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# OSAGES, IRON HORSES AND REVERSIONARY INTERESTS: THE IMPACT OF *UNITED STATES v. ATTERBERRY* ON RAILROAD ABANDONMENTS

## I. INTRODUCTION

On September 23, 1982, the United States of American, as trustee for the Osage Tribe of Indians, filed fifty-four suits to quiet title to an abandoned railroad right of way in Osage County, Oklahoma.<sup>1</sup> The Midland Valley Railroad Company had acquired a railroad easement in 1905, pursuant to the provisions of sections 13 through 23 of the Enid and Anadarko Act.<sup>2</sup> The Enid and Anadarko Act provided for the acquisition of railroad rights of way in the Indian Territory and through Indian lands in the Territory of Oklahoma.<sup>3</sup> The Texas and Pacific Railway became the successor in interest to the Midland Valley Railroad Company in 1967.

Following the Civil War, Congress sought to encourage the westward expansion of the United States.<sup>4</sup> As early as February of 1887, Congress began promulgating various allotment acts that provided for the severalty of tribal lands<sup>5</sup> as well as for the development of railroad systems in Indian Territory.<sup>6</sup> After the division in severalty of the com-

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1. *United States v. Atterberry*, Nos. 82-C-896-B through 82-C-949-B, slip op. (N.D. Okla. Nov. 30, 1984). These cases were consolidated because a common question concerning the interpretation of applicable law was involved. This judgment incorporates by reference a prior order. *The Order, United States v. Atterberry*, Nos. 82-C-896-B through 82-C-949-B (N.D. Okla. June 25, 1984) (order granting defendants' motion for summary judgment and denying plaintiff's motion for partial summary judgment), is the basis for this analysis.

2. Act of Feb. 28, 1902, ch. 134, §§ 13-23, 32 Stat. 43, 47-51.

3. At statehood, the territorial borders of the land designated as Indian Territory and the land designated as Oklahoma Territory were combined to make the current State of Oklahoma. *See Oklahoma Enabling Act*, ch. 3335, 34 Stat. 267 (1906). *See also* J. MORRIS, C. GOINS & E. McREYNOLDS, *HISTORICAL ATLAS OF OKLAHOMA* Map 58 (2d ed. 1976) [hereinafter cited as *HISTORICAL ATLAS*].

4. *See* 5B G. THOMPSON, *THOMPSON ON REAL PROPERTY* § 2716 (J. Grimes ed. 1978).

5. *See* Act of Feb. 8, 1887, ch. 119, §§ 2-11, 24 Stat. 388, 388-91 (current version at 25 U.S.C. §§ 331-358 (1982)), which provided a conceptual framework for the allotment of Indian lands and established that allotment created equal citizenship based on the laws of the State or Territory in which the allottee resided.

6. The Seminoles entered into the first Indian Territory treaty in March 1866. *See* W. SEMPLE, *OKLAHOMA INDIAN LAND TITLES* § 343, at 259 (1952). Response to railroad development in Indian Territory was mixed. The full-blood factions tended to be distrustful while the legislatures of the Cherokee and the Choctaw nations actively promoted stock in Indian-backed companies. *See* Miner, "*Little Houses on Wheels*": *Indian Response to the Railroad*, in *RAILROADS IN OKLAHOMA* 7 (D. Hofsommer ed. 1977).

mon tribal lands, the allottee was governed by state and federal laws like every other citizen.<sup>7</sup> These two parallel trends, railroad development and allotment of Indian lands, are the nucleus for the controversy over the Midland Valley right of way.

In *United States v. Atterberry*, the question before the Court was whether the abutting landowners have title to the underlying fee to the right of way, upon its abandonment by the railroad.<sup>8</sup> The United States, as trustee for the Osage Tribe of Indians, claimed the land as the original grantor.<sup>9</sup> The defendants, as heirs, beneficiaries or assigns of the original Osage allottees, also claimed title based on the language of the government patents.<sup>10</sup> In bringing this action, the United States was seeking a very narrow interpretation of the Enid and Anadarko Act.<sup>11</sup> Sections 13 through 23, the provisions by which the Midland Valley right of way was obtained, do not contain specific language regarding reversionary interests; however, such language is found in section 2 of the Act which states that an abandoned right of way reverts to the Indian Tribe from which it was purchased.<sup>12</sup> This viewpoint is within the presumption that ambiguous legislation should be resolved in favor of the Indians.<sup>13</sup> The defendants maintained that such a reading of the Act is inconsistent with the Act itself, with other pertinent legislation, with federal and state common law and with the language found in the government patents issued to the original Osage allottees.<sup>14</sup>

Although the issue in *Atterberry* was narrow, an outcome favorable to the Osages would have reverberated throughout

7. See *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950). The court held that when the tribes in the allotment treaties surrendered their tribal domains and took allotments in severalty, state law applied in civil and criminal matters. The court determined that congressional intent was to "disestablish the organized reservations and assimilate members of the Indian tribes as citizens of the state or territory." *Id.* at 97-98. *But see* *United States v. Ramsey*, 271 U.S. 467, 471 (1926) (federal law held to control over murder on restricted Osage Allotment lands).

8. Defendants' Motion for Summary Judgment at 2-3, *Atterberry*.

9. Petitioner's Complaint at 1, *Atterberry*.

10. Answer Brief of Defendants [Kelly & Gambill] at 2, *Atterberry*.

11. Act of Feb. 28, 1902, ch. 134, 32 Stat. 43. *See also* Defendants' Oral Arguments on Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

12. Plaintiff's Opening Brief on Interpretation of the Enid and Anadarko Act at 2-3, *Atterberry*. *See also* Act of Feb. 28, 1902, ch. 137, 32 Stat. 43.

13. *See* Plaintiff's Opening Brief on Interpretation of the Enid and Anadarko Act at 7-8, *Atterberry*. *See also* *Leavenworth, L. & G. R.R. v. United States*, 92 U.S. 733 (1875); *accord* *Bennett County v. United States*, 394 F.2d 8 (8th Cir. 1968) (Indian legislation should be strictly construed).

14. Defendants' Oral Arguments on Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

Oklahoma. At a minimum, such a decision would have created a *forty-six* mile long "Chinese Wall" bisecting Osage County.<sup>15</sup> Moreover, at least three additional railroad right of way abandonments have taken place or are pending in Osage County. Finally, the impact could affect the entire former Territory of Oklahoma wherever railroads cross other Indian lands or allotments. Judge Brett, however, ruled in favor of the defendants, stating that "the general common rule which vests in the abutting landowner the entire title and estate in the strip of land set apart for a railroad right of way just makes good sense."<sup>16</sup>

This Comment will explore the reasoning underpinning the holding in *Atterberry* by examining the Enid and Anadarko Act as it relates to the issue of whether the abandoned railroad right of way reverts to the Osage Indian Tribe or to the abutting landowners. An interpretation of the Enid and Anadarko Act is dependent upon an examination of the legislative intent behind the enactment, a comparison with other enactments, an understanding of the theory behind the issuance of the patent deeds, and a review of the applicable case law. As will be discussed below, the *Atterberry* holding is important because it helps to close an eighty-two year old gap inherent in the Enid and Anadarko Act and to resolve forty-two years of litigation.<sup>17</sup>

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15. Outline of Defendants' Oral Arguments in Support of Their Motion for Summary Judgment at 8, *Atterberry*.

One defense attorney wondered why the Osage Indian Tribe wanted "the worlds longest jogging track." Answer Brief of Defendants [Kelly & Gambill] at 3, *Atterberry*. If the Osage Tribe was successful in obtaining the right of way, it intended to require trespass damages from "local farmers and ranchers" who had to cross the right of way to reach their pastures. Letter from David L. Baldwin, Superintendent of Osage Agency, to Bank of Oklahoma, N.A., (Sept. 28, 1979). The letter stated that no trespass damages would be "due for use of this [Midland Valley] railroad right of way" until after a quiet title suit confirmed ownership of the right of way. *Id.*

16. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 31. In the oral arguments on the motions for summary judgment before United States District Judge Thomas R. Brett on March 22, 1984, the United States Attorney indicated that the Osage Tribe of Indians would appeal an adverse ruling since the question raised by this case was of first impression.

17. In *United States v. Midland Valley R.R.*, No. 353 Civil, slip op. (N.D. Okla. 1942), the Osages initiated a suit to collect the \$15 per mile damages authorized by § 15 of the Enid and Anadarko Act for the entire 78 mile Midland Valley right of way. The court found that the right of way was constructed in compliance with the requirements of the Enid and Anadarko Act but that the railroad had failed to make any of the annual payments authorized by the Act. However, "liability for such payments terminated upon the approval of the allotment deeds by the Secretary of the Interior. . . ." *Id.* at 4. The railroad was ordered to pay \$4,727.85 in mileage payments to the Osage Tribe of Indians from the year 1905 (when the construction on the railroad was completed) to 1909 (when the last allotment deed was approved). *Id.* at 4-5. "[S]ince the action is brought by the United States the statutes of limitation do not apply, and no request or demand for payment having been made for more than thirty-five . . . years it follows that it would be inequitable to allow interest upon the amount found due [.] Interest will be allowed only from the date of the entry of judgment herein . . . ." *Id.* This ruling is of limited precedential value for the

## II. THE ENID AND ANADARKO ACT

Because Congress wanted to foster expansion of the United States, it made an effort to encourage development by enacting legislation to provide transportation to and through the rapidly growing western United States. The Enid and Anadarko Act<sup>18</sup> is an example of such legislation. The Act was passed prior to Oklahoma statehood with a two-fold purpose. The first purpose governed the right of the Enid and Anadarko Railway Company to acquire a right of way for a route generally going from what is now central Oklahoma easterly to Arkansas.<sup>19</sup> The second purpose established a method for other railroad companies to acquire future rights of way through the two territories.<sup>20</sup>

Section 1 of the Act established the power of the Enid and Anadarko Railroad Company to acquire rights of way from the town of Geary in Blaine County, Oklahoma Territory easterly through Indian Territory to Fort Smith, Arkansas.<sup>21</sup> This route travelled far south of the Osage lands.<sup>22</sup> According to section 2, the right of way so

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issue raised in *Atterberry* because the *Midland Valley* court did not consider who had title to the right of way since it was still being used for railroad purposes.

In 1949, the Commissioner for Indian Affairs wrote to the Superintendent of the Osage Agency stating, "[i]n view of the [the *Midland Valley* decision] and the decision in . . . *United States v. Magnola* [sic] *Petroleum Company* . . . [110 F.2d 212 (10th Cir. 1923)], it is our opinion that the Osage Nation has no interest in the portion of the [Midland Valley] right of way . . . and that upon abandonment by the railroad company, the ownership thereof would revert to the owner of the abutting land." Letter from H.M. Crutchfield to T.B. Hall (April 4, 1949) (emphasis added).

However, by 1969, the Osages had decided to contest the 1949 opinion and to attempt to quiet title in the right of way in favor of the Tribe. See Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs (March 21, 1969) (discussing the interests of the Osage Tribe in abandoned railroad rights of way).

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

19. *Id.* ch. 134, §§ 1-12, 32 Stat. 43, 43-47.

