals or engage in other non-railroad uses—and the easement retained the important characteristic of causing possession to return to the person or entity that originally granted the easement. *See id.* at 272, 279.

¹¹⁹ *Id.*, 315 U.S. at 273–74.

¹²⁰ *Id.* at 272–277. The Court cited a plethora of legislative history on the growing discontentment with the checkerboard grants, but none of this history indicates an intention to grant a different property right in the right-of-way.

¹²¹ *See* discussion *infra* notes 234–37 and accompanying text.

¹²² Section 912 speaks of vesting:

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way . . . and use and occupancy of said lands for such

left unresolved in *Great Northern*. Either section 912 (which spoke of vesting the government's interest in various transferees after abandonment) applies only to an FGROW held as fee simple determinable and not those now discovered to be held as easements, in which case the applicability of section 912 would be greatly diminished. Or, section 912 would continue to apply to both servient fee and reversionary interests, regardless of whether the FGROW was a defeasible fee or an easement, and federal rights in FGROW would not vest in anyone else until after abandonment and the removal of the railroad's use, thus maintaining federal control and not rendering a Congressional act irrelevant. Or, section 912 would apply only to FGROW lands that had not been patented out to homesteaders after the railroad grant but before the railroad abandoned, thus limiting its applicability to only those adjacent lands still retained in federal ownership. This last argument, which makes section 912 virtually meaningless, is the one adopted by the court in *Hash*, and makes no sense on numerous levels.

In reversing *Townsend*, the *Great Northern* Court was following a trend occurring in the states, that of gradually curtailing railroad property rights at a time when the railroads were pushing the boundaries of their rights as they branched out into new practices in order to remain profitable.¹²³ Ultimately it was the rise of the internal combustion engine that dramatically increased the demand for gasoline, and the new technology to store and transfer large quantities of natural gas for urban consumption, which led railroads to expand into the oil and gas business.¹²⁴ But unlike coal, the energy source of the nineteenth century, oil and gas are migratory and can be exploited through a single well, which can draw out the minerals underlying vast areas of land. Thus, a railroad corridor 200 feet wide became an ideal location for dropping a string of oil wells across the oil producing states, which allowed railroad companies to extract oil from under the lands of neighboring private ranchers and land owners. Because the railroads had the capital to invest in high volume wells, and the ability to transport the oil cheaply to refineries, a railroad with very limited property holdings could extract oil and gas from under hundreds of miles of land owned by private individuals. This imbalance in the ability to compete in the oil and gas market led to many state regulations limiting railroad exploration, and ultimately drove the shift in terminology of the railroad's property rights from defeasible fee interests (that terminated upon abandonment but allowed for the present estate

purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment . . . then and thereupon all right, title, interest, and estate of the United States in said lands shall . . . be transferred to vested in any person, firm, or corporation . . . to whom or to which title of the United States may have been or may be granted

43 U.S.C. § 912 (2000). This language clearly contemplates that the government's interest, if any, does not transfer to or vest until after abandonment. But servient fee interests that underlie easements do not transfer and vest because they are already vested present estates.

¹²³ See Wright, *supra* note 2, at 78A-50.

¹²⁴ *Id.* at 78A-49.

owner to exploit the minerals) to a railroad easement (that also terminated upon abandonment, but was limited to a surface transportation use).¹²⁵

Ironically, while the driving force behind the shift from defeasible fee interests to easements was the growing importance of oil and gas production and the desire to limit railroads in that market, the issues of abandonment that had been so important in the 1920s were unaffected by the change in terminology. The ultimate railroad and utility use of the surface was also unaffected. Yet, in cases today involving the shift from railroad to interim trail use, courts often rely on the relatively narrow distinctions between railroad easements and defeasible fees, which arose in the mineral context, to create distinctions in property rights that frustrate the ability of railroads and local governments to shift transportation uses to comport with new needs and technologies.¹²⁶

The best way to think about the shift from fee to easement is to follow the Court's explanation in 1898 that this new railroad easement is substantially different from a common-law easement, so different that it looks like a fee simple, because it has the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."¹²⁷ In essence, the interest is a limited fee for railroad purposes (minerals are not a railroad purpose) that terminates upon discontinuation of railroad use. The unfortunate use of the term "easement," however, has proved to have far greater consequences than the Court foresaw in 1942. This difficulty in labeling the federal right-of-way continues today, with comments such as the following:

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of 'limited fee' was no doubt applied in *Townsend* because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the "limited fee" label disappeared.¹²⁸

¹²⁵ *Id.* at 78A-50.

¹²⁶ *See, e.g.,* *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119-20 (1957); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934, 936-37 (10th Cir. 1979); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 697-99 (8th Cir. 1980).

¹²⁷ *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898). The Supreme Court has noted that "[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." *W. Union Tel. Co. v. Penn. R.R. Co.*, 195 U.S. 540, 570 (1904). The Court also noted that a federally granted right-of-way is "more than an ordinary easement." *New Mexico v. U.S. Trust Co.*, 172 U.S. at 183. Most courts have not distinguished between limited fee interests and easements under these federal railroad grants because the exclusive rights of the railroads in both comport with corporeal property rights and remedies.

¹²⁸ *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) (internal citations omitted). Note, too, that the difference between a non-presently possessory fee interest (what is left after a railroad easement is taken out) and a reverter interest (what is left after a limited fee is taken out) is extremely hard to identify.

To justify its decision of cutting back the railroad's property rights from a fee to an easement, the Court in *Great Northern* relied extensively on what it perceived to be a shift in federal policy from the relatively generous 1862–1871 land grants (that included the checkerboard grants-in-aid) to the relatively stingy 1875 Act (that merely gave rights-of-way).¹²⁹ The Court assumed that the change in policy indicated a retrenchment of federal support consistent with a grant of an easement rather than a fee.¹³⁰ The *Great Northern* Court did not discuss the issue of whether the 1862–1871 grants should also be deemed easements, nor did it seem concerned by the fact that the right-of-way provisions of all the statutes are virtually identical and that there is no legislative history indicating that a different property right was intended for the corridor land. The Court also did not discuss the implications of its decision on the applicability of section 912. Some of these issues arose and were resolved by lower courts, but the Supreme Court has been remarkably unhelpful in settling these questions.¹³¹

In 1957, the Court faced in *United States v. Union Pacific Railroad (Union Pacific)*¹³² the issue left open in *Great Northern*—whether 1862–1871 grants were also to be redefined as easements or would remain limited fees.¹³³ Ultimately the Court declined to answer the question. It interpreted the right-of-way under the 1862 Union Pacific grant to exclude mineral rights, but it did not explicitly hold that the right-of-way conveyed only an easement, essentially punting on the issue left open in *Great Northern*.¹³⁴ In a very cogent dissent, Justice Felix Frankfurter, joined by Justices Burton and Harlan, argued that the Court should at least continue to recognize a distinction between pre-1871 grants as limited fees and post-1875 grants as easements, thus maintaining the viability of *Townsend*, even though *Stringham* would no longer be good law.¹³⁵ Surprisingly, the majority did not disagree and overrule *Townsend*, nor did they even acknowledge the overarching issue of whether pre-1871 grants should be easements. The majority opinion avoided the issue altogether of what the railroad's interests were, holding simply that whatever the railroad had, it did not include minerals.

The decision in *Great Northern*, which held that these rights-of-way were easements rather than limited fees, created a logical conundrum from which the courts are having a difficult time extricating themselves. If the Court premised the reinterpretation of the railroad's rights—from a defeasible fee with a reverter to an easement—as being the logical result of shifting political attitudes between 1871 (the last of the grants-in-aid) and 1875 (when only rights-of-way were granted), it is ironic that little attention

¹²⁹ *Great Northern*, 315 U.S. 262, 275 (1942).

¹³⁰ *Id.*

¹³¹ *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335 (9th Cir. 1990); *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 210–12 (D. Idaho 1985); *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028, 1031–32 (10th Cir. 1994).

¹³² 353 U.S. 112 (1957).

¹³³ *Id.* at 119.

¹³⁴ *Id.* at 120.

¹³⁵ *Id.* at 120–37 (Frankfurter, J., dissenting).

was given to the fact that the same term was used throughout all federal grants and that no change in policy regarding corridor access was evident, even if there was changing policy about the checkerboard grants.¹³⁶ Moreover, courts now have to grapple with whether the federally-retained interest in an easement is fundamentally different from the retained interest in a defeasible fee, even though the railroad's rights look quite similar. On top of that issue, courts have then been faced with deciding if section 912 applies differently to the two interests.¹³⁷ Additionally, after the *Hash* decision, courts have had to decide if the federal retained interest in 1875 Act easements passed to patentees, if 1862–1871 retained interests passed, or if no interest passes until abandonment and the application of section 912.

In any event, later courts have consistently held that rights-of-way granted pursuant to the 1875 Act¹³⁸ convey only an easement, although they have not identified what corresponding interest the government retained.¹³⁹ At the same time, courts following the 1957 *Union Pacific* decision have held that the land conveyed as right-of-way under the 1862 and 1866 Union Pacific grants conveyed fee simple absolute in some instances,¹⁴⁰ an easement in others,¹⁴¹ or “a limited fee or an easement” in others.¹⁴² With no further guidance from the Supreme Court, lower courts dealing with challenges by adjacent landowners claiming rights in FGROW by virtue of their patents have been rebuffed. Consequently, little clarity has been created in understanding how the differences between easements and defeasible fees function for abandonment under section 912, railbanking, and interim trail use.

IV. ABANDONMENT, RAILBANKING, AND JUST COMPENSATION

As noted above, abandonment is the legal event that triggers the termination of railroad property rights in FGROW held as easements or

¹³⁶ The fact that Congress used very different terminology in the railroad corridor grants over Indian lands indicates that Congress knew how to create easements. The fact that Congress used the term “right-of-way” for all the grants over public lands indicates that the same interest was intended, even if Congress wanted to retreat from its generous checkerboard grants. See *infra* note 235-38 and accompanying text.

¹³⁷ See discussion *infra* Part VIII.

¹³⁸ Ch. 152, 18 Stat. 482 (codified as amended at General Railroad Right of Way Act of 1875, 43 U.S.C. §§ 934–939 (2000)).

¹³⁹ *Hash v. United States*, 403 F.3d 1308, 1311–23 (Fed. Cir. 2005); *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 722 (10th Cir. 1980); *Wyoming v. Andrus*, 602 F.2d 1379, 1380–85 (10th Cir. 1979); *Chi. & Nw. Ry. Co. v. Cont'l Oil Co.*, 253 F.2d 468, 470–73 (10th Cir. 1958).

¹⁴⁰ *Miss., Kans., & Tex. Ry. Co. v. Early*, 641 F.2d 856, 856–60 (10th Cir. 1981); *Union Pac. R.R. Co. v. Atoka*, 6 Fed. Appx 725, 726 (10th Cir. 2001).

¹⁴¹ *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 696–97 (8th Cir. 1980); *Chickasha Cotton Oil Co. v. Town of Maysville*, 249 F.2d 542, 545–46 (10th Cir. 1957); *Hallaba v. Worldcom Network Servs., Inc.*, 196 F.R.D. 630, 638 (N.D. Okla. 2000) (stating that *Union Pacific* held that pre-1871 grants were easements); *Burke v. Gulf, Mobile & Ohio R.R. Co.*, 324 F. Supp. 1125, 1129 (S.D. Ala. 1971) (stating that dicta in *Union Pacific* indicates that pre-1866 grants were easements).

¹⁴² *Sand Springs Home v. Oklahoma*, 536 P.2d 1280, 1280, 1284 (Okla. 1975).

defeasible fees after 1920. Currently, the Surface Transportation Board (STB, the successor to the ICC)¹⁴³ has jurisdiction over the abandonment process. Thus, when a railroad believes that it needs to abandon a line, and there is no negative impact on the public, it will be permitted to discontinue services on that line. Abandonment authorization is granted, but abandonment itself, sufficient to remove federal STB jurisdiction over the line, does not occur until the railroad submits a letter stating that it has consummated its abandonment of the line.¹⁴⁴ If that letter is not submitted within one year of the issuance of the abandonment certificate, the certificate is nullified and the rail line remains on the active rail network.¹⁴⁵ If at any time before the final letter of consummation is submitted, a railroad negotiates to sell its corridor for interim trail use or decides that it would like to retain an interest in the corridor by banking it, it may request that the STB issue a railbanking order instead.¹⁴⁶

Railbanking is an innovative way to preserve rail corridors that in the past would have been broken up and destroyed upon abandonment. Instead of walking away from its corridor land, pursuant to the 1983 NTSA amendments,¹⁴⁷ a railroad may enter into a railbanking/interim trail use agreement with a trail sponsor to transfer the corridor for trail use while retaining a right to reenter and retake the corridor land if the railroad wishes to reactivate the corridor for future railroad use.¹⁴⁸ This ingenious device allows for the preservation of the rail corridor for future transportation needs, it preempts the destruction of the railroad's property rights under state law because federal STB jurisdiction remains over the corridor so long

¹⁴³ See ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 932-33 (1995) (codified at 49 U.S.C. § 701 (2000)) (replacing the Interstate Commerce Commission with the Surface Transportation Board (STB), which is under the purview of the Department of Transportation).

