Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State

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INTRODUCTION AND OVERVIEW

The advent of recreational trails throughout the country has allowed thousands of citizens the opportunity to casually bike, hike, jog, walk, and in some cases rollerblade along miles of urban waterfront or through the pastoral rural countryside. The light clicks of shifting derailleurs or muffled taps of air-soled shoes, however, mask one of the country's most contentious property issues over the past 30 years.[1] The dispute has been over preserving unused railroad corridors by converting them into public recreational trails or pathways.[2] In

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1. *See generally* Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-To-Trail In Indiana*, 30 IND. L. REV. 723, 724 (1997).

2. Conservation Act, 16 U.S.C. § 1247(d) (2000), reads:

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

Washington State alone, the prospect of new recreational trails has led to ongoing litigation and news headlines around the Seattle-Puget Sound area. Landowners adjacent to a proposed trail through farmland in Skagit County, north of Seattle, have filed federal and state class action suits hoping to stop trail construction.[3] Rural residents east of Tacoma in Pierce County have filed suit to halt development of one trail and have organized to oppose the trail's extension.[4] Homeowners along the eastern shore of Lake Sammamish outside of Seattle have filed multiple state and federal suits, challenging King County's land acquisition process and regulatory compliance.[5] Suburban city residents in Kirkland have threatened litigation upon the City Council's voting to study the possibility of a trail.[6]

Hiking and biking trails are extremely popular with citizens in both rural and urban settings.[7] According to the Rails-to-Trails Conservancy, there are currently 1,109 recreational trails stretching 11,313 miles across the country.[8] The organization reports that another 1,225 trails totaling an additional 17,131 miles have been proposed throughout the nation.[9] The country's two most heavily used trails attract an estimated two million users annually.[10] Hiking and biking trails provide dedicated pathways for public recreational activity and alternative forms of transportation for daily commuters. Furthermore, trails provide needed public open space in areas with limited available recreational land.

In 1983, Congress amended the National Trails System Act of 1968,[11] recognizing the value of public rail corridors. The 1983 Amendment was intended to promote the preservation of abandoned

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and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

3. *See, e.g.*, Good v. Skagit, 104 Wash. App. 670, 17 P.3d 1216 (2001).

4. Rob Tucker, *Farmers: Extended Trail Will Trample Operations; Foothills Trail: Growers Launch Campaign To Stop Plan In Its Tracks*, NEWS TRIBUNE, Dec. 13, 2000.

5. Tim Larson, *Trail Fight Goes To Court Today: Contractor Alleges County Forced Him To Put Down Gravel*, EASTSIDE J., Dec. 12, 2000, *available at* http://www.eastsidejournal.com/sited/story/html/36506.

6. Peyton Whitely, *Kirkland To Study Trail Proposal Despite Threat of Suit*, THE SEATTLE TIMES, Mar. 17, 1999, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis/web/vortex/display?slug=tral&date=19990317.

7. RAILS-TO-TRAILS CONSERVANCY, RAIL-TRAIL MILEAGE (June 2001), *available at* http://www.railtrails.org/RTC_Documents/Reports/15.htm (last visited Aug. 30, 2001).

8. *Id.*

9. *Id.*

10. RAILS-TO-TRAILS CONSERVANCY, RAIL-TRAIL MILEAGE (Oct. 2000) (stating that the two most popular trails in the country are the Minuteman Bikeway in Massachusetts and W&OD Railroad Trail in Virginia) (on file with *Seattle University Law Review*).