20. *Id.* ch. 134, §§ 13-23, 32 Stat. 43, 47-51. See also W. SEMPLÉ, *supra* note 6, § 357 for a discussion of the purpose and provisions of the Enid and Anadarko Act. Until this Act was passed, railroads were required to obtain specific legislation in order to obtain a right of way. See *infra* note 41-42 and accompanying text.

21. Ch. 134, § 1, 32 Stat. 43, 43, reads:

That the *Enid and Anadarko Railway Company* . . . is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Territory of Oklahoma and the Indian Territory, beginning at a point on its railway between Anadarko and Watonga, in the Territory of Oklahoma, thence in an easterly direction by the most practicable route to a point on the eastern boundary of the Indian Territory near Fort Smith . . . .

*Id.* (emphasis added).

22. This railroad line ran from Geary, in Blaine County, through Oklahoma City, in Oklahoma Territory, through Seminole and Wewoka (Seminole lands) and through McAlester, Wilburton and Wister (Choctaw lands) in Indian Territory to Hartford and Mansfield in Arkansas. In 1903 this rail line was purchased by the Chicago, Rock Island and Pacific Railroad. The main line of the Enid and Anadarko Railway Company was in Oklahoma Territory and ran

acquired was an easement and the underlying estate remains with the Indian tribe or nation from which that specific easement was carved.<sup>23</sup> Provisions regarding the actual details of establishing the Enid and Anadarko Railway Company, such as maximum land rates, condemnation proceedings, freight and passenger rates and time of construction, were found in sections 3 through 11.<sup>24</sup> These requirements were all subject to congressional amendment.<sup>25</sup>

The remaining sections of the Act set out a pattern whereby future railroads could be built through Indian lands in Oklahoma Territory and in Indian Territory.<sup>26</sup> The Enid and Anadarko Act provided a comprehensive scheme for railroad building and it supplanted the more general Indian Railroad Right of Way Act.<sup>27</sup> So far as Indian lands were concerned, section 13 of the Enid and Anadarko Act granted only the power to take and condemn rights of way for construction of railroads, telegraph and telephone lines.<sup>28</sup> Sections 14

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westerly from Enid, in Garfield County, to Meno, in Major County, then southerly to Okeene and Geary in Blaine County, then to Anadarko, in Caddo County, and on to Lawton, in Commanche County. *See* Outline of Defendants' Oral Argument in Support of Their Motion for Summary Judgment at 4-5, *Atterberry*.

23. Ch. 134, § 2, 32 Stat. 43, 43-44 reads:

That said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way one hundred feet in width through said Oklahoma Territory and said Indian Territory . . . 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.

*Id.*

In 1902, the process to distribute allotments to individual members of the Five Civilized Tribes had begun, but the majority of the land was still held by the tribes as a whole. *See generally* W. SEMPLE, *supra* note 6, §§ 15-24; *see also* A. DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 3-60 (1972 ed.) (discussion of the allotment process for the Five Civilized Tribes). The actual allotment of Osage lands did not commence until after the passage of the Osage Allotment Act in 1906. *See generally* W. SEMPLE, *supra* note 6, §§ 638-56.

24. *See* ch. 134, §§ 3-11, 32 Stat. 43, 44-46.

25. *See* ch. 134, § 12, 32 Stat. 43, 47.

26. *See* ch. 134, §§ 13-23, 32 Stat. 43, 47-51.

27. Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (current version as amended at 25 U.S.C. §§ 312-318 (1982)). This Act provides the foundation for all rights of way through any Indian lands outside of Oklahoma. Only the lands allotted to unrestricted Indians are exempt from its provisions. On non-Indian lands, including Oklahoma non-Indian lands, [*see infra* notes 105-09 and accompanying text] the General Railroad Right of Way Act of March 3, 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. § 934-938 (1982)) applied. Railroad rights of way under either of these two acts were limited to easements [*see infra* notes 65-69 and accompanying text]. The Enid and Anadarko Act, however, created an exception to the general rule and clearly provided that any rights of way acquired in Oklahoma were easements.

28. Ch. 134, § 13, 32 Stat. 43, 47 states:

That the right to locate, construct, own, equip, operate, use, and maintain a railway . . . together with the right to take and condemn lands for right of way . . . and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person

through 22 defined the nature and extent of that power. Finally, section 23 placed the lands in Indian Territory and Oklahoma Territory outside the provisions of the Indian Railroad Right of Way Act, and made the Enid and Anadarko Act controlling over future grants to railroads on Indian reservations or allotments.<sup>29</sup>

Even though a railroad might have filed its maps of location and even though the Secretary of Interior might have approved those maps, it could not take the property sought, enter into possession of it, or commence construction unless payment was made for the damage which would occur due to the development of the railway.<sup>30</sup> Once damages were paid, the railroad received an easement in the land.<sup>31</sup> Under the provisions of the Enid and Anadarko Act, any railroad could acquire an easement in the land for its proposed right of way only after full compliance with sections 13 through 23 of the Act. However, there is no reversionary clause in these sections.

In support of its position regarding ownership of the Midland Valley Railroad right of way, the United States maintained that the language found in section 23 of "this Act" meant that the whole Act (i.e., sections 1 through 23 including the reversionary clause found in section 2) applied to the *Atterberry* right of way.<sup>32</sup> Although this interpretation would have clearly resolved the *Atterberry* question in favor of the United States, it is an incorrect and inconsistent interpretation of the Act. Sections 1 through 12 are specifically directed towards only the Enid and Anadarko Railway Company, an individual corporate entity.

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under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company . . . which shall comply with this Act.

*Id.*

29. Ch. 134, § 23, 32 Stat. 43, 50-51 provides:

That an Act entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes," approved March second, eighteen hundred and ninety-nine, so far as it applies to the Indian Territory and Oklahoma Territory, and all other Acts or parts of Acts inconsistent with this Act are hereby repealed . . . And provided further, That the provisions of this Act shall apply also to the Osages' Reservation and other Indian reservations and allotted Indian lands in the Territory of Oklahoma . . . .

*Id.* (emphasis added).

30. See 55 Interior Dec. 451 (Jan. 30, 1935), *on reh'g*, 55 Interior Dec. 456 (April 23, 1936). See also *supra* note 17 (discussion of United States v. Midland Valley R.R.).

31. See *Gutensohn v. McGuirt*, 194 Okla. 64, 147 P.2d 777 (1944) (reversionary interest vested in the heirs of the Creek freedman allottee). See generally *W. SEMPLE, supra* note 6, § 351 (title to abandoned rights of way in Indian Territory), § 721-22 (rights of way in Osage County), § 796-97 (rights of way for "wild" tribes). See also 5B G. THOMPSON, *supra* note 4, § 2716 (railroad land grants).

32. Plaintiff's Oral Arguments on Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

These sections authorized a specific railway line from a clearly defined point A to a point B. This is special legislation in favor of one railroad company.<sup>33</sup> Other early railroad lines built in Oklahoma and Indian Territories were authorized by comparable special congressional grants benefitting only that railway line.<sup>34</sup> At least one act contained language similar to the provisions found in sections 1 through 12 of the Enid and Anadarko Act.<sup>35</sup> In addition, many of the provisions found in sections 1 through 12 of the Enid and Anadarko Act are nearly exact duplicates of the provisions found in sections 13 through 23.<sup>36</sup> If Congress had intended for the reversionary clause in section 2 to apply to all future rights of way under the Act, then it would not have written sections 13 through 22 but would have simply added the provisions in section 23 to the existing provisions in sections 1 through 12.<sup>37</sup>

In *Atterberry*, the court reviewed the legislative history of the Enid and Anadarko Act and determined that this Act was two entirely separate enactments meshed together.<sup>38</sup> At the time the Enid and Anadarko Act was introduced into the Fifty-seventh Congress, the Enid and Anadarko Railway Company needed quick access through Indian Territory because it had "already constructed about 60 [sic] miles of its railway in Oklahoma Territory. . . ."<sup>39</sup> The bill introduced, H.R. 3104,<sup>40</sup> was the predecessor to sections 1 through 12 of the Enid and Anadarko Act and included the reversionary clause of section 2. This bill was solely for the benefit of the Enid and Anadarko Railway Company. When the Secretary of Interior reviewed H.R. 3104, he stated that he had no objections to it but that he would prefer to see general enabling legislation developed to govern future railroad right of way grants in Indian Territory.<sup>41</sup>

33. See W. SEMPLE, *supra* note 6, § 357.

34. *Id.* at §§ 342-50 (discussion of railroads built in Oklahoma prior to 1902).

35. Compare ch. 134, §§ 1-12, 32 Stat. 43, 43-47 (Enid and Anadarko Act) with Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368 (which granted an easement right of way to the Fort Smith and Western Railroad Company with a reversion to the Choctaw and Creek Nations).

36. Compare § 2 with § 13 (condemnation powers); § 3 with § 14 (right of way widths); § 3 with § 15 (compensation); §§ 4 and 5 with § 16 (rates); and § 11 with § 20 (mortgaging property) of 32 Stat. 43. See also Defendants' Oral Arguments on Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

37. *Id.*

38. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 6-10.

39. H.R. REP. NO. 257, 57th Cong., 1st Sess., 1 (1902).

40. H.R. 3104, 57th Cong., 1st Sess., (1901). See also — CONG. REC. 1201-02 (Feb. 1, 1902) (statement of Rep. Curtis explaining purpose of H.R. 3104), photocopy obtained from court file, *Atterberry*.

41. Letter from E. A. Hitchcock to Hon. Charles Curtis (Jan. 18, 1902), reprinted in H.R. REP. NO. 257, *supra* note 39, at 2.



During the three months in which the Enid and Anadarko Act was before the Fifty-seventh Congress, six additional bills concerning railroad rights of way through Indian Territory were introduced. Four bills were special legislation for specific railroads and contained reversionary clauses,<sup>42</sup> while two were proposals for general legislation and lacked a reversionary provision.<sup>43</sup> These latter two bills<sup>44</sup> were a basis for sections 13 through 23 of the Enid and Anadarko Act when H.R. 3104 was amended by the Senate.<sup>45</sup> In the Joint Conference Committee Report, H.R. 3104 was further amended to include "the Osage Reservation and other Indian reservations and allotted Indian lands in the Territory of Oklahoma. . . ."<sup>46</sup> Thus, the Enid and Anadarko Act was an ad hoc measure designed to provide immediate relief for the Enid and Anadarko Railway Company as well as to create a skeletal procedure so that Congress would not be inundated by further special legislation in Indian Territory or upon Indian lands, including the Osage Reservation, in Oklahoma Territory.

The Enid and Anadarko Act is best understood as a hybrid of two distinctly different types of congressional legislation. The first half of the Act is a grant in favor of an individual corporate entity, the Enid and Anadarko Railway Company. The second half of the Act is non-specific enabling legislation which created a procedure for the future. As enabling legislation, the nuts and bolts of these enactments would

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[I]t is very much better for all concerned that the railroad rights of way in Indian Territory should be obtained and held under general legislation of like application to all instances of a like character; but if it is anticipated that the difficulty and delay incident to the enactment of proper general legislation will be materially greater than those incident to special acts . . . the construction of . . . railroads . . . will . . . be facilitated by . . . resorting to special legislation . . . . If special legislation is to be had, I find no serious objection to the bill . . . .