¹⁴⁴ Until 1984, railroads were required to notify the ICC that they had consummated their abandonment of lines by submission of a letter or statement confirming the abandonment. Because of the confusion that occurred when abandonment authorization was granted and the actions of the railroads regarding consummation were unclear, the STB issued a notice of proposed rulemaking to require a notice of consummation. Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, 61 Fed. Reg. 11,174, 11,177-78 (proposed Mar. 19, 1996). That rule was adopted and is currently in place at 49 C.F.R. § 1152.29(e)(2) (2007). See *Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996); *CONRAIL v. STB*, 93 F.3d 793, 801 (D.C. Cir. 1996).

¹⁴⁵ See, e.g., *Birt v. STB*, 90 F.3d at 586, 590; *Buffalo Twp. v. Jones*, 813 A.2d 659, 664 (Pa. 2002); *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1094-1095 (Md. 1999).

¹⁴⁶ See Prospective Use of Rights-of-Way for Interim Trail Use and Rail Banking, 49 C.F.R. § 1152.29 (2007); Exempt Abandonments and Discontinuances of Service and Trackage Rights, 49 C.F.R. § 1152.50 (2007); STB Rail Abandonments—Use of Rights-of-Ways as Trails (49 C.F.R. Parts 1105 & 1152), 2 I.C.C.2d 591, 609-13 (1986); STB Rail Abandonments—Use of Rights-of-Ways as Trails—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

¹⁴⁷ National Trails System Act Amendments of 1983, Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d) (2000)).

¹⁴⁸ See 49 C.F.R. § 1152.29(a)(3) (2007) (requiring that trail purchaser acknowledge railroad's rights to re-activate); see also Danaya C. Wright and Scott A. Bowman, *Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 581, 586-91, 627-28 (2008) (including a discussion of the nature of the property right retained by the railroads when they railbank their corridors).

as it is railbanked, and interim trail use can be made of the corridor which enhances quality of life for residents nearby.

The railbanking statute, 16 U.S.C. § 1247(d), provides that:

Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C.A. § 801 et seq.)], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, *such interim use shall not be treated, for purposes of any law or rule of law,¹⁴⁹ as an abandonment of the use of such rights-of-way for railroad purposes.* If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.¹⁵⁰

By explicitly halting the abandonment process, this statute allows railroads to prevent the removal of federal jurisdiction and thus the reinstitution of state property law rules that might lead to the extinguishment of their property rights in the corridor land.

Numerous adjacent landowners, however, upset that their expectations of receiving the corridor land upon railroad abandonment have been frustrated, have filed takings claims against the federal statute. In these claims, landowners allege that but for the railbanking process, they would have received property that is now indefinitely being used for public trail purposes.¹⁵¹ Although the NTSA amendments allowing for railbanking and interim trail use were upheld in 1990 by the Supreme Court in *Preseault v. ICC*,¹⁵² the Court remanded on the question of whether the landowners were entitled to compensation due to the postponement of their receiving possessory rights to rail corridor land.¹⁵³ Eventually it was determined that the Preseaults themselves were entitled to compensation because in the

¹⁴⁹ Presumably this applies to federal laws as well. See e.g., RLTD Ry. Corp. v. STB, 166 F.3d 808, 806–07 (6th Cir. 1999) (discussing the application of federal law to abandonment proceedings).

¹⁵⁰ National Trails System Act, 16 U.S.C. § 1247(d) (2000) (emphasis added).

¹⁵¹ See, e.g., *Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996), *damages determined at* 52 Fed. Cl. 667 (Fed. Cl. 2002); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 778 (Fed. Cl. 2000); *Moore v. United States*, 54 Fed. Cl. 747, 755 (Fed. Cl. 2002); *Lowers v. United States*, 663 N.W.2d 408, 411 (Iowa 2003); *Hash v. United States*, 403 F.3d 1308, 1310 (Fed. Cir. 2005); *Toews v. United States*, 376 F.3d 1371, 1372 (Fed. Cir. 2004).

¹⁵² 494 U.S. 1 (1990).

¹⁵³ *Id.* at 17.

State of Vermont their reverter or servient fee rights in the rail corridor were deemed robust enough to justify compensation when the trail preempted their ability to retake possession of the corridor.¹⁵⁴ But other states have determined that under their state law, railroad easements are robust enough, and adjacent landowner rights in rail corridors are weak enough, that compensation is not due when the corridor is railbanked.¹⁵⁵ Thus, each railbanked corridor that is challenged has to be litigated on its merits to determine if a taking has occurred.

The primary distinction between state laws that would require compensation and those that do not has to do with state-law definitions of the scope of the general railroad easement. Thus, in some states, like Missouri, Kansas, and Vermont, courts have determined that the scope of the railroad easement under state law is not sufficiently robust to permit a change in use from railroad to interim trails.¹⁵⁶ But in other states, like Maryland, Minnesota, and Ohio, courts have held that railroad easements are extensive transportation rights that will adjust to shifting public needs and technologies.¹⁵⁷

Until recently, however, corridors that consisted of FGROW, which are not subject to state-law definitions of property rights, were deemed to be less susceptible to a takings challenge precisely because the federal government was deemed to have retained either the servient fee or reversionary interest in all FGROW (at least all of those not held to have been in fee simple absolute) and the federal government could certainly authorize railbanking of the corridor and interim trail use without injury to its own property interests.¹⁵⁸ Concomitantly, the federal government was certainly within its rights to amend section 912 in 1988 to retain its interests in FGROW for railbanking purposes rather than allowing them to vest in adjacent landowners one year after abandonment. The public highway and municipality provisions of section 912 indicated that Congress intended the FGROWs to be used for public purposes, and the 1988 NTSA amendments¹⁵⁹ extended that public purpose to include interim rail-trail use.¹⁶⁰

¹⁵⁴ See *Preseault v. United States*, 100 F.3d at 1552.

¹⁵⁵ See, e.g., *Lowers v. United States*, 663 N.W.2d at 410; *Chevy Chase Land Co. v. United States*, 37 Fed. Cl. 545, 598–599 (Fed. Cl. 1997); *Wash. Wildlife Pres. Inc. v. Minnesota*, 329 N.W.2d 543, 548 (Minn. 1983) (holding that because the easement is robust enough, there was no abandonment upon conversion—thus, no takings liability would result).

¹⁵⁶ See *Glosemeyer v. United States*, 45 Fed. Cl. at 772; *Swisher v. United States*, 262 F. Supp. 2d 1203, 1207 (D. Kan. 2003); *Preseault v. United States*, 100 F.3d at 1529.

¹⁵⁷ See *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1077 (Md. App. 1999) (holding that a railroad right of way is an easement encompassing use as a recreational trail); *Wash. Wildlife Pres. Inc. v. Minnesota*, 329 N.W.2d at 547 (holding that use of railroad right of way is not limited “strictly to railroad purposes” and that use as a trail is compatible with original transportation purpose); *Rieger v. Pa. Cent. Corp.*, No. 85-CA-11, 1985 WL 7919, at *6 (Ohio Ct. App. May 21, 1985) (holding that use of right-of-way as a trail does not exceed scope of easement).

¹⁵⁸ *Hash v. United States*, No. CV 99-324-S-MHW, 2001 WL 35986188, at *3–4 (D. Idaho Nov. 27, 2001).

¹⁵⁹ National Trails System Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (1988) (codified as amended at 16 U.S.C. §§ 1241, 1244, 1248 (2000)).

¹⁶⁰ S. REP. NO. 100-408, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2607, 2607.

V. *HASH V. UNITED STATES*

The challenge against the FGROW in *Hash* arose out of a typical trail-wide class action suit, filed by a set of attorneys who have made a business of challenging the railbanking statute in numerous state and nation-wide class actions,¹⁶¹ alleging it works a taking in all cases, regardless of the railroads' property interests and the adjacent landowners' interests.¹⁶² In this case, a portion of the trail at issue in Idaho was established on land that was originally granted to the railroad by an 1875 federal grant.¹⁶³ The Pacific and Idaho Northern Railroad was constructed between 1899 and 1911, and discontinued in 1995 when it railbanked the 83-mile corridor and entered into a trail use agreement.¹⁶⁴ The trial court held that there was no taking of adjacent landowners' property when the corridor was railbanked for those landowners adjacent to FGROW because the federal government held the servient fee interest in the right-of-way.¹⁶⁵ Because the government retained its servient fee interests, the landowners had no property rights in the corridor land and thus had no standing to challenge the conversion to a trail.¹⁶⁶ Upon abandonment the FGROW would pass back to the federal government, and there was no taking if the government chose to retain it and allow trail use rather than dispose of its interest to adjacent landowners.

The *Hash* plaintiffs, however, alleged that, as successors to homestead patentees, they had received the servient fee interest as part of the patent underlying the FGROW when the original patent was issued in the late nineteenth century. They based their argument on the fact that the reservations and exceptions provisions in the original patent merely excepted out the railroad's interest in the right-of-way.¹⁶⁷ Because the

¹⁶¹ See Ackerson Kauffman Fex Attorneys, Rails-to-Trails, <http://www.ackersonlaw.com/railstotrails.html> (last visited July 20, 2008) (describing the firm's Rails-to-Trails practice area); Zelle Hoffman Voelbel Mason & Gette, Real Estate Litigation, <http://www.zelle.com/practices-30.html> (last visited July 20, 2008) (discussing their nation-wide class action work against railroads).

¹⁶² Many of these cases have been resolved on procedural grounds and others on scope of the easement grounds. See, e.g., *Caldwell v. United States*, 57 Fed. Cl. 193, 203–04 (Fed. Cl. 2003), *aff'd* 391 F.3d 1226 (Fed. Cir. 2004) (dismissing for lack of subject matter jurisdiction when statute of limitations had run on plaintiff's taking claim after railroad easement was converted to a trail); *Barclay v. United States*, 351 F. Supp. 2d 1169, 1180 (D. Kan. 2006), *aff'd*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied* 127 U.S. 1328 (2007) (claim barred by statute of limitations); *Renewal Body Works v. United States*, 64 Fed. Cl. 609, 613–14 (Fed. Cl. 2005). Others, however, have required that the courts look at every deed for each portion of the rail corridor in the state. See, e.g., *State ex rel. Firestone v. Parke Circuit Court*, 621 N.E.2d 1113 (Ind. 1993) (affirming consolidation of two class actions brought to quiet title, and eventually resulting in settlement); *Maas v. Penn Cent. Corp.*, No. 2006-T-0067, 2007 WL 1241336 (Ohio Ct. App. Apr. 27, 2007) (affirming lower court class certification while evaluating claims on a deed-by-deed basis); *Hash v. United States*, 2001 WL 35986188. Trail-wide class actions are tedious—the *Hash* case demonstrates the variety of different state-wide claims that plaintiffs must often address along with the FGROW issue.

¹⁶³ *Hash v. United States*, 403 F.3d 1308, 1312 (Fed. Cir. 2005).

¹⁶⁴ *Id.* at 1311.

¹⁶⁵ *Hash v. United States*, 2001 WL 35986188, at *9.

¹⁶⁶ *Id.*

¹⁶⁷ Brief for Plaintiffs-Appellants at 19–24, *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (No. 03-1395), 2003 WL 25291551.

government did not also except out its servient fee interest in the FGROW, they claimed, that interest passed via the patent.¹⁶⁸

The issue is deceptively simple. If the railroad acquired only an easement from the federal grant, then the servient fee interest was retained by the government. That interest was either conveyed by a subsequent patent to a homesteader, or excepted out of patents and retained by the government to be used or disposed of as the government saw fit. If the former, then the United States has no interest in the underlying fee of these FGROWs (though it might still have an interest in the right-of-way itself);¹⁶⁹ if the latter, then land patentees have no interest in the underlying fee and Congress can amend its laws to dispose of or retain that interest as national transportation needs dictate. If the former, then land patentees will be able to acquire possession of FGROW land when the railroad abandons it; if the latter, then the government can authorize its use for other public municipal, highway, or trails purposes upon abandonment.

The landowners' argument raises a number of red flags, however. First, if the patent had issued prior to 1903 and the *Townsend* decision, the railroad would have been deemed to have had fee simple absolute title to the FGROW and no interest in the right-of-way would have passed via the patent.¹⁷⁰ Similarly, if the patent issued between 1903 and 1942, when the government learned that the interests given to the railroads in FGROW were often defeasible fees, and that it had retained a reversionary interest, the government would most likely not have needed to explicitly retain that interest because reverter interests were generally nontransferable.¹⁷¹

Certainly, after 1942, when the government learned that it was actually granting easements, it should have reserved its servient fee interests when it issued patents—but of course by then most patents had been issued and federal policy toward homesteading had changed.¹⁷² Thus, because the Supreme Court changed its interpretation from a fee simple absolute, to a fee simple determinable, and then to an easement, the retained interests

¹⁶⁸ *Id.*

¹⁶⁹ See discussion *infra* Part IX.

¹⁷⁰ When the government issued its patents “excepting” out the railroad right-of-way, if the railroad’s grant was fee simple absolute, the exception clause would necessarily mean that no interests in the corridor could pass to the patentees because it had already been granted out of federal ownership via fee simple absolute grants to the railroads. See *Townsend*, 190 U.S. 267, 270 (1903) (holding that homesteaders did not receive any interest in the railroad right-of-way).