11. 16 U.S.C. §§ 1241–51 (2000).

railroad rights of way for potential future railroad use.[12] The Act authorizes private or public entities to purchase inactive or unused rail lines from railroad companies for conversion into public recreational use.[13] Railroads retain the option to repurchase the trail and reinstall tracks should rail operations become once again necessary through the corridor.[14] Abandonment of the right of way is thus postponed and "banked" with a state, municipality, or private organization responsible for the trail.[15] Railroads are relieved of tort liability and property tax payments of between $18,000 and $24,000 per mile per year within the corridor.[16] Local residents enjoy a recreational pathway isolated from automobile traffic,[17] and public transportation corridors are preserved for a variety of alternative public purposes including highways, utility corridors, wildlife habitat, and recreational trails.[18]

Landowners adjacent to railbanked corridors, however, claim converting railroad corridors into recreational trails constitutes an unconstitutional taking, requiring compensation under the Fifth Amendment.[19] Homeowners living next to proposed recreational trails have also argued trails lead to increased crime and public safety

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12. *Oversight Hearing on Agency Administration of the Rails-to-Trails Act: Hearings Before the Subcommittee on Railroads of the House Committee on Transportation & Infrastructure*, 104th Cong. (1996) (on file with *Seattle University Law Review*) [hereinafter *Oversight Hearing*].

13. WASH. REV. CODE § 79A.35.080 (2001) reads:

> All trails designated as state recreational trails will be constructed, maintained, and operated to provide for one or more of the following general types of use: Foot, foot powered bicycle, horse, motor vehicular or watercraft travel as appropriate to the terrain and location, or to legal, administrative or other necessary restraints. It is further provided that the same trail shall not be designated for use by foot and vehicular travel at the same time.

14. 49 C.F.R. § 1152.29(d)(2) (1999).

15. *Oversight Hearing*, *supra* note 12.

16. *Id.*; *see also* Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1, 2 (1995) (citing Henry B. McFarland, *Railroad Abandonment Policy in the 1990's*, 58 TRANSP. PRAC. J. 331, 336 (1991) (figures in 1989 dollars)). *But see* Jeffrey Alan Bandini, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis*, 75 N.C. L. REV 1989, 1990 n.5 (1997) (Memorandum from Jeff Bandini, Rail Division, North Carolina Department of Transportation (NCDOT) to Grayson Kelley, Deputy Attorney General, Transportation Section, North Carolina Department of Justice (NCDOJ) (June 12, 1996) (on file with Rail Division, NCDOT) (noting that property taxation is a very minor factor in railroads' abandonment decisions in North Carolina)).

17. RAILS-TO TRAILS CONSERVANCY, *supra* note 7.

18. Charles H. Montange, *Fixing the Unbroken in the Federal Railbanking and Trial Use Statute: A Rejoinder to "Unhappy Trails"*, 6 J. LAND USE & ENVTL. L. 53, 57 (1990); *see also* 49 U.S.C. § 10906 (1988); Judy Mills, *Clearing The Path For All Of Us Where Trains Once Ran*, SMITHSONIAN, Apr. 1990, at 132 (describing advantages of linear parks from rail corridors); Charles H. Montange, *NEPA in an Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 VA. ENVTL. L.J. 1, 16–17 & nn.85–87 (1989).

19. Preseault v. United States, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*Preseault III*).

problems from trail users in the immediate area,[20] additional trespassing,[21] loss of privacy,[22] and to diminished property values because of the public use.[23] Trail critics generally substantiate their claims with little more than anecdotal evidence, but the prospect of adverse impacts has prompted significant litigation over an otherwise popular public amenity.

Landowners adjacent to railbanked corridors have challenged, among other things, administrative rail abandonment procedures,[24] the constitutionality of the 1983 Amendment,[25] and the conversion of rail right of way to recreational use.[26] More recently, adjacent landowners and property rights advocates have sought compensation for perceived property loss through class action litigation[27] and legislative changes to the National Trail System Act.[28] They have even tried collateral challenges, seeking state relief from the federal regulation.[29]

Railbanking opponents have become creative in attempting to stop proposed trails. One homeowners group has attempted to circumvent the Act by establishing a fictitious railroad within the unused rail corridor in order to maintain the rail bed for active rail use.[30] A husband and wife have tried a self-help route, erecting barbed wire

20. Peyton Whitely, *Study Shows Benefits Of Proposed Kirkland Trail*, SEATTLE TIMES, Oct. 20, 1998, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis/web/vortex/display?slug=kirk&date=19981020.