*Id.*

42. H.R. 11003, 57th Cong., 1st Sess. § 2 (1902) (for Saint Louis and San Francisco R.R.); H.R. 11098, 57th Cong., 1st Sess. § 2 (1902) (for Missouri, Kansas and Oklahoma R.R. through the Osage Reservation); S. 3601, 57th Cong., 1st Sess. § 2 (1902) (similar to H.R. 11003); S. 3741, 57th Cong., 1st Sess. § 2 (1902) (similar to H.R. 11098). Apparently these proposed bills were abandoned upon the passage of the Enid and Anadarko Act. See generally W. SEMPLE, *supra* note 6, §§ 346-350, for a discussion of the four railroad lines authorized by special legislation prior to 1902.

43. H.R. 10065, 57th Cong., 1st Sess. (1902); S. 3745, 57th Cong., 1st Sess. (1902) (these bills were concerned only with rights of way in Indian Territory).

44. Compare H.R. 10065 and S. 3745, *supra* note 43, with Act of Feb. 28, 1902, ch. 134, §§ 13-22, 32 Stat. 43, 47-50. See *supra* notes 26-29 and accompanying text.

45. — CONG. REC. 1751-52 (Feb. 14, 1902) (statement of Sen. Cockrell), photocopy obtained from court file, *Atterberry*.

46. — CONG. REC. 1900 (Feb. 19, 1902) (statement of Sen. Rawlins), photocopy obtained from court file, *Atterberry*.

be more fully defined at some appropriate time.<sup>47</sup> Therefore, the Enid and Anadarko Act may be understood only in light of subsequent legislation.

### III. OTHER PERTINENT LEGISLATION

Congressional legislation took a vacillating path in defining the scope of the various land grants for railroad rights of way. Federal grants of public lands have been made to railroads in three ways: grants of right of way easements; direct grants of land; and grants to a state as trustee for the use and benefit of a railroad company.<sup>48</sup> Generally, congressional legislation prior to 1875 involved a fee simple grant to the railroad, while post 1875 legislation limited the railroads to acquiring only easement rights of way.<sup>49</sup> Thus, in order to understand the Enid and Anadarko Act and its proper position in the entire body of laws governing Indians in Oklahoma, it is necessary to compare the Act with other legislation, including Oklahoma statutory provisions, general federal railroad legislation and federal enactments specific to Oklahoma Indians.

#### A. *Oklahoma Law*

The State of Oklahoma was formed by combining the lands known as the Indian Territory with the Territory of Oklahoma.<sup>50</sup> Indian Territory was the land of the Five Civilized Tribes.<sup>51</sup> Oklahoma Territory included the Osage Reservation, the lands of some twenty-three "wild" tribes,<sup>52</sup> and certain non-Indian or "unassigned" public lands.<sup>53</sup> Oklahoma Territory was formally organized under the Organic Act<sup>54</sup> in 1890. In addition to establishing the mechanics for the

47. Such an interpretation would be consistent with a reading of § 21 (Congress can amend "at any time") and § 22 (a general extension of the privileges found in the Enid and Anadarko Act to other railroad companies already in existence in Oklahoma in 1902). See Act of Feb. 28, 1902, ch. 134, § 21-22, 32 Stat. 43, 50.

48. See 5B G. THOMPSON, *supra* note 4, § 2716, at 344.

49. See generally 2 G. THOMPSON, *supra* note 4, § 381. But see *Missouri, K. & T. Ry. v. Roberts*, 152 U.S. 114 (1894) (Act of July 26, 1866, ch. 270, 14 Stat. 289 allowed fee simple purchase of railroad right of way through the former Osage tribal lands in Kansas).

50. See Act of June 16, 1906, ch. 3335, 34 Stat. 267. See also HISTORICAL ATLAS, *supra* note 3, Map 57 (showing counties of Oklahoma Territory and recording districts of Indian Territory).

51. These are the Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes of Indians. See HISTORICAL ATLAS, *supra* note 3, Map 23.

52. See HISTORICAL ATLAS, *supra* note 3, Maps 54 and 55. See generally W. SEMPLE, *supra* note 6, §§ 735-752 (General Allotment Act Indian Tribes).

53. See HISTORICAL ATLAS, *supra* note 3, Maps 33, 34, 45 and 54.

54. Act of May 2, 1890, ch. 182, 26 Stat. 81.

operation of the territorial government, the Organic Act limited railroads to the acquisition of easements for rights of way and for stations.<sup>55</sup> In a separate provision, the Organic Act also provided that title to vacated public highways should return to the "owner of the tract of which it formed a part of the original survey."<sup>56</sup> Although the reversionary interest in public highways clearly vests in the abutting landowner by this enactment, the Organic Act is silent about the ownership of the reversionary interest in railroad rights of way.

The next significant piece of legislation was the Oklahoma Enabling Act<sup>57</sup> which applies to all of present day Oklahoma. While this enactment did not specifically deal with railroads, it did contain many provisions regarding the rights of Indians.<sup>58</sup> It specifically provided that representatives from the Osage Tribe of Indians were to participate in the Oklahoma Constitutional Convention.<sup>59</sup> Additionally, the laws of Oklahoma Territory, rather than those of Indian Territory, were to extend over and apply in the proposed state.<sup>60</sup>

The Oklahoma Constitution, passed in 1907, was the ultimate agenda behind the Oklahoma Enabling Act.<sup>61</sup> The Constitution contained a provision regarding the reversionary interest in railroad rights of way easements. "Railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways."<sup>62</sup> This provision clarified the Organic Act, which stated that title to vacated highways returns to the abutting landowners.<sup>63</sup> Therefore, state law unequivocally established that the owner of the reversionary interest in a railroad right of way is the owner of the land from which the easement was carved and not the remote grantor of the right

55. *Id.* The Organic Act states in part:

No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provisions of this act . . . invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this act, with any land or right to any land in either of said Territories . . . .

*Id.* at § 18, 26 Stat. 81, 91.

56. *Id.* at § 23, 26 Stat. 81, 92.

57. Act of June 16, 1906, ch. 3335, 34 Stat. 267.

58. *See id.* at § 1, 34 Stat. 267, 267. The rights of Indians were to be unimpaired. *Id.*

59. *Id.* at § 2, 34 Stat. 267, 268. *See also id.* at § 21, 34 Stat. 267, 277 (The Osage Reservation was to remain intact and become one county, which explains Osage County's status as the state's largest county).

60. *Id.* at § 13, 34 Stat. 268, 275.

61. *Id.* at § 1, 34 Stat. 267, 267-68.

62. OKLA. CONST. art. IX, § 6.

63. *See supra* note 56 and accompanying text.

of way. Since the general rule is that allotted (as opposed to reservation) Indians are subject to state law unless there is a specific federal law to the contrary<sup>64</sup> and since the Osage Tribe participated in the Oklahoma Constitutional Convention, it should be estopped from claiming an exemption from state law unless there is an overriding federal provision.

### B. *Federal Enactments*

Federal law as it pertains to railroad rights of way through Oklahoma Indian lands is, at best, circuitous, as shown by Table 1 in the Appendix. In 1875, Congress passed the General Railroad Right of Way Act<sup>65</sup> which governed all railroads on public lands except for Indian reservations.<sup>66</sup> This Act limited railroads to acquisition of rights of way in easement rather than in fee simple.<sup>67</sup> The 1899 Indian Railroad Right of Way Act<sup>68</sup> contained similar provisions for railroad rights of way through Indian lands.<sup>69</sup> Neither the General Railroad Right of Way Act nor the Indian Railroad Right of Way Act contained express provisions regarding ownership of abandoned rights of way. In 1902, the Enid and Anadarko Act was promulgated and section 23 specifically excluded all Oklahoma Indian lands from the Indian Railroad

64. *Cf.* United States v. Mason, 412 U.S. 391 (1973) (Oklahoma estate taxes must be paid upon the estates of restricted Osage Indians); United States v. LaMotte, 67 F.2d 788 (10th Cir. 1933) (holding that the Osage Allotment Act should be strictly construed. Therefore, land owned by an unrestricted Osage Indian was freely alienable prior to the passage of Act of Mar. 2, 1929, ch. 493, 45 Stat. 1478 [which restricted alienability of land of unrestricted Osage Indians]); *In re Mosier's Estate*, 199 Okla. 228, 235 P. 199 (1925) (the Osage Allotment Act contained *express provisions* concerning intestate succession which created an exception to Oklahoma laws of descent and distribution).

65. Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 (current version at 43 U.S.C. §§ 934-938 (1982)). Compare § 1, 18 Stat. 482, 482 with Act of Feb. 28, 1902, ch. 134, § 13, 32 Stat. 43, 47 (Enid and Anadarko Act). See also quotation *supra* note 28.

66. Ch. 152, § 5, 18 Stat. 482, 483. The District of Columbia and military reservations are also excluded from this Act. *Id.*

67. Ch. 152, §§ 1-4, 18 Stat. 482, 482-83. The key case in interpreting the nature of the rights of way obtained under the General Railroad Right of Way Act is *Great Northern Ry. v. United States*, 315 U.S. 262 (1942). In *Great Northern* the court said that the General Railroad Right of Way Act only granted easement rights of way and not fee simple title to the railroad. 315 U.S. at 271. The issue in dispute was the ownership of mineral rights underlying the right of way. The Supreme Court would only quiet title to the minerals in favor of the United States, as original grantor, where the United States was still the owner of the land abutting the right of way. 315 U.S. at 279-80. Hence, the court held that reversionary interest in rights of way governed by the General Railroad Right of Way Act vested in the owner of the land from which the right of way was carved.

68. Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (current version at 25 U.S.C. §§ 312-318 (1982)).

69. *Id.* ch. 374, §§ 1-4, 30 Stat. 990, 990-91. Compare 25 U.S.C. §§ 312-318 (Indian Railroad Right of Way Act) with 43 U.S.C. §§ 934-938 (General Railroad Right of Way Act).

Right of Way Act.<sup>70</sup> As discussed above, sections 13 through 23 of the Enid and Anadarko Act created a void with regard to the ownership of reversionary interests in the event of abandonment of the railroad right of way.<sup>71</sup>

Congress was partially aware of this legislative void as seen by the flurry of enactments passed in the spring of 1906. The first enactment, found in section 14 of the Five Civilized Tribes Act,<sup>72</sup> amended the provisions of the Enid and Anadarko Act by clarifying that the underlying interest in the right of way vested in the estate from which it was carved. There were two exceptions to this provision. The railroad had until 1908 to purchase a fee interest in preexisting rights of way. If the land was located within a municipality then the reversionary interest was vested in that municipality.<sup>73</sup>

The Five Civilized Tribes Act provided that easements acquired under the Enid and Anadarko Act could be converted to a fee simple interest upon payment of additional monies to the appropriate tribe. If, however, the railroad chose not to acquire a fee simple easement, the possibility of reverter in the land vested in the "owner of the legal subdivision"<sup>74</sup> from which the right of way was taken. The payment required by the Five Civilized Tribes Act was for the servient estate so that the entire fee estate in land could be acquired by the railroad. Failure to pay this additional amount meant that the servient estate vested in the abutting landowner.<sup>75</sup> It is clear that the payment contemplated by the Five Civilized Tribes Act was for a purpose entirely

70. Act of Feb. 28, 1902, ch. 134, § 23, 32 Stat. 43, 50. Originally, the right of way width provisions in the Indian Railroad Right of Way Act were applied to railroads in Indian Territory. Cf. Act of Mar. 2, 1899, ch. 374, § 2, 30 Stat. 990, 991 (current version at 25 U.S.C. §§ 312-314 (1982)).