¹⁷¹ The government would have retained a possibility of reverter that would not have been transferable until the mid-twentieth century with the advent of marketable title acts. Prior to that, most states held that reversionary interests were nontransferable. While there was no federal law on federally-created reversionary interests, the common legal understanding of the nature of reversionary interests would be that it would not transfer with the transfer of adjoining land. See RESTATEMENT (FIRST) OF PROPERTY §§ 159–60 (1936) (collecting cases). Although the Restatement was moving toward the position of allowing the free alienation of reversionary interests, the cases cited almost uniformly prevented the alienation of the reversionary interests. As the Restatement indicates, reversionary interests were still non-alienable in 1936. *Id.*

¹⁷² See GATES, *supra* note 11, at 495–529 (discussing homesteading and providing a chart showing the complete cessation of land entries after 1943).

changed as well. And what neither the Supreme Court nor the *Hash* court acknowledged is that the differences in retained interests do matter when we consider whether or not exceptions and reservations in deeds cause the transfer of those interests.¹⁷³ Yet the *Hash* court completely ignored dramatic shifts in property rights interpretation in 1903 and 1942. By holding that the failure to reserve the retained interest constituted a grant to the patentees, the court elided the important differences between reversionary interests and servient fee interests.¹⁷⁴

Besides eliding the differences in retained interests, the *Hash* court also relied on the wrong statute. In 1906, Congress passed 43 U.S.C. § 940, which provided that any railroad that received FGROW and failed to construct its road within five years would find its interests forfeited back to the United States.¹⁷⁵ This is a statute dealing with forfeitures for breach of contract, not for abandonment. The abandonment statute, 43 U.S.C. § 912, clearly posits that once the FGROW has vested in the railroad, its interests can be defeated only upon a finding of abandonment by an act of Congress or court of competent jurisdiction. The *Hash* court calls section 912 merely a quiet title statute, requiring that the government dispose of its interests, if any, to adjacent landowners, but in doing so it misses the significance of the public highway and municipality provisions. If the servient fee had already transferred to patentees, then section 912 cannot cause the transfer of the government's interests in FGROW to municipalities or highway departments without being a taking as well. Either the patentees received the government's interest in all cases involving subsequent patents and the highway and municipality provisions are ineffective, or the latter are effective because the government's interests did not transfer to the

¹⁷³ Generally, a deed that "excepts" portions is interpreted to exclude entirely all rights of the grantor in the land so excepted so that the grantee takes nothing in that portion. A deed that "reserves" a portion is usually interpreted to carve out a smaller interest than an estate, reserving it for the grantor, while conveying the remainder of the interest associated with the reserved portion to the grantee. *See, e.g., Hinojos v. Lohmann*, 182 P.3d 692, 699 (Colo. App. 2008) (discussing distinctions between "exceptions" and "reservations" in the context of an action brought to quiet title to a railroad right-of-way). *See also* Celeste M. Hammond, *Transfer by Deed*, in 14 POWELL ON REAL PROPERTY, *supra* note 2, at 81A-104 to 05 (explaining the difference between exceptions and reservations).

¹⁷⁴ *See, e.g., Michael Allan Wolf, Easements and Licenses*, in 4 POWELL ON REAL PROPERTY, *supra* note 2, at 34-11 ("[P]ossession and easement-use cannot exist in the same person either simultaneously or as to the same undivided share"). A fee simple determinable granted to the railroad would result in a possibility of reverter remaining in the government, while an easement granted to the railroad would result in the servient fee interest remaining in the government. The former is a future interest that carries with it the possibility of future possession. The latter is the vested present estate that will become possessory when the exclusive railroad easement terminates. *See id.*; Wright, *supra* note 2, at 78A-41 to -42.

¹⁷⁵ The statute provided that upon forfeiture the U.S. would regain

full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds

Act of June 26, 1906, ch. 3550, 34 Stat. 482 (codified as amended at 43 U.S.C. § 940 (2000)).

patentees, and it is only a year after abandonment that adjacent landowners receive the government's servient fee interest.

This interpretation also goes against a stunning array of precedents holding that patentees did not receive the federal interest in FGROW, all without reference to a single case litigating this precise point.¹⁷⁶ It also went against precedents holding that ambiguities in federal grants should be resolved in favor of the government.¹⁷⁷ Yet the court in *Hash* made no mention of any of these precedents.

Perhaps more troubling, however, is the fact that the *Hash* court did not address two critical issues to the case: abandonment and takings liability. The last paragraph of the section dealing with FGROW, which has acquired a life of its own, states:

We conclude that the land of Category 1 is owned in fee by the landowners, subject to the railway easement. The district court's contrary decision is reversed. On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases. On remand the district court shall determine just compensation on the conditions that apply to these landowners.¹⁷⁸

The first problem is that, regardless of whether the federal interest had transferred to patentees, the court held that the railroad had indeed abandoned its FGROW in the absence of a showing that the railroad had obtained either an act of Congress or a decision of a court of competent jurisdiction as required by section 912.¹⁷⁹ Second, the court failed to address whether the scope of a FGROW was sufficiently robust to allow a shift from railroad to trail use without working an abandonment.¹⁸⁰

Ironically, both sides in *Hash* understood that the issue they appealed was merely the question of who owned the servient fee interest in FGROW. That was all they briefed and argued before the court, yet the court held that the railroad had abandoned its FGROW and ordered compensation for the adjacent landowners.¹⁸¹ Ordering compensation effectively found that the scope of the FGROW was not sufficiently large to encompass trail use, even

¹⁷⁶ See discussion *infra* Part VI.

¹⁷⁷ See, e.g., *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *McDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941).

¹⁷⁸ *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005).

¹⁷⁹ While the railroad had obtained STB jurisdiction to abandon, it had railbanked its corridor which rebuts a finding of abandonment. See discussion *infra* Part VIII.

¹⁸⁰ Both of these issues were briefed in the government's motion for rehearing, but the district court, on remand, gave weight to the denial of the motion for rehearing as expressing somehow the Federal Circuit's belief in the appropriateness of its conclusion. See *Petition of the United States for Panel Rehearing, Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (No. 03-1395), 2005 WL 4814437; *Hash v. United States*, No. CV-99-324-S-MHW, 2007 WL 1309548 at *5 (D. Idaho Feb. 1, 2007).

¹⁸¹ *Hash v. United States*, 403 F.3d at 1318. See also *Hash v. United States*, 2007 WL 1309548 at *4 ("[T]he Federal Circuit itself, rightly or wrongly, made the liability determination applying *Preseault*.").

though the congressional language of the federal grants clearly indicates that they are given for multiple transportation and telecommunications purposes.¹⁸²

There are four principle issues that require further discussion. The first is the homestead precedents ignored by the court. The second is the court's dismissal of section 912 and its reliance on section 940, the forfeiture statute rather than the abandonment statute in interpreting the government's retained interest. The third is the finding that abandonment had occurred without meeting the criteria of section 912 (act of Congress or determination of a court). Section 912 has been held to apply to both defeasible fee and easement FGROW when considering the question of abandonment, and the court's failure to require fact finding on abandonment was grossly improper. Fourth, the court ordered compensation, without argument or briefing, which completely reversed prior decisions holding that compensation is due only upon a determination that the scope of the easement is inadequate for trail use.

VI. HOMESTEAD PRECEDENTS HOLDING THAT PATENTEES HAVE NO RIGHTS IN FGROW ABSENT EXPLICIT LANGUAGE IN THEIR PATENTS

The decision in *Hash* goes against extensive prior case law finding that homesteaders obtained no interest in FGROW granted prior to their patents when the grant was made subject to the FGROW.¹⁸³ The Supreme Court in *Northern Pacific Railroad v. Townsend* stated:

[F]iling of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, [such that] the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way [just] because of the fact that the grant to them was of the full legal subdivisions.¹⁸⁴

Townsend involved an adjacent landowner who first claimed an interest in the FGROW by virtue of his patent, which was promptly rejected, then by

¹⁸² See discussion *infra* Part XI (examining facial takings issues raised by this decision).

¹⁸³ Although the relevant statutory language requires that Congress issue patents "subject to" railroad rights-of-way, it appears that many, if not most, patents were issued without any mention of the right-of-way at all. See, e.g., *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934, 935 (10th Cir. 1979); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1001 (S.D. Ind. 2005); *Klump v. MCI Telecomm. Corp.*, No. 4:01-CV-00421-ACM, 2003 WL 24296629, at *3 (D. Ariz. Mar. 25, 2003); *Rice v. United States*, 348 F. Supp. 254, 255 (D.N.D. 1972) *aff'd*, 479 F.2d 58 (8th Cir. 1973); *Taggart v. Great N. Ry. Co.*, 208 F. 455 (E.D. Wash. 1912). Despite the lack of reservations, these courts generally held that the homesteader did not receive any interest underlying the railroad right-of-way. And when the patent is made subject to the railroad right-of-way, as in *Marshall v. Chicago and Northwest Transportation Co.*, 31 F.3d 1028 (10th Cir. 1994), the homesteader was held to have received no interest in the corridor land.

¹⁸⁴ *Townsend*, 190 U.S. 267, 270 (1903).

virtue of adverse possession under state law, which was also rejected.¹⁸⁵ The Court then went on to hold that the FGROW grant was a limited fee with an implied condition of reverter and not a fee simple absolute in order to more strongly insist that the patentee could acquire no rights in the land.¹⁸⁶ For if the railroad had fee simple absolute, it could transfer the land or a trespasser could acquire it by prescription. But the limited fee with the implied reverter was seen to more accurately represent Congress's intention that the land was to be used for railroad purposes only, and that private individuals should not interfere with railroad obligations and public transportation policies.

It is ironic that the first shift in Supreme Court interpretations of FGROW interests involved a challenge by a homesteader. By weakening the railroad's grant to a limited fee, the Court strengthened the railroad purpose of the grant—that it must be free from interference by private parties. And by creating a reverter in the government, the Court protected the corridor more completely than an absolute fee would because adverse possession against the sovereign is not permissible.¹⁸⁷ The language in *Townsend* clearly indicates that the Court was attempting to better protect not just the railroad, but Congress's intentions behind these grants, by locating the property rights squarely in the hands of the railroads and the federal government. And though some have argued that *Townsend* has been limited or partially overruled by *Union Pacific*, the homesteader provisions have not been altered or even questioned until this case.¹⁸⁸

The *Townsend* opinion has been followed by numerous other courts. The District Court for the Northern District of North Dakota in *Rice v. United States*,¹⁸⁹ involving a challenge by a homesteader to the 1864 Northern Pacific grant FGROW, stated that “the Homesteader cannot reasonably have claimed that in taking a homestead subject to a railroad right of way, he acquired an interest under the right of way.”¹⁹⁰ The district court in *Rice* also stated that it did not matter whether the railroad got a defeasible fee or an easement; the homesteader received no interest in the FGROW because the government did not have the authority to convey its underlying interest:

There is no controversy over the fact that the railway got either a limited fee or an easement. In any event, it got something less than fee simple by the filing and approval of a right of way plat, and construction of the railway. At the time of the issuance of the patents, the United States did have an interest in the right of way. But, if the agency issuing the patent had neither the actual nor the apparent authority to convey the interest of the United States under

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 271-272.

¹⁸⁷ See Wolf, *Adverse Possession*, in 16 POWELL ON REAL PROPERTY, *supra* note 2, at 91-81 to -82.1 (citing cases discussing the Latin phrase *nullum tempus occurrit regi* [time does not run against the king]).

¹⁸⁸ Not surprisingly, the Federal Circuit in *Hash* did not address this important Supreme Court decision.

¹⁸⁹ 348 F. Supp. 254 (D.N.D. 1972).

¹⁹⁰ *Id.* at 257.

the right of way, then, of course, the deed, although it purported so to do, did not convey that interest.¹⁹¹

The *Rice* court further explained the general rule in existence at the time of these homestead grants, that “a tract lawfully appropriated to *any* purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it”¹⁹² The Eighth Circuit upheld the decision in *Rice* in its entirety.¹⁹³

The *Rice* court cites *Hastings & D.R. Co. v. Whitney*¹⁹⁴ and *Wilcox v. Jackson*¹⁹⁵ for the rule that once a tract is appropriated for a homesteader, it cannot be appropriated for the railroad later as part of its grants-in-aid.¹⁹⁶ Conversely, as applied in *Rice*, once a tract is appropriated for a railroad right-of-way, it cannot be appropriated for a homestead, and it would be unreasonable for a homesteader to believe otherwise.¹⁹⁷ Not only does the *Rice* court not distinguish between pre-1871 and 1875 Act railroad grants for application of this rule, it held that the government’s interest in railroad right-of-way lands, already appropriated to the railroad, do not pass to homesteaders, even if those interests are not excepted out in the patent.¹⁹⁸ This precedent was directly on point and ignored by the *Hash* court.

The Supreme Court of Colorado followed the *Townsend* rule that once the railroad filed its map of definite location and built its road, that land was removed from the category of public lands subject to sale to homesteaders, in *Kunzman v. Union Pacific Railroad Co.*¹⁹⁹ And as recently as 2002, the Seventh Circuit found that landowners adjacent to land granted in aid of construction did not receive any rights in the corridor from patents in *Mauler v. Bayfield County*,²⁰⁰ citing *Townsend* for that conclusion.²⁰¹ Other courts have agreed.²⁰²

Although the issue of patents to 1875 Act lands has not been painstakingly distinguished from patents to 1862–1871 FGROW grants, courts have held that homesteaders did not receive the federal government’s retained interests in the 1875 Act lands. In *Marshall v. Chicago & Northwestern Transportation Co.*,²⁰³ a Tenth Circuit panel concluded that

¹⁹¹ *Id.* at 256–57 (citations omitted).

¹⁹² *Id.* at 257 (citing *Hastings & D.R. Co. v. Whitney*, 132 U.S. 357 (1889); *Wilcox v. Jackson*, 38 U.S. 425 (1839)) (emphasis added).

¹⁹³ *Rice v. United States*, 479 F.2d 58, 59 (8th Cir. 1973).