21. KING COUNTY PARK SYS. & DEP'T. OF CONSTRUCTION AND FACILITIES MGMT., DRAFT REPORT, EAST LAKE SAMMAMISH INTERIM USE AND RESOURCE PROTECTION PLAN, App. D (July 1999).

22. *Id.*

23. Dick Welsh, *The National Association of Reversionary Property Owners (NARPO), The Burke-Gilman Trail and Property Values, Explanation of Accompanying Spreadsheet On Certain Property Values* (Apr. 16, 1998), *available at* http://www.halcyon.com/dick/bg-study.doc.

24. Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd., 158 F.3d 135, 143 (D.C. Cir. 1998) (holding that individual notice to property owners is not required prior to abandonment).

25. Preseault v. ICC, 494 U.S. 1, 13 (1990) (*Preseault II*) (holding that even if the statute gives rise to a taking, compensation is available through the Tucker Act, which satisfies the Fifth Amendment requirements).

26. Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 598 (1998) (holding that impacts to adjacent land from a rail line converted to a hiker/biker path cannot be compensated).

27. Moore v. United States, 41 Fed. Cl. 394, 400 (1998) (granting a class action on an opt-in basis).

28. *See* Emily Drumm, *Addressing The Flaws Of The Rails-To-Trails Act*, 8 KAN. J.L. & PUB. POL'Y 158, 167 (1999).

29. 16 U.S.C. 1247(d) (2000).

30. Redmond-Issaquah R.R. Preservation Ass'n. v. Surface Transp. Bd., 223 F.3d 1057, 1061–62 (9th Cir. 2000) (rejecting attempt by homeowners opposing recreational trail to create their own railroad in rail corridor).

topped chain linked fences across the inactive rail bed, hoping to stop trail construction.[31]

The litigation has led to additional costs for taxpayers and delays in trail construction. Furthermore, settlements and court decisions can lead to unjust windfalls for property owners falsely claiming property interests in the rail corridor.[32]

This Comment will analyze the recent approach the Washington court has incorporated in settling trail development disputes across the State. In particular, the Comment will examine the court's use of common law deed interpretation principles in upholding property rights while preserving valuable public transportation corridors. Furthermore, the Comment will show how the Washington court's recent approach in interpreting railroad deeds has made recreational trail construction more appropriately a legislative matter, rather than a legal one.

Section I of the Comment will begin with an historical overview of railroads in the United States, background on the public "Rails-to-Trails" movement, and an explanation of the underlying public policy and enabling federal law. Section II will then examine the leading federal case on railbanking. Section III will look at how Washington courts have addressed the railroad corridor preservation issue, particularly the Washington Supreme Court's reasoning pertaining to deed interpretation in *Brown v. State*.[33] Section IV will address how the court has handled rail corridor quiet title actions subsequent to *Brown*. Finally, Section V will conclude with observations for future trail construction within Washington State.

I. HISTORY OF RAILS-TO-TRAILS

A. The Rise of Railroads in the United States

The advent of rail travel fueled industrial growth in the United States during the 1800's. The amount of the country's railroad tracks grew from about 100 miles to over 27,000 miles between 1830 and 1860.[34] Congress facilitated the rapid rail expansion by invoking its

31. Peyton Whitely, *Fences Blocking Proposed Sammamish Trail*, SEATTLE TIMES, May 16, 1997, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis/web/vortex/display?slug=tral&date=19970516.

32. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 354 n. 8 (2000).

33. 130 Wash. 2d 430, 924 P.2d 908 (1996).