71. Act of Feb. 28, 1902, ch. 134, §§ 13-23, 32 Stat. 43, 47-51. See *supra* notes 32-47 and accompanying text.

72. Act of Apr. 26, 1906, ch. 1876, § 14, 34 Stat. 137, 142.

73. Ch. 1876, § 14, 34 Stat. at 142 reads in part:

That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment . . . That this section shall not apply to land reserved from allotment because of the right of any railroad . . . company therein in the nature of an easement for right of way . . . or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad . . . but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

*Id.* (emphasis added).

74. *Id.*

75. See generally 2 G. THOMPSON, *supra* note 4, § 381 (discussing railroad, municipal and state rights of way).

distinct from the payment required by section 15 of the Enid and Anadarko Act,<sup>76</sup> and that the first payment was in addition to and independent of the latter payment.<sup>77</sup>

The Five Civilized Tribes Act was intended to equalize the major differences between the Indian Territory and Oklahoma Territory so that the State of Oklahoma could be formed.<sup>78</sup> However, Oklahoma Territory lands, including Osage tribal lands, were outside the provisions of the Five Civilized Tribes Act.<sup>79</sup> Osage lands were governed by the Osage Allotment Act,<sup>80</sup> which was mainly concerned with retention of mineral interests for the benefit of the tribe as a whole.<sup>81</sup> The secondary concern of the Osage Allotment Act was the manner in which the tribal lands were to be equally divided among the individual members of the tribe.<sup>82</sup> The Act contained detailed provisions for the method and selection of the individual allotments.<sup>83</sup> The Osage was the only Oklahoma tribe in which *all* of the tribal lands were allotted solely to tribal members.<sup>84</sup> Unique among all the Oklahoma Indian Tribes was Osage tribal retention of all the oil, gas and mineral rights for a theoretical period of twenty-five years.<sup>85</sup>

Section 11 contained provisions regarding railroad rights of way:  
 SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation . . . are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit . . . *Provided*, That such railroad companies

76. Act of Feb. 28, 1902, ch. 134, § 15, 32 Stat. 43, 47-48.

77. *See generally* 55 Interior Dec. 451 (Jan. 30, 1935), *on reh'g*, 55, Interior Dec. 456 (Apr. 23, 1936) (discussing the Enid and Anadarko Act as amended by § 14 of the Five Civilized Tribes Act).

78. *Cf.* Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137. The Five Civilized Tribes Act was intended to be the controlling legislation for Indian Territory, as indicated by its very title.

79. Today, Osage County is commonly considered to be part of eastern Oklahoma because it is east of Interstate 35. Eastern Oklahoma is generally thought to follow the boundaries of the former Indian Territory. However, the Osage Reservation was part of Oklahoma Territory. *See* HISTORICAL ATLAS, *supra* note 3, Maps 55-57.

80. Act of June 28, 1906, ch. 3572, 34 Stat. 539.

81. *Id.* at §§ 3, 11, 34 Stat. 539, 543-45.

82. *Id.* at §§ 1-2, 34 Stat. 539, 539-43.

83. *Id.*

84. *See* L. MILLS, OKLAHOMA INDIAN LAND LAWS § 392, at 376 (1924). For all other Oklahoma Indian tribes, surplus lands were made available for purchase by non-Indians rather than being equally divided among tribal members.

85. *Cf.* L. MILLS, *supra* note 84, § 404; W. SEMPLE, *supra* note 6, § 643; and F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 788-97 (R. Strickland ed. 1982) for discussions of the Osage mineral rights. *See also* Pub. L. No. 95-496, §§ 4, 5, 8, Oct. 21, 1978, 92 Stat. 1660 (extending Osage tribal interest in mineral rights). Recently, the Court of Appeals for the Tenth Circuit held that this mineral retention includes limestone. *See* Millsap v. Andrus, 717 F.2d 1326, 1329 (10th Cir. 1983).

shall not take or acquire hereby any right of title to any oil, gas, or other mineral in any of said lands.<sup>86</sup>

A definitive provision governing the disposition of abandoned railroad rights of way is conspicuously absent from the Osage Allotment Act. The above language in Section 11 is ambiguous: it could mean that the Osage Tribe retained the reversionary interest for the Tribe as a whole; or that the railroad received a fee simple grant except for minerals; or that the original Osage Allotments were subject to the preexisting rights of way. This ambiguity is especially confusing because the Osage Allotment Act did contain several very specific provisions regarding the allotment procedures, alienability, and retention of oil and gas mineral rights.<sup>87</sup>

The ambiguity regarding railroad rights of way is even more puzzling when the legislative history of the Osage Allotment Act is examined. An earlier version (H.R. 17478) of the Osage Allotment Act was introduced in 1904.<sup>88</sup> The committee reported:

The object of this bill is to provide for an equal division of the lands and moneys of the Osage tribe of Indians . . . . After each member is given a homestead, it provides that the remaining lands shall be divided as equally as practicable among the members of said tribe, *giving to each as nearly as possible the same number of acres of farming, mineral, and grazing lands.*<sup>89</sup>

The committee report also stated that H. R. 17478 would be submitted to the Osage Tribe as a whole "for ratification before the same should be of full force and effect"<sup>90</sup> since the Osages owned title to their reservation by a government patent.

The following year, H.R. 15333<sup>91</sup> was introduced into Congress. This bill "was submitted to the Osages at the last general election held by them, and was adopted by all factions of the tribe."<sup>92</sup> This bill did contain a reversionary clause,<sup>93</sup> although it was not as detailed as sec-

86. Act of June 28, 1906, ch. 3572, § 11, 34 Stat. 539, 545 [emphasis in original].

87. *Id.* at §§ 1-3, 34 Stat. 539, 539-44.

88. H.R. REP. NO. 4622, 58th Cong., 3rd Sess. (1905) (discussing H.R. 17478, 58th Cong.,—Sess. (1904)).

89. *Id.* at 1 (emphasis added).

90. *Id.* at 3. The Osage Tribe was relocated from Kansas to Oklahoma in the late nineteenth century on land that had once been part of the Cherokee Outlet and which was purchased from the Cherokee Nation. See Act of June 5, 1872, ch. 310, 17 Stat. 228. Relocation served two purposes: (1) it opened up the former Osage lands in Kansas for white settlement and (2) it was another example of a Congressional attempt to consolidate the various Indian tribes into one general and more limited area. See W. SEMPLE, *supra* note 6, § 638.

91. H.R. 15333, 59th Cong., 1st Sess. (1906).

92. H.R. REP. NO. 3219, 59th Cong., 1st Sess., at 1 (1906).

93. H.R. 15333, 59th Cong., 1st Sess. § 14 (1906). This states:

tion 14 of the Five Civilized Tribes Act discussed above.<sup>94</sup> The Committee on Indian Affairs, without further explanation, recommended that the reversionary provisions be deleted and the current language of the Osage Allotment Act be substituted.<sup>95</sup> In reviewing the amendments to H.R. 15333, C.F. Larrabee, Acting Commissioner of Indian Affairs, approved this revision stating "Section 13 is not identical with section 14 of the original bill, relating to railway companies, but the Office sees no objection to the section as it now stands."<sup>96</sup> Perhaps the Interior Department's decision to acquiesce in the revised language regarding railroad rights of way is best understood from a "squeaky wheel gets oil" perspective. The letters on file concerning the Osage Allotment Act focused on: the extension of oil and gas leases and the preservation of mineral rights;<sup>97</sup> the situs where the original Osage patents should be filed;<sup>98</sup> the preservation of lands and improvements used by a white trader;<sup>99</sup> tribal enrollment and a time frame for full United States citizenship for the Osages.<sup>100</sup> Additionally, there were no railroads traversing Osage County prior to the construction of the Midland Valley line in 1905.<sup>101</sup> Unlike the Five Civilized Tribes, who had coped with railroad abandonments, bankruptcies and mergers,<sup>102</sup> the Osages had not yet dealt with these types of problems since relocation to Oklahoma.

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SEC. 14. That all lands taken by any railroad company for right of way or other railroad purposes in the Osage Indian Reservation . . . shall be used for right of way or other railroad purposes only; and if said lands are used for any purpose other than railroad purposes, said lands so used shall revert to the Osage Indian tribe or the individual members of said tribe, according to the roll herein provided, or to their heirs, as herein provided.

*Id.* (emphasis added).

94. See *supra* notes 72-78 and accompanying text.

95. H.R. REP. NO. 3219, 59th Cong., 1st Sess., at 5 (1906).

96. Letter from C.F. Larrabee to the Secretary of the Interior (May 31, 1906), *reprinted in* S. REP. NO. 4210, 59th Cong., 1st Sess., at 6 (1906).

97. *Cf.* Letter from Henry Rogers to the Hon. Arthur L. Bates (Feb. 27, 1906) (accompanying a petition opposing oil and gas lease provisions in H.R. 15333 and expressing fear that the bill's current provisions would mean that the area would be controlled by Standard Oil Company); *with* Letter from C.F. Larrabee, Acting Commissioner of Indian Affairs, to the Secretary of Interior (June 16, 1906) (expressing concern that the provisions in H.R. 15333 left "too much of a loop-hole for graft" *quoting* Letter from R.D. Hood to C.F. Larrabee (June 5, 1906)).

98. See Letter from H.P. White to Hon. James S. Sherman (Mar. 22, 1906) (Act needs to specify that the allotment deeds will be recorded in Pawhuska [now Osage County, Oklahoma]).

99. See Letters from C.F. Larrabee, Acting Commissioner of Indian Affairs, to the Secretary of Interior (Mar. 13, 1906 and June 28, 1906) (ten acres rather than forty should be reserved for the Florer property).

100. See Letter from F.E. Leupp, Commissioner of Indian Affairs, to the Secretary of Interior (Mar. 10, 1906) (limit the reopening of tribal rolls for fraud only upon newly discovered evidence; full United States citizenship should be granted at the end of the twenty-five year trust period).

101. See HISTORICAL ATLAS, *supra* note 3, Map 53.

102. *Cf.* Miner, *supra* note 6.



The defendants in *Atterberry* maintained that the Osage Allotment Act is primarily concerned with reservation of the mineral rights underlying railroad easements rather than disposition of the right of way upon abandonment.<sup>103</sup> This lack of a reversionary provision is a rather glaring omission in controlling federal legislation, especially when compared to the clear statement of congressional intent regarding ownership of reversionary interest for railroad rights of way in the Five Civilized Tribes Act.<sup>104</sup>

On June 26, 1906, two days before the Osage Allotment Act was passed, Congress passed the Oklahoma and Arizona Railroad Act<sup>105</sup> which placed railroad rights of way on public lands in these two territories under the provisions of the General Railroad Right of Way Act.<sup>106</sup> By placing public lands in Oklahoma under the General Railroad Right of Way Act, Congress partially dissolved the legislative void inherently created by sections 13 through 23 of the Enid and Anadarko Act. The legislative history of the Oklahoma and Arizona Railroad Act<sup>107</sup> reveals a concern about protecting existing rights of way so that the railroads would not be forced to pay twice for the same easement.<sup>108</sup> This 1906 Act meant that upon abandonment, the reversionary interest in the railroad right of way reverts to the abutting landowners on non-Indian lands.<sup>109</sup> Still, Oklahoma Territory Indian lands remained within a legislative void.