¹⁹⁴ 132 U.S. 357 (1889).

¹⁹⁵ 38 U.S. 425 (1839).

¹⁹⁶ *Rice v. United States*, 348 F. Supp. at 257.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Kunzman v. Union Pac. R.R. Co.*, 456 P.2d 743, 745–46 (Colo. 1969).

²⁰⁰ *Mauler v. Bayfield County*, 309 F.3d 997 (7th Cir. 2002).

²⁰¹ *Id.* at 1001.

²⁰² *See, e.g.,* *Marlow v. Malone*, 734 N.E.2d 195, 202–03 (Ill. App. Ct. 2000) (concluding that a landowner claiming title to a right-of-way must produce title to the underlying lands, either through a U.S. patent, a purported conveyance leading from title granted from the United States, or any other manner in which state law allows).

²⁰³ 31 F.3d 1028 (10th Cir. 1994).

the conveyance of the “whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures” did not transfer 1875 Act interests.²⁰⁴ The Supreme Court of Nebraska agreed that the United States’s interest in an 1875 Act right-of-way did not pass to homesteaders in *Whipps Land & Cattle Co., Inc. v. Level 3 Communications, LLC (Whipps)*.²⁰⁵ While noting that courts “are divided on that question,” it stated that “the prevailing view is that the underlying interest in active rights-of-way is held by the United States and not by the adjacent landowner.”²⁰⁶ The Nebraska court noted that only the District Court of South Dakota has taken the contrary view in *City of Aberdeen v. Chicago & Northwest Transportation Co. (Aberdeen)*,²⁰⁷ contradicting the Seventh, Ninth, and Tenth Circuits, as well as the South Dakota and Nebraska state supreme courts.²⁰⁸ Moreover, *Aberdeen* is of questionable precedential value because the South Dakota Supreme Court subsequently ruled that homesteaders have no interest in FGROW grants, as did the Eighth and Tenth Circuits, all being higher courts to which the district court should defer.²⁰⁹

The only other precedent that homesteaders might have received the government’s retained interest is dicta in *Wyoming v. Udall*,²¹⁰ but that position was rejected by the same court twelve years later in *Wyoming v. Andrus*.²¹¹ Moreover, *Udall* was specifically concerned with whether the minerals in pre-1871 corridors passed to homesteaders and did not address 1875 Act lands.²¹² Despite dicta that the rule might be different for 1875 Act lands, the *Udall* court affirmed the position that

the location of a railroad right-of-way across a tract of public land of the United States does not separate the servient estate from the public domain with the

²⁰⁴ *Id.* at 1032 (quoting section 912 of the 1875 Act).

²⁰⁵ 658 N.W.2d 258, 265 (Neb. 2003).

²⁰⁶ *Id.*

²⁰⁷ 602 F. Supp. 589, 593 (D.S.D. 1984) (holding that the United States did not retain a reversionary interest when it patented land underlying an easement to an individual).

²⁰⁸ *Whipps Land & Cattle Co., Inc. v. Level 3 Commc’ns, LLC*, 658 N.W.2d at 265.

²⁰⁹ South Dakota used to be in the Tenth Circuit but is now in the Eighth Circuit. However, since both have rejected the position taken by the district court, *Aberdeen* is of little precedential value. See *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726, 731 (S.D. 1992); *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d at 1032; *Rice v. United States*, 479 F.2d 58, 59 (8th Cir. 1973). Based on the decision in *Hash*, the South Dakota Supreme Court has reversed *Barney* in *Brown v. N. Hills Reg’l R.R. Auth.*, 732 N.W.2d 732, 739 (S.D. 2007), but for obvious reasons that does not affect this criticism of *Hash*, indeed it further strengthens it. See discussion *infra* at Part X.

²¹⁰ 379 F.2d 635 (10th Cir. 1967).

²¹¹ 602 F.2d 1379, 1384 (10th Cir. 1979).

²¹² See *Udall*, 379 F.2d at 638 (narrowing the question before the court to consideration of railroad right-of-ways granted by Congress before 1871). Similarly, the Tenth Circuit decision in *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*, 606 F.2d 934 (10th Cir. 1979), which held the patentee did receive the government’s servient estate in an 1862 FGROW, did so on the grounds that the patent did not exclude or reserve the railroad’s right-of-way. This error was the basis on which the servient fee was deemed to pass, and should not be extended to include patents which do exclude or reserve the railroad’s interest.

result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract.²¹³

Just as the land does not pass to homesteaders, neither do the mineral rights. The *Udall* court affirmed the general rule that homesteaders acquired no federal retained interests unless explicitly stated in the patent.

The refusal of most courts to treat pre-1871 retained interests differently from 1875 Act retained interests makes sense because the interests granted to the railroads are substantially the same. The *Udall* court explained that the difference in labeling between limited fee and easement has little substantive meaning.²¹⁴ The virtual equivalency of the limited fee without minerals (as defined in *Union Pacific* for pre-1871 grants) and the exclusive railroad easement in perpetuity without minerals (as defined in *Great Northern* for 1875 Act grants) suggested to this court that at least whatever interest the federal government retained, it did not pass to homesteaders without express mention in the patent.²¹⁵

Some courts have placed great reliance on whether or not the homestead patent excepts out the right-of-way. For instance, in *Energy Transportation Systems Inc. v. Union Pacific Railroad Co.*,²¹⁶ the Tenth Circuit ruled that homesteaders received the federal servient estate in a patent that made no mention of the FGROW at all.²¹⁷ In *Marshall*, however, the same circuit excluded the servient fee interest in a homestead patent that did make the grant subject to the right-of-way.²¹⁸ This distinction emphasizes the presence or absence of the “subject to” language at the expense of the *Townsend* rule that once the railroad has filed its map of definite location, that land becomes encumbered in such a way that the government is without the authority to make subsequent conveyances of the land.²¹⁹ Certainly if fee simple absolute has already been conveyed, the government has nothing left to convey to a homesteader and any patents

²¹³ *Udall*, 379 F.2d at 639–40.

²¹⁴ The court stated:

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of “limited fee” was no doubt applied in *Townsend* because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the “limited fee” label disappeared.

Id. at 640.

²¹⁵ *Id.*

²¹⁶ 606 F.2d 934 (10th Cir. 1979).

²¹⁷ *Id.* at 935–37.

²¹⁸ *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028, 1029, 1032 (10th Cir. 1994).

²¹⁹ See *Rice v. United States*, 348 F. Supp. 254, 256 (D.N.D. 1972) (discussing the lower court decision in *Zarak v. Cardinal Petroleum Co.*, 4 IBLA 83, 89 (1971)). The disagreement between the *Rice* court and the special concurrence in *Zarak* relied on the distinction between mere deed language, and notions of agency and authority. *Id.* at 256–57. The *Rice* court held that the government land agents were without authority to transfer the government’s retained interest in FGROW, despite absence or presence of particular deed language. *Id.* at 257.

attempting to do otherwise are simply void.²²⁰ *Townsend* indicates that the same is true with the defeasible fee interest; the reverter interest retained by the government is vital to the purpose of the railroad grant and its conveyance to homesteaders would defeat that purpose. Hence, the government is without authority to convey it away without defeating the original railroad grant.

As a general rule, however, courts do distinguish between exceptions and reservations in deeds, so when the patents “except” out the right-of-way, the most common understanding of the effect of that language is that the government’s reverter interest does not pass.²²¹ This language, in conjunction with the rule articulated in *Caldwell v. United States*,²²² that nothing passes but what is explicitly listed, is consistent in denying that the government’s reverter or servient fee interest passed, unmentioned, to homesteaders.

It is remarkable that the *Hash* court made no mention of any of these homestead cases involving precisely the same claims the landowners made. On the one hand, the U.S. Supreme Court has stated that homesteaders acquire no interest in FGROW by virtue of their patent, and other courts have held that the government was without the power to transfer the interest underlying the FGROW, even if it purported to do so. The reasoning of *Townsend*, however, is most persuasive. To the extent Congress made these railroad grants to further important public transportation purposes, it would be contrary to the purpose of the grants to hold that the government’s servient fee interest transferred to patentees. By effectively destroying the federal interest, the *Hash* court has hamstrung the government in its ability to enforce the terms of the grants and promote the policies of the grants.²²³

VII. CONGRESS’S SHIFTING RESPONSES TO RAILROAD FORFEITURES AND ABANDONMENTS

Another criticism of the *Hash* decision is its reliance on a 1906 forfeiture statute²²⁴ and not the 1922 abandonment statute,²²⁵ even though the issue in the case was abandonment and not forfeiture. And although the language of the two statutes may have fostered such reliance, an

²²⁰ *Id.* (citing *Hastings & D.R. Co. v. Whitney*, 132 U.S. 357 (1889) for the rule that “a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or operate upon it, although no exception be made of it”).

²²¹ *See, e.g.*, *Peck v. McClelland*, 225 N.W. 514, 515 (Mich. 1929); *In re Estate of Harding*, 878 A.2d 201, 204 (Vt. 2005); *Green v. Alvesteffer*, No. 259947, 2006 WL 2380774, at *2, *4 (Mich. App. Aug. 17, 2006). Courts have also recognized that exception and reservation clauses put grantees on notice to investigate the title that may be excluded from their grant. *See Corning v. Lehigh Vall. R.R. Co.*, 14 A.D.2d 156, 164 (N.Y. App. D. 1961). *But see Pollnow v. State Dep’t of Natural Res.*, 276 N.W.2d 738, 747 (Wis. 1979).

²²² 250 U.S. 14,20 (1919)

²²³ *See* discussion *infra* Part IX (analyzing the scope of the FGROW held as easements).

²²⁴ 43 U.S.C. § 940 (2000).

²²⁵ *Id.* § 912.

understanding of the history of railroad grants and railroad legislation shows the grave error the court made. The 1875 Act provided that upon filing a map of definite location, that land would be noted on the land registers so that subsequent land grants would be made subject to the railroad right-of-way.²²⁶ More important, however, the statute noted that “if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.”²²⁷

This forfeiture provision of the 1875 Act, however, was not self-executing, and required a congressional or judicial finding of forfeiture before a railroad would lose its grant.²²⁸ Consequently, in 1906 and again in 1909 Congress passed forfeiture statutes to essentially execute section 4 of the 1875 Act.²²⁹ House and Senate reports on the 1906 and 1909 forfeiture acts explain that the

forfeiture declared in the [1875] statute because of failure to build the road is not self-executing. Either a Congressional or judicial forfeiture must be declared. . . . This bill expresses an affirmative declaration of forfeiture against all the old unused selection of rights of way where they are more than 5 years old. The bill only deals with these old, abandoned, and unused filings, leaving future Congresses to declare future forfeitures.²³⁰

The reports state that the filings “constitute a cloud upon the title,”²³¹ and these acts operate to execute the forfeitures and clear the title so subsequent grants can be made without reference to railroad lines that have not been built.

There is no great significance to these two forfeiture acts which simply effectuate the forfeiture provision of the 1875 Act. Moreover, they only operate for forfeitures that have already occurred. Future forfeitures are to be established by subsequent congressional or judicial determinations. Yet, the *Hash* court viewed the language in these forfeiture provisions, that the removal of the cloud of the railroad’s claim would inure automatically to the benefit of adjacent patentees, as indicating that in all railroad forfeitures or abandonments the patentee had already received the government’s interest and the statute simply removed the cloud on the title. Of course, this makes no sense in light of the legislative history of these provisions, for they were designed to operate only when enacted, in 1906 and again in 1909, to determine the past forfeitures and cause the government’s interest to inure

²²⁶ General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 483 (codified as amended at 43 U.S.C. § 937 (2000)).

²²⁷ *Id.*

²²⁸ See *Schulenberg v. Harriman*, 88 U.S. 44, 63–64 (1874).

²²⁹ See Act of June 26, 1906, ch. 3550, 34 Stat. 482; Act of Feb. 25, 1909, ch. 191, 35 Stat. 647. Congress also passed a forfeiture act in 1890. See GATES, *supra* note 11, at 457.

²³⁰ S. REP. NO. 60-961, at 1 (1909); H.R. REP. NO. 60-1885, at 1 (1909); H.R. REP. NO. 59-2283, at 1 (1906); S. REP. NO. 59-2732, at 1 (1906).

²³¹ S. REP. NO. 60-961, at 1; H.R. REP. NO. 60-1885, at 1; H.R. REP. NO. 59-2283, at 1; S. REP. NO. 59-2732, at 1.

to the adjacent patentees' benefit at that time.²³² There is no reason to think that subsequent forfeiture declarations would include the same language. It is important to realize that the general forfeiture provision of the 1875 Act, codified at 43 U.S.C. § 937, is the substantive provision declaring forfeiture and terminating the railroad's interests after five years of nonconstruction. The 1906 and 1909 acts, codified at 43 U.S.C. § 940, are the congressional declarations necessary to effectuate the substantive provision as well as the substantive grant of that forfeited interest to the patentees. The fact that no forfeitures have been declared by Congress since 1909 indicates that Congress has either not faced any forfeitures or has chosen to deal with forfeitures differently.