34. Drumm, *supra* note 28, at 159 n.11 (citing 2 JACKSON J. SPIEL VOGEL, WESTERN CIVILIZATION 718 (2d ed. 1994)).

eminent domain power in acquiring land needed to support the national infrastructure.[35] In addition, federal lawmakers embarked on a policy of providing railroads with lavish public land grants.[36] The federal government in 1835 began granting an estimated ninety million acres of land directly to railroads and another forty million acres indirectly to rail carriers through various state grants.[37] By 1890, Congress had transferred more than 1.2 billion acres of public land to private parties.[38] Many states also passed laws giving railroads plenary powers to condemn and acquire private land for railroad uses.[39] Acquiring property for railroads, however, was hardly an exact practice. Some railroad companies armed with quasi-governmental power established corridors based on convenience and economy, rather than on pre-existing property boundaries.[40] Railroad representatives would appear on landowner's doorsteps with form deeds in hand.[41] Landowners could either sell their property or have it taken under eminent domain.[42] The process led to ambiguous conveyances sometimes stating fee simple acquisitions but using terms such as rights of way, easements, reversions, and other limiting language such as "for railroad purposes only."[43]

Congress acted to define the scope of railroad property interests by enacting the Transportation Act of 1920.[44] The Act granted the Interstate Commerce Commission (ICC) the authority to regulate construction, operation, and abandonment of railroad lines.[45] At the time of the Act's passage, U.S. railroads had laid down more than a quarter of a million miles of tracks.[46]

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35. *Id.* at 159 n.13 (citing G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 106 (2d ed. 1987)).

36. Great N. Ry. Co. v. United States, 315 U.S. 262, 273 (1942).

37. Karin P. Sheldon, *Federal Lands in the West Embarking on the New Millennium, The Thrilling Days of Yesteryear: Some Comments on the Settlement of the West and the Development of Federal Land and Resource Law*, SF34 A.L.I.-A.B.A. 1, 12 (2000) (citing PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 1–48, 356–86 (1968)).

38. *Id.* (citing E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSITION AND RESERVATION POLICIES 1900–1950 8 (1951)).

39. *See* Wright, *supra* note 1, at 725.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Law of 1920, ch. 91, § 402, 41 Stat. 474, 477–78 (1920) (codified as amended at 49 U.S.C. § 10903 (1998)).

45. The ICC was dissolved in 1996, and the agency's duties transferred to the Department of Transportation's Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 101–102, 109 Stat. 803, 804–52 (1995).

46. Preseault v. ICC, 494 U.S. 1, 5 (1990) (*Preseault II*).

Ten years later, however, railroads began facing stiff competition from the country's trucking industry.[47] The federal government was directly subsidizing the nation's highways.[48] Truckers, having no need to own roads or pay property taxes, enjoyed lower costs.[49] Until the 1920's, railroads had a virtual monopoly on the nation's freight revenue.[50] In the early 1930's, rail companies began consolidating and abandoning lines in order to remain profitable, as U.S. industry discovered other modes of freight transport.[51] By 1940, rail carriers' freight revenue market share dropped to 75.42 percent, while motor carriers captured 17.74 percent.[52]

B. The Subsequent Fall

By the 1960's, railroads had been in full retreat for thirty years, and the country had sustained substantial loses in its rail network through abandonments and property reversions. As of 1963, rail carriers had abandoned 49,374 miles of the 252,588 miles of track that existed in 1920.[53] In 1970, rail freight revenue market share dropped to 40.62 percent and was still falling.[54] Meanwhile, motor carriers captured 53.26 percent of market share.[55]

Congress, in recognizing the expense of reacquiring the rail corridors for possible future use, addressed the issue by enacting the Railroad Revitalization and Regulatory Reform (4R) Act of 1976.[56] The 4R Act expressly prescribed the preservation of abandoned rail corridors for public use, including "highways, other forms of mass transportation, conservation, energy production or transmission, or recreation."[57] The Act authorized the ICC to delay abandonment

47. *See* Wright, *supra* note 1, at 726 n. 18 (citing Dennis McKinney, *A Railroad Ran Through It*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, STAYING ON THE CUTTING EDGE: THIRD ANNUAL REAL ESTATE SYMPOSIUM (1995)); Samuel H. Morgan, *Rails-To-Trails: On the Right Track*, 8 PROB. & PROP. 10, (1994); Wild, *supra* note 16.

48. Wild, *supra* note 16, at 6 (citing RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY, 34–35 (1991)).

49. *Id.* (citing STONE, *supra* note 48, at 69, as stating that railroads had little local political support in tax districting arrangements and often paid discriminatory rates).