In 1908, while in the process of amending the Five Civilized Tribes Act, Congress partially amended the Enid and Anadarko Act.<sup>110</sup> Although this 1908 Act was primarily concerned with revisions to the restrictions on alienation of the Five Civilized Tribes allotments in the former Indian Territory,<sup>111</sup> the Act provides that:

No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen through twenty-three inclusive, of . . . [the Enid and Anadarko

103. See Defendants' Motion for Summary Judgment at 11-12, *Atterberry*. See also Act of June 28, 1906, ch. 3572, 34 Stat. 539.

104. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

105. Act of June 26, 1906, ch. 3548, 34 Stat. 481, (repealed as to lands in the National Forest System by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976)).

106. Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 (current version at 43 U.S.C. §§ 934-938 (1982)).

107. S. REP. NO. 1417, 59th Cong., 1st Sess. (1906); H.R. REP. NO. 4777, 59th Cong., 1st Sess. (1906).

108. S. REP. NO. 1417, 59th Cong., 1st Sess. at 1-2 (1906).

109. See *supra* note 67 (discussion of *Great Northern*).

110. Act of May 27, 1908, ch. 199, 35 Stat. 312.

111. *Id.*

Act] are hereby continued in force in the State of Oklahoma.<sup>112</sup>

The *Atterberry* court stated that this 1908 Act "did not apply to the Osage Tribe of Indians but the language of the Act is significant in that only 'section thirteen through twenty-three inclusive' of the Enid and Anadarko Act are 'continued in force in the State of Oklahoma'."<sup>113</sup> The court was apparently concerned about applying an amendment occurring within revisions to the Five Civilized Tribes Allotment legislation to the Enid and Anadarko Act. Nonetheless, the 1908 Act is a further example of the ad hoc nature of congressional enactments pertaining to Oklahoma Indians. There are very specific legislative mandates for the Five Civilized Tribes of the former Indian Territory but inadequate provisions for the Indian tribes, including the Osages, of the former Territory of Oklahoma.

Finally, congressional policy for its own lands [i.e., public lands] was clearly established by the Act of March 8, 1922.<sup>114</sup> This Act provides that title in an abandoned or forfeited railroad right of way reverts to the current owner of the subdivision from which the right of way was created.<sup>115</sup>

Thus, a legislative review indicates a hodge-podge of ad hoc measures designed to meet specific situations often with little recognition of the long-range consequences created by incremental change.<sup>116</sup> How-

112. *Id.* at § 1, 35 Stat. 312, 312.

113. *United States v. Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 11 (N.D. Okla. June 25, 1984) (Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment).

114. Act of Mar. 8, 1922, ch. 94, 42 Stat. 414 (codified at 43 U.S.C. § 912 (1982)).

115. *Id.* This statute reads in part:

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 purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company . . . then . . . all right, title, interest, and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, 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 of nature whatsoever . . . .

*Id.* This language is very similar to the provisions in § 14 of the Five Civilized Tribes Act, ch. 1876, 34 Stat. 137, 142; *see supra* note 73. *Cf.* *Noble v. Oklahoma City*, 297 U.S. 481 (1936) (because of specific restrictions in conveyance, right of way reverted to remote grantor rather than to the municipality) *with* *Wyoming v. Andrus*, 602 F.2d 1379 (10th Cir. 1979) (title to right of way reverted to the current owner of estate from which it was created).

116. *Cf.* J. RARICK, *CASES AND MATERIALS ON PROBLEMS IN LANDS ALLOTTED TO AMERICAN INDIANS* 423-70 (rev. 1st perm. ed. 1982) (a comprehensive analysis of all the legislation and case law affecting Osage titles to real property).

ever, four patterns of congressional intent emerge from the legislation since 1875 involving railroads in Oklahoma. First, the rights of way were easements and not fee simple grants. Second, the right of eminent domain was reserved for the railroad. Third, existing rights of way were to be preserved during the allotment process. Finally, upon abandonment of the right of way, the easement attaches to the adjoining lands, except for Indian lands in the former Oklahoma Territory. Moreover, it is clear that when the Midland Valley Railroad acquired its interest in the right of way, it was limited to an easement which could not be converted to a fee simple interest because of the language of sections 13 through 23 of the Enid and Anadarko Act.<sup>117</sup> Oklahoma statutes clearly provided that abandoned railroad rights of way revert to the abutting landowners.<sup>118</sup> The Five Civilized Tribes Act made very explicit provisions regarding railway line abandonments in Indian Territory.<sup>119</sup> The Oklahoma and Arizona Railroad Act brought non-Indian lands in Oklahoma Territory back within the general rule regarding right of way abandonments.<sup>120</sup> However, on Indian lands in Oklahoma Territory, especially on the former Osage reservation, there is a legislative gap. Because the unambiguous provisions regarding reversionary interests in railroad rights of way found in the Five Civilized Tribes Act are lacking in the Osage Allotment Act,<sup>121</sup> an examination of the original Osage patents is required to determine what was actually allotted and whether the Osage Tribe specifically retained a reversionary interest in the right of way.<sup>122</sup>

#### IV. THE ORIGINAL OSAGE PATENTS

In dealing with the status of rights of way, a major question is whether an allotment of lands by the Indian tribe has finally and completely ended the interest of the tribe therein, or whether the tribe retains some equitable interest in the land conveyed. Prior to the passage of the Osage Allotment Act,<sup>123</sup> the Midland Valley Railroad acquired

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117. Act of Feb. 28, 1902, ch. 134, §§ 13-23, 32 Stat. 43, 47-50. *See supra* notes 33-47 and accompanying text.

118. *See supra* notes 54-64 and accompanying text.

119. *See supra* notes 72-77 and accompanying text.

120. *See supra* notes 105-09 and accompanying text.

121. *See supra* notes 80-104 and accompanying text.

122. *See Adams v. Osage Tribe of Indians*, 59 F.2d 653 (10th Cir. 1932), *cert. denied*, 287 U.S. 652 (1932) (the deed contained an expressed reservation of mineral rights in favor of the Osage Tribes, so the plain language of the deed controls the conveyance).

123. Act of June 28, 1906, ch. 3572, § 2, 34 Stat. 539, 540 (1906).

an easement through the former Osage Reservation.<sup>124</sup> At the time of allotment, the railroad had a vested interest in the easement. The congressional purpose for allotment was to equally divide *all* the land among the Osage Tribe members.<sup>125</sup> Similar to the Five Civilized Tribes,<sup>126</sup> the Osage Indians held more than the ordinary tribal title to their tribal lands as evidenced by the fact that during the allotment of the lands the Tribal Chief and the Secretary of the Interior of the United States executed the patents.<sup>127</sup>

The quality of the estate given to each allottee was to be fee simple absolute with a reservation of mineral interest in the tribal community for 25 years, as well as some restrictions on alienability and taxation. Theoretically, these severed mineral interests were to rejoin the land and give the allottee the absolute fee in the minerals as well as the surface.<sup>128</sup> Upon selection and allotment of all the land, each allottee received an allotment deed for homestead and an allotment deed for surplus lands.

Allotment deeds are government patents which provide root of title from the sovereign.<sup>129</sup> A government patent "form[s] the first link in any complete chain of title—to *any* tract of land, located *anywhere* in the United States."<sup>130</sup> Moreover, a government patent is strictly construed:

[A] patent is in the nature of a quitclaim releasing whatever title the United States might otherwise assert and *is not subject to collateral attack*. A title thus confirmed is held to be a good title and conclusive as to the existence, validity, and confirmation of the Grant as *against the United States* and all persons claiming under it by subse-

124. See *United States v. Midland Valley R.R.*, No. 353 Civil, slip op. at 4 (N.D. Okla. 1942) (the court found that construction started on or about May 5, 1905). See also Petitioner's Complaint at 1, *Atterberry*.

125. See H.R. REP. NO. 3219, 59th Cong., 1st Sess. (1906), which stated that the purpose behind H. R. 15333 (the Osage Allotment Act) was "for equally dividing the lands among the members [of the Osage Tribe] who are entitled to enrollment, *giving each his fair share in acres as nearly as possible*." *Id.* at 1 (emphasis added).

126. Cf. Act of Mar. 1, 1901, ch. 676, § 23, 31 Stat. 861, 867-68 (the principal chief of the new Creek Tribe will issue patents using blank forms supplied by the Secretary of the Interior) with Five Civilized Tribes Act, Act of Apr. 26, 1906, ch. 1876, § 6, 34 Stat. 137, 139 (1906) (a principal chief who fails to sign "any instrument!" may be removed for cause).

127. Osage Allotment Act, ch. 3572, § 8, 34 Stat. 539, 545 (1906). See *infra* note 133.

128. The minerals have remained severed from the surface and continued to be held by the Osage Tribe in its entirety. See Pub. L. No. 95-496, §§ 4-5, 92 Stat. 1660, 1661 (1978).

129. See 2 R. PATTON & C. PATTON, PATTON ON LAND TITLES § 281, at 2-6 (1957). See also 5B G. THOMPSON, *supra* note 4, § 2725 (nature of government patents).

130. 2 R. PATTON & C. PATTON, *supra* note 129, § 281, at 6 (emphasis in original).

quent grant.<sup>131</sup>

An examination of the Osage allotment deeds that contain a reservation for the railroad right of way reveals that the deeds were jointly issued by the Secretary of the Interior and the Principal Chief of the Osage Tribe as required by section 8 of the Osage Allotment Act.<sup>132</sup> These deeds<sup>133</sup> contain three specific reservations:

1. Each was issued subject to the existing railroad easement ("less 'X' acres for right of way of Midland Valley Railroad") although no adjustment was made in the 160 acre allotments to accommodate the allottee for the acreage lost due to the easement.<sup>134</sup>

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131. *Id.* at § 285, at 10-11 (emphasis added). THOMPSON ON REAL PROPERTY is in accord with PATTON ON TITLES regarding government patents.

A federal patent to lands is the equivalent of a quitclaim deed . . . It is the last official act of the government in its procedure to divest itself of public lands, and is impeachable only for fraud or mistake. The federal patent is said to be the highest and best deed known to the law.

5B G. THOMPSON, *supra* note 4, at 383.