Paul Gates discusses at length the Western animus toward railroad land grants by the 1870s.²³³ Notably, those angry about the railroad checkerboard grants, and not the right-of-way grants, were settlers and land speculators who wanted the railroad land opened to settlement. Railroad lands that were declared forfeited were then opened to settlement by people who had often entered the land and made improvements as trespassers and who feared ejection by the railroads. But there was such widespread abuse of the homestead and settlement laws throughout the end of the nineteenth century, as epitomized by the invasion of the Indian reserves in eastern Oklahoma,²³⁴ that the end of the nineteenth and early twentieth centuries saw a series of laws designed to reign in the avaricious settlers while also punishing the railroads for taking more land than they used.²³⁵ It took well into the twentieth century, though, before the laws caught up with the government's need to preserve some public lands. So it is not surprising that the Supreme Court was flip-flopping on issues of railroad rights, congressional land grant policy, and the interests of settlers.

Oddly enough, the 1906 and 1909 statutes speak of the railroad's easements being forfeited at a time when the Supreme Court had interpreted 1862–1871 FGROW grants to be limited fees following the 1903 decision in *Townsend*. One could argue, therefore, that Congress did not intend section 940 to apply to any 1862–1871 grants or 1875 Act grants because they were all held to be defeasible fees. Between 1882 and 1902, Congress passed

²³² This timing issue is important. If the government's interest passed via patent, then legally the forfeiture would automatically inure to the benefit of the patentee and we would not need a statute effectuating that. But if the government's interest was retained and disposed via the statutes at the time of forfeiture, then the language makes sense. In that regard, neither is a quiet title statute because each grants the property rights in the land to the patentee at the time of forfeiture or abandonment of the railroad grant.

²³³ See GATES, *supra* note 11, at 454–61.

²³⁴ *Id.* at 464 (describing how 50,000 “sooners” ran across the border from Kansas in a mass race to establish claims to homestead and other lands, many of whom had already staked out their claims before the land was available).

²³⁵ See Act of Mar. 3, 1887, ch. 376, 24 Stat. 556 (authorizing the government to institute suits against the railroads for return of lands erroneously conveyed to them); Act of July 10, 1886, ch. 764, 24 Stat. 143 (removing tax exempt status for railroads); Act of Feb. 25, 1885, ch. 149, 23 Stat. 321 (punishing persons who attempted to deter settlement by legitimate settlers); Act of May 14, 1880, ch. 89, 21 Stat. 140 (removing pretended claims from timber lands). See also GATES, *supra* note 11, at 477–85.

numerous railroad grants over Indian lands, the majority of which explicitly limited the railroad's rights to possessory use rights that would cease upon discontinuation of railroad services which were clearly interpreted to be easements.²³⁶ The language used in these Indian land acts was some form of the following:

No part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railway, telegraph, and telephone lines; and when any portion thereof shall cease to be so used such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.²³⁷

Congress clearly knew how to limit the railroads to easements (i.e. possessory use rights) in some of its grants, and it is quite reasonable to conclude that Congress intended the forfeiture acts to apply only to these more limited grants. Even if Congress intended the forfeiture acts to apply to defeasible fee FGROW, undue emphasis should not be placed on the use of the term "easement" within the acts because Congress was under great pressure from settlers to restrict the railroad grants as much as possible.²³⁸

The 1906 and 1909 forfeiture provisions should be contrasted with the abandonment statute which Congress enacted in 1922—43 U.S.C. § 912. This Act states that upon forfeiture or abandonment of FGROW, as declared by act of Congress or judicial determination (the same requirement of congressional or judicial determinations that was required for forfeitures), then

all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree of forfeiture or abandonment be transferred to and vested in any person . . . to whom or to which title of the

²³⁶ See *Smith v. Townsend*, 148 U.S. 490, 498 (1893). See also Act of Apr. 6, 1896, ch. 93, 29 Stat. 87; Act of Aug. 4, 1894, ch. 215, 28 Stat. 229; Act of Feb. 24, 1896, ch. 29, 29 Stat. 12; Act of Mar. 2, 1887, ch. 319, 24 Stat. 446; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, 893–94; Act of Feb. 27, 1893, ch. 171, 27 Stat. 492; Act of Feb. 18, 1888, ch. 13, 25 Stat. 39; Act of July 30, 1892, ch. 328, 27 Stat. 336; Act of July 1, 1886, ch. 601, 24 Stat. 117; Act of Mar. 23, 1898, ch. 87, 30 Stat. 341; Act of Feb. 28, 1902, ch. 134, 32 Stat. 43; Act of Mar. 3, 1891, ch. 535, 26 Stat. 844; Act of Mar. 2, 1896, ch. 38, 29 Stat. 40; Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368; Act of Feb. 26, 1889, ch. 280, 25 Stat. 745; Act of Feb. 24, 1887, ch. 254, 24 Stat. 419; Act of Mar. 1, 1893, ch. 188, 27 Stat. 524; Act of Feb. 20, 1893, ch. 144, 27 Stat. 465; Act of June 21, 1890, ch. 479, 26 Stat. 170; Act of July 4, 1884, ch. 177, 23 Stat. 69; Act of Mar. 3, 1893, ch. 224, 27 Stat. 747; Act of May 14, 1888, ch. 248, 25 Stat. 140; Act of July 6, 1886, ch. 744, 24 Stat. 124; Act of Feb. 27, 1893, ch. 169, 27 Stat. 487; Act of Dec. 21, 1893, ch. 9, 28 Stat. 22; Act of Feb. 4, 1899, ch. 88, 30 Stat. 816; Act of Jan. 17, 1887, ch. 26, 24 Stat. 361; Act of Jan. 16, 1889, ch. 49, 25 Stat. 647; Act of Feb. 14, 1898, ch. 17, 30 Stat. 241; Act of Jan. 29, 1897, ch. 106, 29 Stat. 502; Act of Mar. 30, 1898, ch. 104, 30 Stat. 347; Act of June 26, 1888, ch. 494, 25 Stat. 205; Act of June 30, 1890, ch. 638, 26 Stat. 184; Act of July 26, 1888, ch. 718, 25 Stat. 350; Act of Mar. 18, 1896, ch. 60, 29 Stat. 69; Act of Mar. 30, 1896, ch. 82, 29 Stat. 80; Act of Oct. 1, 1890, ch. 1248, 26 Stat. 632; Act of July 4, 1884, ch. 179, 23 Stat. 73; Act of May 8, 1890, ch. 198, 26 Stat. 102; Act of Feb. 23, 1889, ch. 201, 25 Stat. 684.

²³⁷ Act of Feb. 28, 1902, ch. 134, 32 Stat. 43, 44.

²³⁸ See GATES, *supra* note 11, at 456–61.

United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed . . . by such railroad . . . , except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality²³⁹

Besides this statute also requiring a congressional or judicial determination of forfeiture or abandonment, it does not vest the government's interest in the FGROW until one year after the abandonment when it is clear that no public highway will be established on the corridor land. The 1922 Act, even more clearly than the forfeiture act, envisions that the government's interest will vest in adjacent patentees only after the abandonment and after no municipal or highway use is declared.

Legislative history behind this act confirms the view that it was passed to conform to the new Supreme Court decisions holding that the railroads received only qualified fees and not fee simple absolute in their FGROW and that upon forfeiture or abandonment the "land reverts to and becomes the property of the United States."²⁴⁰ E.C. Finney, Acting Secretary of the Interior, wrote a letter in response to this proposed bill stating:

In making conveyances of the subdivisions traversed by such rights of way, however, the United States issues patents for the full area of the tracts, no diminution of acreage being made by reason of the prior grant of the right of way. It follows as a result of the rulings above cited [*Townsend and Stringham*] that upon the abandonment by any railroad company of any right of way or any portion of any right of way granted to it *the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.*²⁴¹

Hence, to get the land into the ownership of the patentees, section 912 was necessary.

It is confounding that the *Hash* court calls section 912 a quiet title enactment and gives section 940 such substantive weight,²⁴² when in fact it should be the other way around. Section 940 was called by its own creators a bill to, on a single date, remove the clouds of title created by the railroad

²³⁹ 43 U.S.C. § 912 (2000).

²⁴⁰ H.R. REP. NO. 67-217, at 2 (1921).

²⁴¹ *Id.* at 3 (emphasis added). In contrast, some land grants allowed patentees to acquire additional lands if their portion was diminished by a railroad right-of-way grant. See *United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 216 (10th Cir. 1939); *United States v. Drumb*, 152 F.2d 821, 824 (10th Cir. 1946) (holding that under the Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137, 142, adjacent landowners took title to right-of-way upon abandonment, even though they had been allotted other land to compensate for the diminution caused by the railroad grant). The *Drumb* outcome, however, has been the subject of scholarly criticism. See W.F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED 266 (1952).

²⁴² *Hash v. United States*, 403 F.3d 1308, 1317 (Fed. Cir. 2005). The court stated: "[S]ection 912 was of the nature of a 'quiet title' enactment." *Id.*

maps, while section 912 was identified as giving to adjacent patentees the rights in the FGROW that were excluded from their grants. It is unthinkable that the *Hash* court did not even consult the legislative history of section 912, nor understand that it was clearly enacted in response to the Supreme Court's redefinition of FGROW as limited fees in *Townsend* and *Stringham*. And since the Court had clearly stated in *Townsend* that homestead patentees did not receive any interest underlying the FGROW in their patent, this Act served to give them those interests. Calling section 912 a quiet title act, and not a bill giving substantive rights, clearly shows the court's misunderstanding of the nature of these early railroad statutes. And unfortunately, the court's failure to consider the application of section 912 violates clear congressional policy and undermines an important protection of the public interest in these railroad grants.

VIII. ABANDONMENT PURSUANT TO 43 U.S.C. § 912.

The flip side of the homestead coin is the applicability of the 1922 railroad abandonment Act,²⁴³ 43 U.S.C. § 912, to 1875 Act FGROW. If the government's interests in 1875 Act corridors passed to homesteaders, then section 912 is inapplicable because the property rights had passed out of the government's hands before the railroad abandoned and the law became operational. If, however, the government's retained interests in 1875 Act lands did not pass to homesteaders, then they would be subject to disposal pursuant to section 912, and subsequent amendments.²⁴⁴

Three issues are important in analyzing this abandonment issue and the applicability of section 912 to 1875 Act FGROW. The first is whether section 912 applies at all to 1875 Act FGROW to dispose of the government's retained interest given its language and the differences between servient fee and reverter rights. The overwhelming majority view held by the courts is that section 912 is applicable to 1875 Act retained interests. By implication, therefore, those interests did not pass to homesteaders. The second is the timing of the transfer of property rights to adjacent landowners: at the time of patent issuance, at the time of railroad abandonment, at the time of a judicial or congressional determination of abandonment, or one year after the judicial or congressional determination. If the interest passed at the time of the patent, as the *Hash* court held, then subsequent legislative attempts to amend section 912 to deal differently with these servient interests constitutes a facial taking without just compensation.²⁴⁵ The third is whether the criteria of section 912 were appropriately applied in this case.

Because most courts have held that patentees did not receive the government's retained interest in FGROW, and as a result section 912 is

²⁴³ Act of Mar. 8, 1922, Pub. L. No. 67-163, 42 Stat. 414 (codified at 43 U.S.C. § 912 (2000)).

²⁴⁴ The most important amendment is the 1988 amendment to the NTSA that retained the federal interests in FGROW rather than disposing of them to patentees. See National Trails System Improvements Act of 1988, Pub. L. No. 100-470, § 3, 102 Stat. 2281 (codified at 16 U.S.C. § 1248(c) (2000)).

²⁴⁵ See discussion *infra* Part XI.

applicable, the *Hash* court's refusal to engage any of these cases is particularly troubling. The Ninth Circuit, in *Vieux v. East Bay Regional Park District*,²⁴⁶ stated that section 912 "applies to grants both before and after 1871."²⁴⁷ The United States District Court for the District of Idaho, in *Idaho v. Oregon Short Line Railroad Co.*,²⁴⁸ held that "§§ 912 and 316 apply to 1875 Act rights-of-way."²⁴⁹ The Seventh Circuit stated that the "language of § 912 . . . plainly refers to all Congressional grants of public lands for railroad rights of way," in *Mauler v. Bayfield County*.²⁵⁰ The Tenth Circuit held that sections 912 and 316 apply to 1875 Act rights-of-way, in *Marshall v. Chicago & Northwestern Transportation Co.*²⁵¹

State courts have also concurred in the applicability of section 912 to 1875 Act FGROW.²⁵² The Nebraska Supreme Court stated just two years before the *Hash* decision that

[w]e are persuaded by the reasoning of the 9th and 10th Circuits, . . . and likewise conclude that § 912 applies to rights-of-way created pursuant to the 1875 Act and that the import of § 912 is that the United States retained all reversionary interests in such rights-of-way until the United States disposes of those interests as provided by law.²⁵³

The decision in *Hash* undermines these precedents and sets up a conflict among the circuits.²⁵⁴ The only case that disagrees with the applicability of section 912 to 1875 Act rights-of-way is *City of Aberdeen v. Chicago & Northwestern Transportation Co.*,²⁵⁵ but, as noted above, that case is clearly

²⁴⁶ 906 F.2d 1330 (9th Cir. 1990).

²⁴⁷ *Id.* at 1335.

²⁴⁸ 617 F. Supp. 207 (D. Idaho 1985).

²⁴⁹ *Id.* at 213.

²⁵⁰ 309 F.3d 997, 1001 (7th Cir. 2002).

²⁵¹ 31 F.3d 1028, 1032 (10th Cir. 1994).