50. *Id.* at 7 (citing MICHAEL CONANT, RAILROAD MERGERS AND ABANDONMENTS, 113 (1964)).

51. *Id.* at 6.

52. *Id.* at 7 (citing AM. TRUCKING ASS'NS, AMERICAN TRUCKING TRENDS 1979-1980 35 (1980) [hereinafter AMERICAN TRUCKING TRENDS]).

53. *Id.* at 5 (citing CONANT, *supra* note 50 (using ICC statistics)).

54. AMERICAN TRUCKING TRENDS, *supra* note 52, at 35.

55. *Id.* (stating that airways captured 2.61 percent and oil pipelines captured 2.17 percent of freight revenue market share).

56. Pub. L. No. 94-210, § 802, 90 Stat. 31, 127–30 (1976) (codified as amended at 49 U.S.C. § 10905 (1998)).

57. *Id.*

proceedings until after a public use offer had been refused.[58] The intent of the 4R Act was to promote what is now known as "railbanking," the preservation of abandoned rail corridors for potential future rail use.[59]

Applying the 4R Act in preserving abandoned rail corridors, however, proved cumbersome and unwieldy. Railroad companies looking to quickly dispose of financial responsibilities along an unused or underused corridor had no incentive to work with trail groups or local municipalities in fashioning a land transfer.[60]

In 1983, Congress recognized that its previous efforts were not successful in establishing a process utilizing unused railroad right of ways for recreational trail purposes.[61] It amended the National Trails Systems Act by adding Section 8(d).[62] The changes allowed the ICC to withhold abandonment declarations and issue Certificates of Interim Trail Use (CITU).[63] Congress, in amending the Act, expressly intended that "interim use of a railroad right of way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes."[64]

By 1989, the number of the country's railroad corridor miles had dropped to about 141,000 miles, a nearly fifty percent reduction from the railroad industry's peak in 1920.[65] Studies suggest that railroad operators will abandon an additional 3,000 miles of track annually.[66] On the other side of the equation, approximately 11,000 miles of recreational trails have now been created under the Act, indicating public popularity and support of the Act.[67]

C. Abandoning a Rail Corridor

The presumption underlying railbanking statutes is that a railroad has not abandoned tracks under its control, unless the requisite

58. *Id.*

59. *Oversight Hearing*, *supra* note 12.

60. Wright, *supra* note 1, at 727 n. 21 (citing 49 U.S.C. § 10907(b)(1) (Supp. I 1995)) ("The ICC could only force a sale to an entity planning to continue offering rail services. It could not force a sale for trail conversion.").

61. H.R. REP. NO. 98-28, pt. 1, at 119 (1983).

62. 16 U.S.C. § 1247(d) (1988).

63. Wright, *supra* note 1, at 727 n.22 (citing Pub. L. No. 98-11, §§ 201–207, 97 Stat. 42, 42–50 (codified as amended at 16 U.S.C. §§ 1241–51 (1994 & Supp. I 1995)).

64. H.R. REP. NO. 98-28, pt. 1, at 119 (1983).

65. Preseault v. ICC, 494 U.S. 1, 5 (1990) (*Preseault II*); *see also* Thomas A. Jones, *Rails to Trails: Converting America's Abandoned Railroads Into Nature Trails*, 22 AKRON L. REV. 645 (1989).

66. *Id.*

67. RAILS-TO-TRAIL CONSERVANCY, *supra* note 7.

administrative criteria (as noted below) have been satisfied.[68] The presumption holds regardless of whether the railroad has already ceased operations within the rail corridor and has removed tracks, rail ballast, and other material required for railroad operations.[69]