132. Act of June 28, 1906, ch. 3572, 34 Stat. 539, 545.

133. For illustrative purpose, *see* allotment deed dated Oct. 9, 1908 and approved on Feb. 8, 1909, from the United States and the Osage Tribe to Hum-pah-to-kah or Tresa Whitehorn, an Osage Indian allottee (also found in the Records of the County Clerk of Osage County at Book 2, Page 176) [hereinafter cited as Representative Allotment Deed]. In pertinent part, the deed provides:

NOW, THEREFORE, I, the undersigned, Principal Chief of the Osage Tribe of Indians, by virtue of the power and authority vested in me by the said Act of Congress have granted and conveyed, and by these presents do grant and convey, unto the said Hum-pah-to-kah or Tresa Whitehorn *all right, title, and interest of the following United States and the Osage Tribe of Indians in and to the following described lands situated on the Osage Reservation in Oklahoma to-wit:*

. . . [description of land] *less 2.69 acres for right of way of the Midland Valley railroad, [description of land] less 4.64 acres for right of way of the Midland Valley railroad in [Section, Township and Range] . . . East of the Meridian, containing 152.67 acres, more or less, according to the United States survey thereof, to have and to hold the same unto the said [allottee's name], his heirs, executors, administrators, and assigns, forever; subject, however, to all the conditions, limitations, and provisions of said Act of Congress, one of which is said that the homestead selection shall be inalienable and non-taxable until otherwise provided by Act of Congress, and all mineral in said land is reserved to the Osage Tribe of Indians for the period of twenty-five years from and after the eighth day of April, 1906 . . . .*

*Id.* (emphasis added).

134. *Id.* *See also* Affidavit [by Bruce Gambill] in Support of Motion for Summary Judgment, *Atterberry* (when "railroad easements are reflected in . . . [the Osage] acreage allotments . . . no compensating acreage was deeded to said allottees."). *Cf.* H.R. REP. NO. 217, 67th Cong., 1st Sess. (1921). In describing the purpose of H.R. 244 (Act of Mar. 8, 1922), the report stated:

[I]n making conveyances of subdivisions [of public lands] traversed by such [railroad] rights of way the United States issues patents for the full area of the tracts or legal subdivisions, making no diminution by reason of the prior grant of the right of way.

*It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision has been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent.*

*Id.* at 2 (emphasis added). *See also supra* notes 114-15 and accompanying text.

2. Each contained expressed limitations concerning the inalienability and non-taxability of the land "until otherwise provided by Act of Congress,"<sup>135</sup> and,
3. *All* mineral rights were "reserved to the Osage Tribe".<sup>136</sup>

By virtue of the clear language in the allotment deeds, the Osage allottees acquired fee simple title to the individually allotted lands, except for the minerals. The United States and the Osage Tribe, as a whole, were completely divested of any title to the surface.<sup>137</sup> There was no *express* reservation of the fee title to the railroad right of way by the Osage Tribe or the United States government on behalf of the Tribe. Thus, the right of way should revert to the abutting landowners, unless the described parcel of land, which conveyed the land "less 'X' acres for right of way for the Midland Valley Railroad Company" in the allotment deeds, served as an *implied* reservation rather than a limitation on the grantor's liability to the estate transferred to the allottee.<sup>138</sup> Therefore, federal and state common law must be used to determine the nature of the grant conveyed.

#### V. COMMON LAW ANALYSIS

The common law rule on easements is that an abandoned or vacated right of way reverts to the abutting landowners and not to the original grantor: "Lands abandoned as [railroad] right of way constitute private land of the abutting owners freed from right of way easement whenever the right of way was an easement only."<sup>139</sup> This is because the easement is a "burden or encumbrance on the servient estate. So, when the easement ends, the freehold ceases to be burdened and remains as before except that the encumbrance is no longer on its back."<sup>140</sup> Unless there is an expressed reversionary interest in the deed in favor of the original grantor, the common law assumes that a conveyance of the servient estate is also a conveyance of the reversionary

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135. See Representative Allotment Deed, *supra* note 133.

136. *Id.*

137. See *Jennings v. Amerada Petroleum Corp.*, 179 Okla. 561, 66 P.2d 1069 (1937) where the Oklahoma Supreme Court held that the meaning of "less the right of way" and "except [the] right of way" was unambiguous. By using this language, the grantor conveyed his entire interest in the servient estate and at the same time expressly recognized and acknowledged the easement. Thus, the reversionary interest in the right of way was conveyed to the grantee.

138. *But cf.* *Palmer v. Campbell*, 333 P.2d 957 (Okla. 1959) (a deed of conveyance which contains no expressed reservations to show the grantor's intent to reserve any interest in the property conveys to the grantee all of the interest vested in the grantor at the time of the execution of the deed).

139. 1 R. PATTON & C. PATTON, *supra* note 129, § 420, at 268.

140. 2 G. THOMPSON, *supra* note 4, § 450, at 756.

interest in the easement.<sup>141</sup> This is because the advantages of owning long narrow strips of land are considered *de minimus*.<sup>142</sup>

These common law rules were adopted by the Tenth Circuit in *Shell Petroleum Corp. v. Hollow* in 1934.<sup>143</sup> The court held that a deed conveying a tract "excepting one acre", which had been conveyed to a school district for so long as the property was used for school purposes, operated to convey the grantor's reversionary interest in the one acre. Therefore, the grantee had fee title to that one acre upon its abandonment for school purposes.<sup>144</sup> In arriving at that conclusion, the court relied heavily on the common law presumption, created as a matter of public policy, that a conveyance of land carries with it the grantor's interest in strips, gores and small parcels which have been carved out of it by prior conveyance of an interest less than a fee simple absolute.<sup>145</sup>

The *Shell Petroleum* rule of reversion was quickly applied to railroad rights of way in general and to Indian Territory lands in particular in *United States v. Magnolia Petroleum Co.*<sup>146</sup> In *Magnolia Petroleum* the issue was whether the reversionary right to minerals underlying a railroad right of way easement belonged to the original allottee or to the Choctaw and Chickasaw Tribes, who originally granted

141. See 1 R. PATTON & C. PATTON, *supra* note 129, § 161, at 430-33. Accord 2 G. THOMPSON, *supra* note 4, § 381, at 513.

142. See 3 AMERICAN LAW OF PROPERTY § 12.112 (A. Casner ed. 1952).

The construction in the case of public rights of way is . . . based upon the greater public convenience of having the title held locally and the lack of practical benefit to the grantor to justify a construction of intent to retain title to the strip of land . . . [T]he grantee takes title. . . .

*Id.* at 428-29.

143. 70 F.2d 811 (10th Cir. 1934) (owners of mineral rights to school lands).

144. *Id.*

145. *Id.* at 814. The court explained:

The servient estate in a small tract, usually in the form of a strip set apart for highway or railway right of way purposes, passes with a conveyance of the fee to the abutting tract of which the strip formerly was a part. The servient estate passes with such a conveyance, even though no express provision to that effect is contained in the instrument. The rule is that such estate passes unless it is excluded by clear, unequivocal, and unmistakable language. The considerations of sound public policy evoking the application of that doctrine and constituting its undergird, as well as the mischief sought to be obviated by it, was declared by the late Chief Justice Taft . . . in *Paine* . . . "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases."

*Id.* (quoting *Paine v. Consumers' Forwarding & Storage Co.*, 71 F. 626, 632 (6th Cir. 1895) (ownership of two strips of land on the other side of a subsequently vacated public highway held to belong to neither the remote grantor nor the grantee)).

146. 110 F.2d 212, 217-18 (10th Cir. 1939).

the allotments but reserved the easement.<sup>147</sup> Even though the allottee had received additional acreage to compensate for the easement, the court held that there was a strong presumption in favor of the reversionary interest vesting in the owner of the subdivision from which the right of way easement had been carved since the allotment deed did not *specifically* reserve this reversionary interest for the grantor Indian tribe.<sup>148</sup> Thus, *Magnolia Petroleum* refused to recognize an implied reservation of a reversionary interest in a railroad right of way.

The *Magnolia Petroleum* rule on reversionary interests in railroad rights of way has been consistently affirmed by the Tenth Circuit.<sup>149</sup> It was also adopted by the Oklahoma Supreme Court in 1975.<sup>150</sup> The

147. *Id.* at 214-15 (the Choctaw and Chickasaw Ry. was the original easement holder).

148. *Id.* at 217.

149. *Cf.* *United States v. Drumb*, 152 F.2d 821, 822 (10th Cir. 1946) (The railroad had obtained a right of way in easement through former Choctaw and Chickasaw lands. This land was exempted from allotment and set aside for railway purposes within the limits of a municipality. The municipality exchanged parcels with the railway and then issued quitclaim deeds on subdivided lots created out of the original parcel and sold these to individuals. The title to the right of way reverted to the abutting landowners.); *Seminole Nation v. White*, 224 F.2d 173, 173-74 (10th Cir. 1955) (The allotment deed was issued "less [X] acres occupied as [railroad] right-of-way" by the Choctaw, Oklahoma and Gulf Railroad. Even though the Indian allottee received additional land to compensate for the railroad easement, title to the underlying fee vested in the allottee or her heirs or assigns rather than the Indian tribe as remove grantor.); *Chickasha Cotton Oil Co. v. Town of Maysville*, 249 F.2d 542, 544 (10th Cir. 1957) (Under the Five Civilized Tribes Act, "title to lands within a municipality, should upon abandonment vest in such municipality."); *St. Louis-S.F. Ry. v. Town of Francis*, 249 F.2d 546, 547-48 (10th Cir. 1957) (The railroad company could only acquire rights of way in easement from the Indians under the Act of Mar. 30, 1896 and the Enid and Anadarko Act. The railroad company failed to convert this easement into a fee simple pursuant to § 14 of Five Civilized Tribes Act. Since the land was within municipal boundaries, title to the underlying fee vested in the municipality rather than the abutting landowners as provided by the exception to the general rule found in the Five Civilized Tribes Act.); *City of Wilburton v. Swafford*, 253 F.2d 479, 481-83 (10th Cir. 1958) (A government patent was issued to Indian allottee "including [X] acres subject to right of way for M.K.&T. Railway". Reversionary interest vested in the allottee, his heirs or assigns rather than in the municipality which annexed the subdivision from which the easement was carved.); *Wallace v. Swafford*, 273 F.2d 602, 604-05 (10th Cir. 1959) (Grantor obtained land from Indian tribe subject to railroad right of way easement. Subsequently, grantor conveyed portions of the property in three separate deeds. Careful reading of the deeds revealed that grantor intended to retain the reversionary interest in the railroad right of way because the lands previously conveyed were west of the highway while the railroad right of way was north of the highway.); *Fitzgerald v. City of Ardmore*, 281 F.2d 717, 718 (10th Cir. 1960) (When the railroad company failed to acquire a fee simple interest in the right of way pursuant to § 14 of the Five Civilized Tribes Act, the reversionary interest in the right of way vested in the Indian allottee who was owner of the legal subdivision from which the right of way was carved. Since these lands were not located within the municipality in 1908 when the reversionary interest was vested, the allottee's successors in interest, rather than the municipality, had superior title to the right of way).