²⁵² See, e.g., *Barney v. Burlington N. R.R. Co., Inc.*, 490 N.W.2d 726, 731 (S.D. 1992), *rev'd on other grounds*, *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732 (S.D. 2007) (stating that "[w]e conclude that the United States Government retained a reversionary interest in railroad rights-of-way, including those granted post 1871 and that § 912 applies to the right-of-way granted to the Railroad"). See also *Marlow v. Malone*, 734 N.E.2d 195, 201 (Ill. App. Ct. 2000); *City of Maroa v. Ill. Cent. R.R.*, 592 N.E.2d 660, 667 (Ill. App. Ct. 1992); *Hamilton v. King County*, No. 44699-1-I, 2000 WL 1772525, at *3 (Wash. Ct. App. Dec. 4, 2000) (holding that section 912 would apply once the railroad was deemed to have abandoned its right-of-way).

²⁵³ *Whipps Land & Cattle Co. v. Level 3 Commc'ns, LLC*, 658 N.W.2d 258, 267 (Neb. 2003). See also *Keife v. Logan*, 75 P.3d 357, 358 (Nev. 2003) (applying section 912 to an 1862 FGROW).

²⁵⁴ Because *Vieux* held that section 912 was applicable to 1875 Act corridors, and because Idaho is in the Ninth Circuit, there arises a possibility of an untenable conflict were this court to rule contrary to *Vieux*. *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335 (9th Cir. 1990). A real property defendant, who must conform to the legal standards set out in the circuit governing its territory, cannot be held to conform to different legal standards. Either section 912 is applicable to 1875 Act lands in the Ninth Circuit, or it is not. A decision out of the Federal Circuit on a specialized matter under the Tucker Act could potentially create such a conflict. Although this conflict of laws issue was not directly before the court in *Hash*, it offers an additional reason why the decision is problematic in contradicting precedents in the Seventh, Ninth, and Tenth Circuits—the only circuits to rule on the applicability of section 912 to 1875 Act lands.

²⁵⁵ 602 F. Supp. 589, 591–92 (D.S.D. 1984).

the anomaly.²⁵⁶ Because it held that the patentees did receive the servient fee interest in their patents, it was logically necessary to hold that section 912 was inapplicable. Although not directly overruled, however, the Tenth Circuit disagreed with the holding in *Aberdeen* in 1994 in, *Marshall v. Chicago & Northwestern Transportation Co.*²⁵⁷

Numerous courts have also stated that failure to apply section 912 to 1875 Act interests would nullify and render futile the act itself. As the Seventh Circuit explained in *Mauler*, “[c]learly Congress assumed the United States possessed a reversionary interest in railroad rights of way, else it would make little sense for Congress to have passed laws like §§ 912, 913, and 1248(c) to dispose of land the federal government did not own.”²⁵⁸ In *Idaho v. Oregon Shortline Railroad Co. (Idaho I)*,²⁵⁹ the court stated that

[t]his Court has the obligation to interpret § 912 (and §§ 913 and 316) in such a way to fully effectuate congressional intent: These statutes would be rendered null if this Court were to find them inapplicable to 1875 Act rights-of-way, for they were specifically enacted to dispose of the United States’ retained interest in 1875 Act rights-of-way.²⁶⁰

Legislative history also exists to support Congress’s intention that section 912 applies to 1875 Act corridors.²⁶¹

The second important issue to consider in determining abandonment is the timing of the shift in property rights. The *Hash* decision raises profound questions about the timing of the property transfers and thus raises potential takings liability. If the homestead patent was granted after the railroad received the FGROW, then the government’s interest in the underlying fee either transferred at the time of the patent or was retained to be disposed of when the railroad terminates the FGROW through abandonment. Section 912 clearly envisions that the government’s retained interest does not transfer until at least one year after a formal declaration of abandonment and only then would the land office make a formal transfer of its property in the FGROW.²⁶² This delay insures that other public uses can be made of these corridors. The *Hash* decision completely undermines this public

²⁵⁶ See *supra* note 207–09 and accompanying text (discussing *Aberdeen*).

²⁵⁷ 31 F.3d 1028, 1032 (10th Cir. 1994).

²⁵⁸ *Mauler v. Bayfield County*, 309 F.3d 997, 1002 (7th Cir. 2002).

²⁵⁹ 617 F. Supp. 207 (D. Idaho 1985).

²⁶⁰ *Id.* at 212.

²⁶¹ See H.R. REP. NO. 59-2283, at 1 (1906); H.R. REP. NO. 66-843, at 1–2 (1920). See also *Barney v. Burlington N. R.R. Co., Inc.*, 490 N.W.2d 726, 731 (S.D. 1992), *rev’d on other grounds*, *Brown v. N. Hills Reg’l R.R. Auth.*, 732 N.W.2d 732 (S.D. 2007) (“To say that § 912 does not apply to the easements granted under the 1875 Act would, in effect, nullify the intent of Congress. . . . [T]he Congressional Record which accompanied the enactment of § 912 shows Congress’s intent to preserve railroad corridors for ‘public highway’ use.”).

²⁶² See 43 U.S.C. § 912 (2000); See also *King County v. Burlington N. R.R. Corp.*, 885 F. Supp. 1419, 1422 (W.D. Wash. 1994) (holding a decision by the Washington Supreme Court involving a section of right-of-way did not constitute a formal declaration of abandonment for purposes of commencing the one-year period during which the county could embrace the right-of-way as a public highway).

character of section 912 and forecloses Congress's ability to amend section 912 to dispose of its interests differently.

Abandonment of a federally granted right-of-way entails a three-step process of: 1) obtaining STB abandonment authorization; 2) consummating that abandonment by submission of a letter of consummation pursuant to 49 C.F.R. § 1152.29(e)(2);²⁶³ and then 3) disposing of the property rights as determined by section 912. Section 912 provides that federal rights-of-way will be deemed abandoned only by virtue of a judgment by a court of competent jurisdiction or an act of Congress, and STB abandonment does not meet this criteria, thus necessitating the multi-step process.²⁶⁴ As noted above, the federal courts have determined that section 912 controls disposition of all FGROW.²⁶⁵ Under this statute any federally granted parcel continues to exist, usable as a railroad or other public highway, until Congress adopts a statute transferring the title²⁶⁶ or a judicial declaration of abandonment is made.²⁶⁷ Most notably, an agency determination of abandonment authorization (in the event of public necessity and convenience) does not constitute a judgment by a court of competent jurisdiction; the federal district courts have held that only a decision of a federal court meets the criteria of section 912.²⁶⁸

Once abandonment has been declared along a federally granted right-of-way, the land will automatically transfer to any municipality through which the line runs.²⁶⁹ The land may be transferred for public highway use to a state department of transportation or similar state agency within a year pursuant to 43 U.S.C. § 913 or, prior to 1988, it would then be granted to the

²⁶³ Until 1984, railroads were required to notify the ICC that they had consummated their abandonment of lines by submission of a letter or statement confirming the abandonment. Because of the confusion that occurred when abandonment authorization was granted but the actions of the railroads regarding consummation were unclear, the STB issued a notice of proposed rulemaking to require a notice of consummation. Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, 61 Fed. Reg. 11,174, 11,178 (proposed Mar. 19, 1996) (codified at 49 C.F.R. § 1152.29(e)(2) (2007)). *See also* Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996) (noting that when considering whether a railroad has consummated abandonment, the court must look to the carrier's intent); *CONRAIL v. STB*, 93 F.3d 793 (D.C. Cir. 1996) (prior to the consummation notification requirements going into effect, the *CONRAIL* court rejected respondent's suggestion that the railway's failure to notify the Commission that the line had been abandoned was evidence of petitioner's uncertainty of purpose).

²⁶⁴ *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377 (10th Cir. 1996); *Barney v. Burlington N. R.R. Co., Inc.*, 490 N.W.2d at 730–31.

²⁶⁵ *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335 (9th Cir. 1990); *King County v. Burlington N. R.R. Corp.*, 885 F. Supp. at 1422; *Marshall v. Chi. & Nw. Transp. Co.*, 826 F. Supp. 1310, 1312 (D. Wyo. 1992), *aff'd*, 31 F.3d 1028 (10th Cir. 1994); *Barney v. Burlington N. R.R. Co., Inc.*, 490 N.W.2d at 730–31; *Mauler v. Bayfield County*, 204 F. Supp. 2d 1168, 1170 (W.D. Wis. 2001), *aff'd*, 309 F.3d 997 (7th Cir. 2002); *City of Maroa v. Ill. Cent. R.R.*, 592 N.E.2d 660, 666 (Ill. App. Ct. 1992). *But see* *City of Aberdeen v. Chi. & Nw. Transp. Co.*, 602 F. Supp. 589, 591–92 (D.S.D. 1984) (holding that section 912 was not applicable to 1875 Act rights-of-way).

²⁶⁶ *See, e.g., Brown v. Washington*, 924 P.2d 908, 916–17 (Wash. 1996) (noting Congress adopted a statute authorizing transfer of title to the state of Washington).

²⁶⁷ *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d at 1377; *see also Idaho v. Or. Short Line R.R. Co. (Idaho II)*, 617 F. Supp. 213, 216–18 (D. Idaho 1985).

²⁶⁸ *Phillips Co. v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d at 1377.

²⁶⁹ *See* 43 U.S.C. § 912 (2000).

patentees of the subdivision traversed by the corridor if no public highway or municipal use was made. What is important about the timing issue is that if the government's servient fee interest does not transfer until at least one year after abandonment, then there are no vested rights under section 912 in adjacent landowners and Congress can amend section 912 to retain its servient fee interest for railbanking. This is what it believed it was doing in 1988 by the amendments to the NTSA.²⁷⁰ And if there are no vested rights in patentees, then Congress's decision to retain its servient fee interests does not raise potential takings issues.²⁷¹

It is a well-accepted rule of construction that statutes should be interpreted to further the public policy that motivated their enactment, not so as to frustrate that policy.²⁷² The entire history of the railroad land grants, as explained in *Townsend*, *Stringham*, *Great Northern*, and *Union Pacific*, uniformly support the high public policy of encouraging and protecting railroad corridors and public highways. In *Townsend*, the Supreme Court noted that federal railroad grants are to be interpreted "subject to the condition that their rules do not impair the efficacy of the grants," and that "[t]he substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad."²⁷³ Another court stated that "[f]ederal legislation governing the disposition of the government's reversionary interest evinces 'an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation.'"²⁷⁴ As one piece of legislative history notes:

Recognizing the public interest in establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.²⁷⁵

There can be no question that protecting railroad corridors from fractionation and disintegration upon abandonment was the prime motive behind the passage of section 912. Congress wanted to protect these expensive corridor assets by allowing for conversion to highway use, or

²⁷⁰ National Trails System Act, 16 U.S.C. § 1248 (2000); see S. REP. NO. 100-408, at 3 (1988), reprinted in 1988 U.S.C.C.A.N. 2607, 2607-08; see also *King County v. Burlington N. R.R. Corp.*, 885 F. Supp. at 1422-23 (applying section 912 to FGROW and finding that a trail qualifies as a "public highway" under Washington law).

²⁷¹ Courts should always avoid the interpretation that creates a constitutional violation. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-56 (1936) (Brandeis, J., concurring) (discussing interpretive justiciability limits).

²⁷² *Dolan v. U.S. Postal Serv.*, 126 S. Ct. 1252, 1257 (2006) (holding that courts should look to the purposes behind the legislation); *United States v. Evans*, 333 U.S. 483, 486 (1948) (stating that "every reasonable presumption attaches" to legislation "to make it effective in accord with the evident purpose").

²⁷³ *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 270-71 (1903).

²⁷⁴ *Hamilton v. King County, Wash.*, No. 44699-1-I, 2000 WL 1772525, at *3 (Wash. Ct. App. Dec. 4, 2000) (quoting *Idaho I*, 617 F. Supp. 207, 212 (D. Idaho 1985)).

²⁷⁵ S. REP. NO. 67-388, at 2 (1922).

allowing preexisting highway uses,²⁷⁶ and yet have the least amount of disruption when abandonment occurred. The importance of the public policy of protecting rail corridors motivated Congress into requiring that vesting in subdivision owners would occur only upon a determination of abandonment by a court of competent jurisdiction or act of Congress. The destruction of these corridors, therefore, was not to occur simply by non-use, or even upon the elements of common-law abandonment. Nor would they occur by a simple ICC/STB authorization of abandonment. No interests would vest in private parties except upon a court determination or act of Congress.²⁷⁷ It is hard to imagine a more persuasive statement of the congressional intent of preserving these rail corridors than requiring an act of Congress for their destruction.

Furthermore, the railbanking statute functions as a legal process for a railroad to preserve, rather than abandon, its property rights. The statute explicitly provides that railbanking and interim trail use “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”²⁷⁸ Because the railroads retain a future interest to reenter and reactivate, the railroads’ property rights, as stated in the statute, do not terminate. Thus, railbanking is a *de jure* declaration that abandonment has not occurred. Railbanking, quite simply, is a process to “not abandon.”

Typically, state-law property rights do not become possessory until the railroad has abandoned its line and some entity interferes with the repossession by the landowner. Justice O’Connor, in her concurrence in *Preseault v. ICC*, stated that ICC continuing jurisdiction over abandonment cannot always be the equivalent to, and preempt issues of, the landowner’s constitutional rights under the takings clause.²⁷⁹ Thus, questions of abandonment and takings liability must be disaggregated. Takings liability may still exist even if a railroad has not abandoned. And takings liability may exist after abandonment if an entity interferes with the landowner’s property rights. But there is no question that a railroad that railbanks its corridor has

²⁷⁶ That is the purpose of 43 U.S.C. § 913 (2000) and 23 U.S.C. § 316 (2000), which sought to reverse a contrary Ninth Circuit holding in *H.A. & L.D. Holland Co. v. N. Pac. Ry. Co.*, 214 F. 920, 928 (9th Cir. 1914).