150. *See Sand Springs Home v. State ex rel. Dep't. of Highways*, 536 P.2d 1280, 1284 (Okla. 1975) (Railroad's interest in railroad right of way was limited to an easement when the right of way was condemned by the State for highway purposes. Upon abandonment, the interest in the easement reverted to the owners of the underlying fee, i.e., the successors in interest to the Indian allottees, from which the right of way had been carved.).



only exception to this rule occurred under the Five Civilized Tribes Act when the right of way was located within a municipality. By this exception the municipality could receive the right of way.<sup>151</sup>

Case law that is strictly concerned with an interpretation of the Enid and Anadarko Act, unamended by the Five Civilized Tribes Act, was not pertinent to the issues raised in *Atterberry*. These cases focused on adverse possession,<sup>152</sup> the application of state law to a railroad deriving its right of way from a federal enactment,<sup>153</sup> and whether a purported fee simple conveyance by a Pawnee Indian allottee was void *ab initio*.<sup>154</sup> The one case which appears to be on point is also of questionable validity. In *United States v. Texas and Pacific Railway*,<sup>155</sup> the issue before the court was ownership of an abandoned railroad right of way within the City of Pawhuska, Osage County, Oklahoma.<sup>156</sup> In interpreting sections 13 through 23 of the Enid and Anadarko Act, the court held that the railroad's interest in the right of way was an easement

151. See *Oklahoma City-Ada-Atoka Ry. v. City of Ada*, 182 F.2d 293, 296 (10th Cir. 1950) (The Five Civilized Tribes Act provided that abandoned railroad right of way easements reverted to the abutting landowners unless the land was located inside a municipality. Even though the municipality had assessed property taxes against the railroad company for the land in question, it was not estopped from asserting that the land reverted to the city upon abandonment by the railroad.); *Town of Maysville v. Magnolia Petroleum Co.*, 272 F.2d 806, 812 (10th Cir. 1959) (Even though a municipality had never been validly incorporated, it was in de facto existence at the time of statehood. The railroad company had failed to convert its right of way easement into a fee simple interest pursuant to Five Civilized Tribes Act, § 14. Since the disputed right of way was within the boundaries of a preexisting municipality, the reversionary interest vested in the municipality rather than the abutting landowners pursuant to the municipality exception in § 14.); *Midwestern Developments v. City of Tulsa*, 259 F.Supp. 554 (N.D. Okla. 1966) (Railroad had not abandoned right of way since both highway and railroad actively shared the easement, thus right of way still had not vested in abutting property owner.); *Fitzgerald*, discussed *supra* note 149; *contra* *Noble v. Oklahoma City*, 297 U.S. 481 (1936) (Remote grantors who expressly retained reversionary interest in easement had superior title to municipality's statutory claim; right of way went to abutting landowner as assignee of remote grantor.).

152. See *St. Louis-S.F. Ry. v. McBride*, 104 Okla. 216, 219, 234 P. 284, 286 (1924). The Oklahoma Supreme Court held that neither laches nor the statute of limitations can be used to establish adverse possession of an unused portion of the railroad right of way against the Indian tribe as owner of the reversionary interest.

153. See *City of Tulsa v. Midland Valley R.R.*, 168 F.2d 252, 253-54 (10th Cir. 1948). In determining whether the Oklahoma Corporation Commission has exclusive jurisdiction to determine and prescribe location of highway crossings over railroads in Oklahoma, the court held that enumeration of specific powers in a statute operates to exclude those not enumerated. Statutes are strictly construed and not repealed by implication. Railroad rights of way obtained pursuant to the Enid and Anadarko Act are subject to regulation by the Oklahoma Corporation Commission.

154. See *Haymond v. Scheer*, 543 P.2d 541 (Okla. 1975). The Oklahoma Supreme Court held that the Enid and Anadarko Act limited railroad rights of way to easements. A conveyance made by Pawnee allottee to railroad company purporting to grant a fee simple interest in the right of way was void *ab initio*. Title to the underlying fee vested in the heirs of Pawnee allottee.

155. *United States v. Texas and Pac. Ry.*, No. 70-C-329, slip op. (N.D. Okla. Feb. 22, 1972).

156. *Id.* at 1.

rather than a fee simple interest.<sup>157</sup> This holding is consistent with other interpretations of the Act.<sup>158</sup> The court went on to find that the underlying fee to the right of way was presumed to vest in the Osage Tribe as opposed to the City of Pawhuska or the abutting landowners.<sup>159</sup>

This latter holding is questionable for three reasons. First, the City of Pawhuska was not an abutting landowner. The city was concerned about a utility line easement. None of the abutting landowners actively participated in the action but defaulted and failed to appear before the court.<sup>160</sup> It would appear that the City of Pawhuska was without standing and the court had no jurisdictional authority to determine the property rights of the abutting landowners.<sup>161</sup> Second, the court did not consider all of the applicable statutory authority. The only legislative issue before the court was an interpretation of the Enid and Anadarko Act in light of the Osage Allotment Act.<sup>162</sup> The court's ruling on this matter failed to consider the full mosaic of the legislative history, as discussed in this Comment, because the legislative history was never placed before the court. Finally, the court's interpretation of section 11 of the Osage Allotment Act<sup>163</sup> was a very literal interpretation which did not consider the actual language of the original Osage allotment patents as quitclaim deeds<sup>164</sup> nor the failure by the Osage Tribe to compensate the allottees for the land lost to the railroad right of way in their 160 acre allotment.<sup>165</sup> *Texas and Pacific* is the key case

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157. *Id.* at 6.

158. *Cf. supra* notes 146-50.

159. *Texas and Pac. Ry.*, No. 70-C-329, slip op. at 5-7 (N.D. Okla. Feb. 22, 1972).

160. *Id.* at 1-2.

161. *Cf. Summers v. St. Louis-S.F. Ry.*, No. 5452-Civil, slip op. (E.D. Okla. Nov. 6, 1964). Although the conveyance of the right of way by the Creek allottee to the railroad company was purportedly in fee simple, at the time of the conveyance the Enid and Anadarko Act limited acquisition of rights of way to an easement in the land. The railroad company never converted its easement into a fee simple interest pursuant to § 14 of the Five Civilized Tribes Act; therefore, the reversionary interest vested in the allottee. Although plaintiff was abutting landowner and claimed root of title from the allottee, careful reading of the conveyances revealed that plaintiff was not the owner of the subdivision from which the right of way had been carved. The reversionary interest remained vested in the Creek allottee and his heirs, beneficiaries, and assigns. *See also* *Great Northern Ry. v. United States*, 815 U.S. 262 (1942) (court recognized claims of United States for abandoned right of way only for those parcels in which the government was the abutting landowner). *See supra* note 67.

162. *Texas and Pac. Ry.*, No. 70-C-329, slip op. at 5-6 (N.D. Okla. Feb. 22, 1972).

163. *Id.* *See also* Act of June 28, 1906, ch. 3548, § 11, 34 Stat. 539, 545.

164. *See supra* notes 129-31 and accompanying text.

165. *See* Defendants' Oral Arguments on the Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

upon which the United States based its argument in *Atterberry*.<sup>166</sup> Since all the subissues found in *Atterberry* regarding other applicable legislation and the nature of the allotment patents were never presented to the *Texas and Pacific* court, that case seems to have limited validity in a determination of the *Atterberry* issue.<sup>167</sup> The *Texas and Pacific* case is at best an anomaly; every other case pertaining to railroad right of way easements in Oklahoma has held that the underlying fee to the easement vested in the abutting landowner unless there were unique circumstances in the deed<sup>168</sup> or the land was located in a municipality.<sup>169</sup> Thus, an examination of case law reveals a judicial intent to include Indian lands within the common law unless there is an overriding and express statutory provision to the contrary.<sup>170</sup>

The pattern which emerges regarding railroad rights of way on Indian land is an attempt to follow the common law which disfavors an implied reservation of an interest in an easement once title is transferred to the property. Although the Osage Indian tribe is different from other tribes in certain respects, such as the allotment of all tribal lands, head rights and mineral leasing, these differences are not sufficient to justify placing them outside the common law rule regarding abandoned railroad rights of way.

## VI. THE *ATTERBERRY* DECISION

As mentioned above, the *Atterberry* court ruled in favor of the defendants, holding that title to the reversionary interest in the abandoned right of way vests in the abutting landowners rather than the Osage Tribe.<sup>171</sup> The court ruled<sup>172</sup> that the reversionary clause found

166. See Plaintiff's Oral Arguments on the Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*.

167. See Defendants' Oral Arguments on the Motions for Summary Judgment (Mar. 22, 1984), *Atterberry*. See also Answer Brief of Defendants [Kane, Kane, Wilson & Mattingly] at 9-10, *Atterberry*; Answer Brief of Defendants [Rogers and Bell] at 16-18, *Atterberry*.

168. Cf. *Aubert v. St. Louis-S.F. Ry.*, 207 Okla. 537, 251 P.2d 190, 194 (1952) (Enabling legislation limited the railroad to acquisition of easement rights of way which would revert to the Indians from which the right of way was granted upon abandonment for railroad purposes. At the time of conveyances to the railroad, lands were held in fee by the grantor. Ownership of the underlying fee to the right of way vested in the current owner of the estate from which the easement was carved); *Chicago, R.I. & Pac. R.R. v. Blackmon*, 229 F.2d 803 (10th Cir. 1956) (deed granted to railroad "for right of way purposes" did not grant fee title); *supra* note 151 (discussion of *Noble v. Oklahoma City*).

169. See *supra* note 151 and accompanying text.

170. See "Table: Summary of Cases Relating to Osage Allotment Deeds or Oklahoma Railroad Easements" in Defendants' Motion for Summary Judgment at 18-30, *Atterberry*. See also *supra* note 65 and accompanying text.

171. *United States v. Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 31 (N.D. Okla. June

in section 2 of the Enid and Anadarko Act<sup>173</sup> does not apply to rights of way obtained pursuant to section 13 through 23 of this Act.<sup>174</sup> The court examined the 1908 Act<sup>175</sup> which partially amended the Enid and Anadarko Act so that only "sections thirteen through twenty-three . . . are hereby continued in force in the State of Oklahoma."<sup>176</sup> The court utilized the legislative history of the Enid and Anadarko Act and confirmed that the Act is two separate pieces of legislation with two different purposes enacted together.<sup>177</sup> The *Atterberry* court cited<sup>178</sup> *Oklahoma, K. & M. I. Ry. v. Bowling*<sup>179</sup> which interpreted the 1908 Act and which provided that after statehood, the Enid and Anadarko Act applied only to the lands of restricted Indians.<sup>180</sup> The *Atterberry* court ruled that:

Congress simply failed to specifically provide for reversion under the 'General right of way' provisions (Sections 13 through 23) of the Enid and Anadarko Act, and have [sic] not enacted any legislation covering reversion with respect to rights of way acquired under the Enid and Anadarko Act in the Osage Reservation since the passage of the act in 1902.<sup>181</sup>

In reaching this decision, however, the *Atterberry* court did not apply Oklahoma law<sup>182</sup> (as suggested in *Bowling*<sup>183</sup>) to resolve this legislative void nor did the decision clearly focus on the full panorama of federal enactments as discussed in this Comment.<sup>184</sup>

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25, 1984) (Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment).

172. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 20.

173. Act of Feb. 28, 1902, ch. 134, § 2, 32 Stat. 43, 43-44.

174. See *supra* notes 32-47 and accompanying text.

175. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, 312.

176. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 11-12.

177. *Id.* at 15.

178. *Id.* at 11.

179. 249 F. 592 (8th Cir. 1918).

180. *Id.* at 594.

181. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 15.

182. *Id.* See also *supra* notes 50-64 and accompanying text.