²⁷⁷ 43 U.S.C. § 912 (2000).

²⁷⁸ National Trails System Act, 16 U.S.C. § 1247(d) (2000).

²⁷⁹ 494 U.S. 1, 24 (1990) (O’Connor, J., concurring). Justice O’Connor stated:

The scope of the Commission’s authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission’s exercise of power over matters within its jurisdiction effected a taking of petitioners’ property. . . . Although the Commission’s actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. . . . The Commission’s actions may delay property owners’ enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. . . . Any other conclusion would convert the ICC’s power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.

Id. (O’Connor, J., concurring) (internal citations omitted).

not abandoned it. The government may still be liable for interference with state-law property rights, as the Federal Circuit held on remand in *Preseault v. United States*,²⁸⁰ and be obligated to pay compensation. But the compensation is due precisely because the abandonment that would trigger state-law property rights was forestalled by application of the railbanking statute.

The critical question in this case, therefore, is whether the federal property rights can be taken, such that compensation is due, when Congress amends its statutes to provide a mechanism for a railroad to not abandon, but to retain its federally-based property rights intact. The answer to that question has to do with whether or not the patentees' rights in the servient fee are vested such that railbanking and continued federal jurisdiction over the rail corridor interferes to such an extent with those vested rights that constitutional property rights are unduly interfered with.²⁸¹ Interference with those property rights, however, is not tied to the actual process of abandonment by the railroad.

Nevertheless, for federally granted property rights, as exist in these FGROWs, Congress could provide that no rights vest in adjacent patentees until the FGROW is abandoned by the railroad, and if so Congress could certainly alter the terms and conditions of abandonment at any time without implicating the takings clause so long as the patentees' rights have not vested.²⁸² This is precisely what Congress believed it was doing when it adopted section 912 and section 1248(c), which provided that landowner rights would not shift until a judicial or congressional declaration of abandonment.²⁸³ And this is why the timing of the shift in property rights matters. Hence, for FGROW subject to section 912, adjacent landowners' property rights in the servient fee do not transfer out of the government until one year after abandonment when it is determined that no public highway use will be made of the corridor. If the property rights transfer any earlier, then the public highway use, the municipality use, the interim trail use, or any other public use could all raise takings implications.

Any other interpretation of the applicability of section 912 would render the application of section 912 in *Vieux, Marlow, Barney, Marshall, Whipps*, and *Idaho I* to have been unconstitutional takings.²⁸⁴ As we can see,

²⁸⁰ 100 F.3d 1525, 1550 (Fed. Cir. 1996).

²⁸¹ See discussion *infra* Part IX.

²⁸² In general, property owners do not have a vested right in a particular statutory scheme, even a statutory scheme that defines state property rights. Thus, modification of those statutory schemes in ways that extinguish unvested or contingent property rights are not deemed unconstitutional because the rights are not deemed "property." "[T]he rule is well settled that the legislature may modify [possibilities of reverter and rights of re-entry] for the betterment of judicial procedure and the unfettering of estates, so as to bring them into the market for sale, unless such retroactive laws impair rights which are vested." Wayne F. Foster, Annotation, *Validity of Statute Canceling, Destroying, Nullifying, or Limiting Enforcement of Possibilities of Reverter or Rights of Re-Entry for Condition Broken*, 87 A.L.R. 3d 1011, 1014 (1978).

²⁸³ 43 U.S.C. § 912 (2000); 16 U.S.C. § 1248(c) (2000).

²⁸⁴ It is a common rule of statutory construction, however, that courts should not interpret statutes so as to create a constitutional violation if another reasonable interpretation would avoid such a conflict. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

however, the *Hash* court's summary finding of abandonment, without discussing the criteria of section 912 or making findings of abandonment that would justify its decision as a judicial determination of abandonment, resulted in essentially nullifying section 912, and ruling that the adjacent landowners were entitled to compensation.²⁸⁵ This ruling means that Congress could not amend section 912 to retain rather than dispose of its rights without running afoul of the takings clause of the Fifth Amendment. By its holding, the *Hash* court essentially ruled that 16 U.S.C. § 1248(c) was a facial taking because it purported to retain and reuse property rights that had already been transferred out of federal ownership.²⁸⁶ Given the fact that the Supreme Court has yet to find that any law works a facial taking, this court's decision without any discussion, briefing, argument, or findings is particularly stunning.²⁸⁷ To the extent the *Hash* court found that section 912 is not applicable to 1875 Act corridors, it eviscerated not only section 912, but 43 U.S.C. § 913, 23 U.S.C. § 316, and 16 U.S.C. § 1248(c)²⁸⁸ in the majority of FGROW cases, namely those involving 1875 Act FGROW.

IX. SCOPE OF THE FGROW EASEMENT

Any sound interpretation of the interplay of the pre-1871 and 1875 Act railroad grants, the Homestead Act, section 912, and subsequent legislation, however, must begin from the position that the goal of the railroad grants was to provide a system of public transportation and communications that was recognized as being of the highest public priority. And a final important issue is whether the scope of the 1875 Act federal railroad easement is sufficiently robust to permit railbanking and trail use without running afoul of the takings clause. As noted above, some states have held that railroad easements can be converted to trail uses without violating the scope of the easement. Others have held that trail use is beyond the scope and thus converting the corridor to a trail requires compensation. Although no court has yet ruled on the scope of these 1875 Act easements, the language of the grants and the purpose behind the grants support the conclusion that railbanking and trail use fit well within the parameters of the easement and that consequently no takings liability arises when trail use is made.

In support of an enlarged understanding of the scope of these easements is their similarity to fee interests. Numerous courts have rejected the stark

²⁸⁵ *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005).

²⁸⁶ *Id.*

²⁸⁷ The Supreme Court has yet to find any statute works a facial taking, and has indeed noted that facial challenges are "uphill battles." *See* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737 (1997). There have been a few successful facial takings cases in state and district courts. *See, e.g.,* *Richardson v. Honolulu*, 759 F. Supp. 1477, 1497 (D. Haw. 1991); *Borman v. Kossuth County*, 584 N.W.2d 309, 321 (Iowa 1998); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1177 (Fed. Cir. 1991). Given the Court's curtailing of its runaway takings jurisprudence, it is highly unlikely that it will find any statute to work a facial taking in the near future.

²⁸⁸ These statutes, and others, were periodically enacted to manage these retained interests in railroad rights-of-way, first by encouraging their conversion to other public transportation uses, and then through retaining those interests and making them available for railbanking.

distinction between the limited fee of *Townsend* and the easement of *Great Northern*, holding instead that the railroad easement is closer to a fee simple than to the common-law private easements with which it is often confused. The Supreme Court explained that a railroad easement is substantially different from a common-law easement, so different that it looks like a fee simple, when it stated that a railroad easement is “more than an ordinary easement” and has the “attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property.”²⁸⁹ The District Court of Idaho also explained:

[U]nder traditional rules, a simple easement carries with it no right to exclusive use and occupancy of the land. Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions — which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the “Western vastness.” Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement. This is consistent with another well-settled rule of statutory construction which provides that conveyances by the Government will be strictly interpreted against the grantee and in favor of the grantor.²⁹⁰

Many courts are grappling with the fact that the railroad easement is, in essence, a new estate in land that looks like a defeasible fee without mineral rights. Even though individual private parties may not create new estates, the federal government can. Just as the limited fee and the easement are not typical common-law real property interests, the government’s retained interest is not a typical possibility of reverter or servient fee. As the court in *Idaho I* explained:

Congress clearly felt that it had some retained interest in railroad 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. . . . [C]ongressional committeemen in the early 1920’s spoke of this retained interest in terms of an “implied condition of reverter.” Regardless of the precise nature of this interest, Congress clearly believed that it had authority over 1875 Act railroad rights-of-way. [Section 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation.²⁹¹

²⁸⁹ *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898). In a subsequent case, the Supreme Court noted, “[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.” *W. Union Tel. Co. v. Penn. R.R. Co.*, 195 U.S. 540, 570 (1904). Most courts have not distinguished between limited fee interests and easements under these federal railroad grants because the exclusive rights of the railroads in both comport with corporeal property rights and remedies.

²⁹⁰ *Idaho I*, 617 F. Supp. 207, 212 (D. Idaho 1985) (citing *Union Pacific* and *Great Northern*).

²⁹¹ *Id. Accord* *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994).

The renaming of the right-of-way in *Great Northern*, from a limited fee to an easement, concerns the balance of rights as between the federal government and the grantee railroad and should not indicate that the scope of activities that can be undertaken on the railroad's easement are dramatically less than could be undertaken on a limited fee.

Even if one were to adopt common law property rules that easements are mere servitudes on an underlying fee, while defeasible fee interests are corporeal hereditaments, any interpretation of the nature of the federally-granted rights-of-way must take into account the purpose of the grants. These right-of-way grants were not made simply to create a railroad, but were to create public transportation and communications arteries. The typical federal railroad grant would be titled: "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."²⁹² Even if the 1875 Act did not carry the same title, the grants of these federal rights-of-way did carry with them the obligation to allow the placement of telegraph lines, use for parcel post, and required free or reduced rates for military transportation.²⁹³ To imagine that the land granted to the railroads under the 1875 Act are mere railroad easements that terminate upon the cessation of rail use assumes that the federal government has no other interest in these corridors than providing subsidies for the railroads. Clearly, that is not the case. Regardless of what we call this "railroad easement," it must contain within it the entire array of transportation and communications uses.

Besides the integrated national defense and transportation policies behind the federal railroad grants, there must be implicit within them a retained interest in the government sufficient to protect these overall national policies. Thus, when the court in *Rice* stated that the "agency issuing the patent had neither the actual nor the apparent authority to convey the interest of the United States under the right of way, then, of course, the deed, although it purported so to do, did not convey that interest,"²⁹⁴ it could only have meant that that retained interest was of such a quality that it could not be conveyed out of the government's possession because there were other important governmental purposes protected by the grant.

One of the most common challenges by opponents to rail-trail conversions is that trail use exceeds the scope of a railroad grant and, therefore, when a corridor is railbanked and interim trail use is made of the land pursuant to 16 U.S.C. § 1247(d), the federal government has taken the reversionary or underlying fee interest from the adjacent landowner and owes compensation. When the Supreme Court upheld the constitutionality of section 1247(d), it held that whether or not the statute worked a taking

(following the *Idaho I* decision).

²⁹² Act of July 2, 1864, ch. 216, 13 Stat. 365.

²⁹³ General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (codified as amended at 43 U.S.C. §§ 934–939 (2000)).

²⁹⁴ *Rice v. United States*, 348 F. Supp. 254, 256–57 (D.N.D. 1972).

was to be determined in individual cases through a Tucker Act claim.²⁹⁵ After a number of decisions looking at the state-law property rights and the interplay of federal ICC jurisdiction,²⁹⁶ the Court of Appeals for the Federal Circuit eventually held that compensation was due in that particular case because the state-law railroad easements had terminated prior to the corridor's railbanking, and that the possession of the corridor land had returned to the landowner.²⁹⁷ Subsequent takings cases have found that whether compensation is due or not depends on whether the state law property rights have been unduly interfered with by the federal railbanking statute. Not surprisingly, in states in which the easement is robust and general, no compensation has been found due;²⁹⁸ and in states in which the easement is deemed to be narrowly drawn and specific to railroad use only, compensation has been ordered.²⁹⁹

Hash is the first case to specifically address the compensation obligation with regard to FGROW, and not to state-law created railroad easements. But using the reasoning of the *Preseault* line of cases and the state-law cases, it should be clear that no taking has occurred when the federal government passes a law holding intact easements that were granted for multiple transportation and communication purposes when the railroad use ceases but other public uses continue. There are numerous reasons for this conclusion.

First, FGROW are creatures of federal law and not state law and therefore we look to federal actions to determine the scope of the rights conveyed. Because these rights-of-way had multiple uses and served important postal and military needs, the scope must be deemed broader and infused with a greater public purpose than merely a grant to aid a railroad corporation. Also, because FGROW are creatures of federal law, federal laws can alter the property rights without running afoul of the constitutional protections on property so long as the rights are not vested, because no one has a vested right to a particular statutory scheme. Similarly, congressional actions, as in the passing of section 912, are relevant in interpreting the scope of federally granted property rights. The fact that Congress believed the government retained an interest in these FGROW that survived homestead patents is a good indication that Congress meant to dispose of the federal interest only after abandonment.

²⁹⁵ *Preseault v. ICC*, 494 U.S. 1, 12–13 (1990).

²⁹⁶ *See generally*, *Preseault v. United States*, 24 Cl. Ct. 818 (Cl. Ct. 1992); *Preseault v. United States*, 27 Fed. Cl. 69 (Fed. Cl. 1992).

²⁹⁷ *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996). This case can be easily distinguished from typical railbanking takings cases in that the state-law rights were held to have been terminated before the removal of federal ICC jurisdiction and railbanking, and not as a result of the railbanking, an outcome that is logically unsound and very odd.

²⁹⁸ *See, e.g.*, *Chevy Chase Land Co. v. United States*, 37 Fed. Cl. 545 (Fed. Cl. 1997).

²⁹⁹ *See, e.g.*, *Preseault v. United States*, 52 Fed. Cl. 667 (Fed. Cl. 2002); *Swisher v. United States*, 262 F. Supp. 2d 1203 (D. Kan. 2003); *Town of Grantwood Vill. v. United States*, 55 Fed. Cl. 481 (Fed. Cl. 2003); *Glosemeyer v. United States*, 45 Fed. Cl. 771 (Fed. Cl. 2000); *Hubbert v. United States*, 62 Fed. Cl. 73 (Fed. Cl. 2004); *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004); *Moore v. United States*, 63 Fed. Cl. 781 (Fed. Cl. 2005).