183. 249 F. at 594. The court stated:

The act of 1902 prescribed a procedure for the exercise of the right of eminent domain and by its terms applied to all lands in the Indian Territory, regardless of Indian title. . . . But the comprehensive scope of the legislation did not survive the admission of the state. By the act of 1908 Congress merely sought to preserve it so far as it affected Indian lands including those that had been allotted but were still subject to restrictions against alienation. That was the extent of its interest during statehood. The power of Congress to legislate ends when the transitory character of the subject-matter ceases to be of federal concern. . . . *The obvious, apparent reason for the continuance of the legislation in question during statehood is in the peculiar character of the tenure of a particular class of lands, and when that ceases the laws of the state attach and are exclusive.*

*Id.* (emphasis added).

184. See *supra* notes 65-121 and accompanying text. The *Atterberry* court incorrectly held that

The *Atterberry* decision relied upon a recent United States Claim Court case, *Capurro v. United States*,<sup>185</sup> which adopted the common law rule found in *Magnolia Petroleum*,<sup>186</sup> and its progeny.<sup>187</sup> *Capurro* involved a disputed railroad right of way on Indian lands in Nevada.<sup>188</sup> The *Capurro* court followed "the common law"<sup>189</sup> and held that the abandoned right of way reverted to the adjoining landowner rather than to the Indian tribe as remote grantor.<sup>190</sup> Apparently, *Capurro* is the first application of this *Magnolia Petroleum* rule to Indian lands

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"acts covering rights of way through the *public lands* of the United States," such as the Act of 1906 and the Act of 1922, cannot be used to resolve right of way problems on *Indian lands*. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 15. (emphasis in original).

185. 2 Cl. Ct. 722 (1983).

186. 110 F.2d 212 (10th Cir. 1939). See *supra* notes 146-48 and accompanying text.

187. See *supra* notes 149-51. The *Capurro* court specifically relied on the *Fitzgerald v. City of Ardmore*, and *United States v. Drumb*, [*supra* note 149] and *Sand Springs Home v. State ex rel. Department of Highways*, [*supra* note 150] cases.

188. 2 Cl. Ct. at 723. In *Capurro*, a party named Sutcliffe occupied public land and established a cattle ranch upon it "near the middle of the nineteenth century." *Id.* Subsequently, in 1874, the Pyramid Lake Paiute Indian Reservation was created although Sutcliffe remained in possession of his land and disputed title with the government. In 1910 the railroad obtained a right of way through the reservation and in 1911 the railroad obtained a quitclaim deed from Sutcliffe. Sutcliffe (or his heirs or assigns), however, did not obtain a government patent to the land until 1924; approximately seventy-five years after he first occupied it. Similar to the problem with the Osage patents, the railroad right of way "was expressly excluded from the patent." *Id.* at 724. In 1972, the railroad conveyed its interest in the right of way to the Paiute Indians with a quitclaim deed. In 1978, the tribe's housing authority's construction of a dwelling which partially encroached on the strip of land led to this suit. *Id.*

189. *Id.* at 725.

190. *Id.* The Claims Court ruled that the plaintiff rancher was entitled to the right of way, even though, "Sutcliffe did not obtain any right to the land by virtue of the 1924 patent since the patent specifically excluded the strip. Moreover, even if Sutcliffe had acquired an interest in the land through his occupancy, he quitclaimed it to the railroad in 1911." *Id.* at 724. The court did not discuss the doctrine of after-acquired title in reaching this decision. The court also found the right of way was an easement obtained under the Indian Railroad Right of Way Act [see *supra* notes 68-69 and accompanying text]. The Claims Court refused to apply the 1922 Act [see *supra* notes 114-15 and accompanying text], or the *Great Northern* ruling [see discussion *supra* note 67]. The Claims Court stated:

[s]ection 912 by its terms applies only to rights-of-way [sic] through public land . . . [and] is codified in Title 43 which governs the administration of public land. The right-of-way here in issue passed over Indian land . . . [and] is codified in Title 25 (Indians).

Indian land may, under certain circumstances, be treated as public land . . . Nevertheless, it is a special category of property as to which Congress has passed a separate series of laws . . . .

*It is significant that Congress enacted section 912 in Title 43 . . . but passed no similar provisions in Title 25 governing the extinguishment of railroad rights-of-way on Indian land.*

*Under these circumstances, it would be wholly inappropriate to apply section 912 here.*

*Id.* at 725 (citations omitted and emphasis added). The Claims Court never states why it finds this Title 25 versus Title 43 dichotomy significant. This author, however, does not see the significance. The whole history of railroad right of way acts in general, and Indian enactments in particular, is an ad hoc response to the immediate problem with little congressional consideration given to how the given incremental change currently under consideration affects the whole mosaic of legislation. See *supra* notes 48-122 and accompanying text.

outside of Oklahoma.<sup>191</sup> The *Capurro* court said, “[i]t is significant that this rule was developed by courts in the western United States where this land is located. Courts familiar with local conditions are best suited to enunciate and interpret the law pertaining to real estate.”<sup>192</sup>

In adopting *Capurro* and *Magnolia Petroleum* to resolve the Osage County right of way problem, the *Atterberry* court<sup>193</sup> correctly applied common law principles “[s]ince statutory guidance . . . [was] lacking.”<sup>194</sup> But the *Atterberry* court did not extend its application of the common law to overrule the *Texas and Pacific* case.<sup>195</sup> The court did not show the depth of antipathy found in the common law against reversion by remote grantors of reversionary interests in “small strips and gores” of land.<sup>196</sup> The court did not consider that in issuing the patents to the original allottees both the United States government and the Osage Tribe divested themselves of their interest in all of the Osage Reservation except for the specifically retained minerals and the limits on alienability and taxation,<sup>197</sup> and that the proper plaintiffs were the allottees who received 160 acres of land subject to the railroad right of way. These allottees should be made whole vis-à-vis the other Osage allottees who received their 160 acre allotments unencumbered by a right of way. It is imperative for the courts to confirm the common law as defined in *Great Northern Ry. v. United States*<sup>198</sup> and *Magnolia Petroleum*,<sup>199</sup> which holds that the right of way runs with the land and upon abandonment reverts to the original allottee or his successors in title, *unless such right of way was specifically and unequivocally retained by the remote grantor rather than just acknowledged.*

## VII. CONCLUSION

The Osage Allotment Act as it pertains to railroads was primarily concerned with reservation of the mineral rights underlying such easements rather than disposition of the right of way once abandoned. The lack of an expressed reservation in the allotment deeds, and the lack of

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191. See 2 Cl. Ct. at 725-26.

192. *Id.* at 726.

193. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 21-26.

194. 2 Cl. Ct. at 725.

195. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 5-6. (discussing *United States v. Texas and Pac. Ry.*, No. 70-C-328 slip op. (N.D. Okla. Feb. 22, 1982)). See *supra* notes 155-65 and accompanying text.

196. *Atterberry*, Nos. 82-C-896-B through 82-C-949-B at 26-28.

197. See Representative Allotment Deed, *supra* note 133.

198. 315 U.S. 262 (1942); See discussion *supra* note 67.

199. 110 F.2d 212 (10th Cir. 1939). See *supra* notes 146-51 and accompanying text.

compensation to the original allottees for the land used for the right of way, coupled with the silence of the Enid and Anadarko Act regarding ownership of the reversionary interest, clearly indicate the common law intent that the right of way should revert to the abutting landowners.

Land reverts to the Indian tribe, under statutory law, only when a railroad failed to acquire an easement. In light of the Enid and Anadarko Act's legislative history, the express wordings in the original Osage allotment patents, and an analysis of federal and state common law, both federal and state law are in accord regarding the ownership of the abandoned railroad right of way in question in *Atterberry*. The *Atterberry* court confirmed that when an easement is abandoned, the estate out of which the right of way was carved receives the land; therefore, the reversionary interest vests in the abutting landowner, rather than the Osage Tribe, as remote grantor. Unfortunately, the *Atterberry* court did not recognize that Indian allotment deeds in Oklahoma are quitclaim deeds from both the government and the Indian tribe. Moreover, this court did not specifically overrule the *Texas and Pacific* case. The *Atterberry* court failed to completely close the door to costly and time-consuming litigation regarding railroad abandonments in former Oklahoma Territory.

*Sharon J. Bell*

## APPENDIX

## TABLE 1

SUMMARY OF FEDERAL LEGISLATION  
PERTAINING TO RAILROAD RIGHTS OF  
WAY IN OKLAHOMA

Year	Act	Area Affected	Applicable Provision
1875	GENERAL RAILROAD RIGHT OF WAY ACT OF MAR. 3, 1875, ch. 152, 18 Stat. 482 (current version at 43 U.S.C. § 934-938).	All public lands in U.S.A. except District of Columbia and military and Indian reservations.	Limits railroads on public lands to the acquisition of rights of way in easement rather than in fee simple. Original act did not contain a reversionary clause for abandoned rights of way.
1899	INDIAN GENERAL RAILROAD RIGHT OF WAY ACT OF MAR. 2, 1889, ch. 374, 30 Stat. 991 (current version at 25 U.S.C. § 312-318).	All Indian lands except Oklahoma.	25 U.S.C. § 312 limits railroads to acquisition of right of way easements on unallotted Indian lands. The Act lacks a reversionary clause for abandoned rights of way.
1902	ENID AND ANADARKO ACT OF FEB. 28, 1902, ch. 134, 34 Stat. 43.	Oklahoma and Indian Territories	Provides for acquisition of easement rights of way. Sections 13-23 do not contain a reversionary clause.
1906	FIVE CIVILIZED TRIBES ACT OF APRIL 26, 1906, ch. 1876, 34 Stat. 137.	Indian Territory only.	Section 14 amended the provisions of the Enid and Anadarko Act by clarifying that the underlying interest in the right of way vested in the estate from which it was carved <i>but</i> : <ol style="list-style-type: none"> <li>1. the railroad had until 1908 to purchase a fee interest in preexisting rights of way, and</li> <li>2. if the land was located within a municipality the reversionary interest would vest in the municipality.</li> </ol>
1906	OKLAHOMA AND ARIZONA RAILROAD ACT OF JUNE 26, 1906, ch. 3548, 34 Stat. 481.	Oklahoma Territory	Provided that the General Railroad Right of Way Act applies to non-Indian lands in Oklahoma Territory.
1906	OSAGE ALLOTMENT ACT OF JUNE 28, 1906, ch. 3572, § 11, 34 Stat. 539, 543-45.	Osage County.	Section 11 provides for the preservation of the railroad rights of way as part of the allotment process with a specific reservation (in favor of the Osage Tribe) of mineral rights underlying the rights of way.
1908	ACT OF MAY 27, 1908, ch. 199, 35 Stat. 312.	Amended the Five Civilized Tribes Act and the Enid and Anadarko Act.	Sections 13-23 of the Enid and Anadarko Act apply only to Indian lands in State of Oklahoma.
1922	ACT OF MAR. 8, 1922, ch. 94, 42 Stat. 414 (codified at 43 U.S.C. § 912).	All federal public lands.	Abandonment or forfeiture of a railroad right of way vests the underlying fee in the current owner of the subdivision from which the right of way was created.