Furthermore, what the railbanking statute does is provide for a different disposition of federal interests in FGROW *before* the railroad abandons, because abandonment is the act that causes the vesting of landowner rights in corridor land. By amending section 912 through 16 U.S.C. § 1248(c), Congress chose to retain property that in the past it had chosen to give away because giving it away frustrated an important public purpose (preserving intact rail corridors), and it chose to retain only those properties that had not yet vested in landowners through abandonment.

Thus, when the *Hash* court ordered compensation on the grounds that the railbanked corridor had been abandoned, it doubly erred. It erred by ignoring the issue of abandonment which is the heart of the railbanking statute. To the extent section 1247(d) holds that railbanking is not abandonment, then how can a railbanked federal right-of-way be deemed abandoned? Such a finding shows that the court does not understand the interplay of abandonment and railbanking. Then when it further ordered compensation because the corridor is abandoned, it compounded its error. Because even if the corridor were abandoned (and not railbanked), it is entirely wrong to view the federal rights as so limited to railroad uses only that they could not accommodate shifting technologies and other public purposes. If the federal government gives to a railroad company a right-of-way for multiple public purposes, and then it determines that too many corridors are being destroyed which should instead be preserved, and thus it passes a law to preserve them, it makes no sense whatsoever to require the government pay again through compensation to landowners whose rights in the corridor land had not yet vested.

X. *HASH* PROGENY

Unfortunately, the poor reasoning and the very lax final order of the *Hash* decision is beginning to wreak havoc among other courts. First, the district court on remand in *Hash* examined the final paragraph of the Federal Circuit decision, and read it as a mandate that abandonment had occurred and that railbanking constituted a taking for which just compensation was due.³⁰⁰ The final paragraph read:

On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases. On remand the district court shall determine just compensation on the conditions that apply to these landowners.³⁰¹

For Judge Williams, the most persuasive evidence that the Federal Circuit had determined both the abandonment and takings liability issues (even

³⁰⁰ *Hash v. United States*, No. CV-99-324-S-MHW, 2007 WL 1309548, at *1, *6 (D. Idaho Feb. 1, 2007).

³⁰¹ *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005).

though neither were briefed nor argued before the Federal Circuit and the parties believed they were only appealing the issue of the retained interest) was the fact that the Federal Circuit refused to rehear the case on the government's petition for rehearing.³⁰² Had it accepted the petition to rehear the case it could have spoken to the abandonment and liability issues. But it did not. Consequently, Judge Williams accepted that the railroad had abandoned the corridor (despite it having been railbanked) and that compensation was due.³⁰³

To some extent this outcome is merely the consequence of a wrong decision on appeal. Judge Williams had little option, given the language of the last paragraph, but to accept the landowners' claims that the Federal Circuit had made a final decision on abandonment and takings liability. Were the language in the future tense, instead of the past tense, the outcome might have been quite different. However, the effects of this somewhat haphazard final paragraph are not limited to the remand in *Hash*, but have extended to another case involving a different landowner on the same railroad corridor as in *Hash*. In that case, *Blendu v. United States*,³⁰⁴ Judge Hewitt found that the Federal Circuit decision in *Hash* precluded his court's consideration of the merits of the case—namely whether the railroad had abandoned and whether takings liability accrued.³⁰⁵ Thus, the court granted summary judgment for the landowners and moved directly to assessing takings damages.³⁰⁶ Both Judge Williams and Judge Hewitt were uncomfortable with the idea that the issues of abandonment and liability were determined once and for all by the Federal Circuit without briefing or argument on the issues, but both felt bound to follow the Federal Circuit's rather offhand order.

Not surprisingly, the impact of the *Hash* finding has now moved beyond the narrow scope of the trail at issue in that case, to a trail in Colorado. In *Ellamae Phillips Co. v. United States*,³⁰⁷ Judge Baskir very reluctantly felt bound to follow the *Hash* mandate on abandonment and liability for 1875 Act FGROW, but did not do so without criticism. As Judge Baskir noted:

The absence of any predicate to the Federal Circuit's conclusory statement regarding abandonment is troublesome both for the litigants in *Hash* and for courts attempting to apply correctly precedent in other 1875 Act conversions. The Government thoroughly briefed its non sequitur arguments to the Federal Circuit in its petition for rehearing in *Hash II*. The petition was denied . . . It is not for a trial court to disregard appellate decisions we think *wrongly decided* or *poorly reasoned*.³⁰⁸

With the extension of the *Hash* mandate to other 1875 Act trail conversions, the courts risk seriously undermining the entire railbanking program and

³⁰² *Hash v. United States*, 2007 WL 1309548, at *5–6.

³⁰³ *Id.*

³⁰⁴ 75 Fed. Cl. 543 (Fed. Cl. 2007).

³⁰⁵ *Id.* at 549.

³⁰⁶ *Id.*

³⁰⁷ 77 Fed. Cl. 387 (Fed. Cl. 2007)

³⁰⁸ *Id.* at 395 (emphasis added).

certainly neglect numerous congressional statements that preservation of rail corridors through railbanking is a high national priority and does not constitute abandonment. Judge Baskir, at least, could have resisted the finding of abandonment by requiring that the landowners in *Ellamae Phillips* comply with the terms of section 912. It would be counterintuitive that a federal statute requiring an act of Congress or judgment of a court of competent jurisdiction is satisfied when abandonment is declared by the Federal Circuit in a different case, for a different corridor, and without argument or briefing by the parties.

Further reverberations have occurred in the state courts. The Supreme Court of South Dakota has now overruled its prior decision in *Barney v. Burlington Northern Railroad Co., Inc.*³⁰⁹ Following the *Hash* finding that no reversionary interests remain in the government for 1875 Act FGROW lands, the South Dakota court in *Brown v. Northern Hills Regional Railroad Authority*³¹⁰ held that section 912 did not apply to an FGROW and it therefore quieted title to an abandoned corridor in the adjacent landowner. Again, the court was uncomfortable with this finding. After nostalgically reciting at great length the rationale for its decision in *Barney*, especially the role of numerous federal statutes (sections 912, 913, 1247(d) and 1248(c)) and the legislative history behind these acts, the South Dakota court simply stated that without a reservation in the patents for the servient fee underlying the FGROW, the federal government retained no interest once it issued the patent.³¹¹ It is quite clear from the opinion that the court felt *Hash* is problematic—the lengthy and affirmative discussion of the rationale behind the *Barney* decision is contrasted to the very brief and circumspect rationale behind *Hash* that called for *Barney*'s reversal.³¹²

The only small comfort that can be taken from the *Hash* decision is that so far it only applies in the case of one type of FGROW—those corridors granted pursuant to the 1875 Act. This was made clear in *Home on the Range v. AT&T Corp.*³¹³ In that case, the District Court for the Southern District of Indiana held that the government did retain substantial interests in 1862–1871 FGROWs that would allow for placement of fiber optic cables on those corridors, while finding that *Hash* governed only on the issue of 1875 Act FGROWs.³¹⁴ The court relied heavily on the *Townsend* decision and a Seventh Circuit decision³¹⁵ that found homestead patentees did not receive the government's interest in those pre-1875 defeasible fee FGROWs.³¹⁶ Thus, the court tried to make it clear that the corridor preservation objectives of section 912 remain intact in the case of other federal grants. But until *Hash* is properly clarified, either by the Federal Circuit itself or a higher court, and

³⁰⁹ 490 N.W.2d 726 (S.D. 1992).

³¹⁰ 732 N.W.2d 732 (S.D. 2007).

³¹¹ *Id.* at 738–40.

³¹² *Id.* at 738–39.

³¹³ 386 F. Supp. 2d 999 (S.D. Ind. 2005).

³¹⁴ *Id.* at 1017–24.

³¹⁵ *Mauler v. Bayfield County*, 309 F.3d 997 (7th Cir. 2002).

³¹⁶ *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d at 1004–07.

the issues of abandonment and subsequent use of these corridors is actually decided through considered legal analysis instead of in an offhand remark, the case may continue to be applied by the courts in a manner that will undermine Congress's clear intention that, upon abandonment, these corridors be made available for continued and future public transportation use.

XI. CAN *HASH* BE LIMITED?

Until it is corrected by a higher court, we are left with the odd situation that the government has no retained interest underlying 1875 Act FGROWs and a conflict in the circuits with respect to the applicability of both section 912 and 16 U.S.C. § 1248(c) to 1875 Act FGROW. But there is one way to protect the federal interest in these corridors while still respecting the *Hash* decision—if the courts ultimately find that, even if the government's underlying fee interest transferred to homesteaders, section 912 still applies to the federal government's retained property right; not in the underlying fee, but in the FGROW itself. Because FGROWs were conveyed out of the public lands for transportation and telecommunications needs, and because the government has a clear priority interest in promoting and maintaining national transportation infrastructure, it is quite logical to recognize a federal interest, perhaps a kind of reversionary interest, in the FGROW itself. Under this rationale, the government can authorize the shift in use from railroad to highway or to municipal use under section 912, consistent with a recognition that the adjacent landowner will receive unencumbered use of the full fee only when all other public uses of the FGROW have been considered and found unnecessary. This result follows from the stringent requirement that FGROWs are not to be deemed abandoned without an act of Congress or judicial decision looking at the public necessity for these valuable corridors. Once no further public use is to be made, then the FGROW easement will terminate and no further action need be taken. The adjacent landowners can then reacquire full possession of their servient fee.

This is the only logical way to harmonize the abandonment statutes and the trails act amendments with the lengthy case law applying section 912 to FGROW and this anomalous *Hash* decision.³¹⁷ If we deem the government to have retained an interest in the FGROW itself, enough to protect its grant and to allow for railbanking and other public uses, then all is not lost.

³¹⁷ This holding is clearly dicta, but it has nonetheless been given precedential effect in several other claims court cases. It squarely conflicts with the view of the court in *Beres v. United States*, 64 Fed. Cl. 403 (Fed. Cl. 2005), holding the United States did not retain any interest in the underlying fee. Nonetheless, the court in *Beres* held the United States did not retain an interest in 1875 Act lands, explicitly stated that its ruling “by no means resolves the case before the court. There remain numerous issues to resolve before this court can determine if the plaintiffs are entitled to compensation, including resolution of the successor in title to the land and whether or not there was an abandonment. . . . By this decision, we have taken only one step in a series of steps to determine the property rights and damages claims at issue.” *Id.* at 428 (emphasis added).

Even if the federal government's underlying fee interest has transferred to homesteaders, that does not mean the scope of the railroad easement is not sufficient to accommodate interim trail use or to require preservation of the right-of-way in federal hands for future transportation purposes. Hence, we should not conclude from the decision in *Hash* that the railroad's interest in its right-of-way is a typical, relatively weak, common law easement, or even an exclusive railroad one. Rather, it remains to be determined if it is a transportation easement that is subject to shifting public uses and can be reacquired by the federal government from the railroads without prejudice to the underlying fee owner remains to be determined. It would seem only logical that if the federal government gave away public lands to railroads for transportation and telecommunications purposes, that when the railroads no longer needed them, the lands would return to government control for other public uses.³¹⁸ Only if the government determines that the railroad right-of-way has no foreseeable public use should the federal interest terminate and the underlying fee be unburdened.³¹⁹

XII. CONCLUSION

Although it may seem a bit excessive to spend this much time criticizing a single wrongly-decided case, the situation warrants much attention. The *Hash* case, if it remains valid, threatens to undermine nearly 200 years of federal support of transportation infrastructure. It threatens to erode a core aspect of the National Trails System Act, and it renders inconsequential a number of federal statutes dealing with FGROW (section 912, section 913, etc.). Worse, it ignores the public character of FGROW and the public's right to demand that infrastructure using public lands continue to be devoted to public purposes. In essence, it construes the railbanking act to be a facial taking in all FGROW cases, which is certainly a position the Supreme Court has rejected. Furthermore, it flaunts the notion of stare decisis which is crucial to the protection of the very property rights the court purports to be protecting. This case is not only wrongly decided, but is fundamentally destructive of the corridor preservation purposes of the railbanking statute. For these reasons alone it should be overruled.

Fortunately, the Court of Federal Claims recognized the error of this case and certified an interlocutory appeal on the *Hash* holding in *Ellamae Phillips Co. v. United States*,³²⁰ which the Federal Circuit has granted.³²¹ If the Federal Circuit does not revise its holding, this case is ripe for Supreme Court review. The *Hash* decision creates a rift among the circuits, it misreads Supreme Court precedents, and it renders numerous federal statutes null and void. When the dust has settled in this area, we will be able

³¹⁸ The broad scope of these FGROWs is indicated by 43 U.S.C. § 934 (2000).

³¹⁹ This is clearly the intent of 43 U.S.C. § 912 when it permits conversion of FGROW to other public uses. See, e.g., S. REP. NO. 67-388, at 2 (1922).

³²⁰ 77 Fed. Cl. 387 (Fed. Cl. 2007).

³²¹ *Ellamae Phillips Co. v. United States*, Misc. No. 867, slip op. at 1 2008 WL 586408 (Fed. Cir. Feb. 7, 2008).

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to judge whether the public's rights to benefit from the lavish right-of-way grants will bear lasting fruit, or will fall once again to the greed of private landowners.