A railroad or a successor in interest must apply to the Surface Transportation Board (STB), formerly the ICC,[70] for a CITU or Abandonment.[71] Depending on the circumstances, a railroad can alternately file a Notice of Interim Trail Use (NITU) or Abandonment.[72] The CITU or the NITU provides a 180-day period during which the railroad may discontinue service, cancel tariffs, and salvage track and equipment.[73] The provisions also allow railroads to negotiate a voluntary agreement for interim trail use with a qualified trail operator.[74] If an agreement is reached, interim trail use is subsequently authorized under the statute, and the right of way is railbanked for future rail service.[75] If no agreement is reached within the time prescribed by the CITU or NITU, the railroad is free to abandon the right of way and the STB loses jurisdiction over the issue.[76] Any agreement between the railroad and a trail provider must allow the STB to reopen rail service within the corridor once the STB or a rail carrier shows a justification for resuming rail service.[77] Federal preemption is lost upon the STB's losing jurisdiction, and property rights impacted by rail abandonment are, thus, defined under state law.[78]

II. FROM RAIL TO TRAIL: PRESERVING THE PUBLIC CORRIDOR

A. The Presault *Cases*

The primary issue involved with converting a rail corridor into a recreational trail is whether the change in use constitutes a taking un-

68. *See* 16 U.S.C. § 1247(d) (1988); *see also Preseault II*, 494 U.S. at 7 n.5.

69. *Id.*

70. Pub. L. No. 104-88, 109 Stat. 803, (codified at 49 U.S.C. § 10501 (1996)). Before 1995, discontinuance and abandonment of railway service were the responsibility of the ICC. 49 U.S.C. § 10501(c)(3)(B).

71. *See* 49 C.F.R. § 1152.29 (1999); *see also* Glosemeyer v. United States, 45 Fed. Cl. 771, 773 (2000).

72. 49 C.F.R. § 1152.29(d)(1).

73. *Id.*

74. 49 C.F.R. § 1152.29(c)(1).

75. *Glosemeyer*, 45 Fed. Cl. at 774.

76. *Id.*; *see also* Robin W. Foster, RTLD Railway Corporation v. Surface Transportation Board: *Jurisdictional Derailment—Has the Sixth Circuit Thrown the Switch on the Congressional Policy of Promoting "Railbanking," The Conversion of Railroad Tracks into Recreational Hiking and Biking Trails?*, 27 N. KY. L. REV. 601, 610 (2000).

77. Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 554 (1998).

78. *Oversight Hearing*, *supra* note 12.

der the Fifth Amendment. The United States Supreme Court in reviewing cases involving the railbanking statute has recognized the plenary power of the ICC (now STB) over railroad abandonments. However, the Court has expressly looked to state law in deciding whether application of the statute has led to an unconstitutional taking.

The Court, in its most significant decision on the issue, *Presault v. ICC* (*Presault II*), upheld the use of rail corridors for recreational trails, noting Congress's valid use of the Commerce Clause to preserve railroad right of ways for future rail use and to encourage energy-efficient transportation alternatives.[79] *Presault* is actually a series of cases filed by J. Paul and Patricia Presault in various courts against both the federal government and State of Vermont. The cases involved three lots referred to as Parcels A, B, and C along Vermont's Lake Champlain.[80] The Rutland-Canadian Railroad Company acquired a right of way through the parcels in 1899.[81] Railroad ownership subsequently passed through several hands.[82] Active railroad operations eventually ceased in 1970.[83] Vermont removed the tracks on the Presaults' property in 1975, although tracks remained on land adjacent to the parcels at issue.[84] The state also continued to collect rent on pre-existing license and crossing agreements.[85] In 1982, the Vermont Legislature passed a statute maintaining possession of railroad easements notwithstanding cessation of railroad operations.[86] The legislature also applied the statute's provisions retroactively.[87]

The *Presault II* Court noted that Congress intended to deem interim trail use as "discontinuance," rather than an "abandonment" of the rail corridor, to prevent reversion under state law.[88] The Court further held that state law generally governs the disposition of reversionary interests subject to the ICC's "exclusive and plenary" jurisdiction to regulate rail abandonments.[89] If the statute preempts a property owner's reversionary interest in the rail bed, the Court held, the Tucker Act would provide a remedy for any taking of the reversionary

79. 494 U.S. 1, 8 (1990).
80. Preseault v. United States, 100 F.3d 1525, 1531 (Fed. Cir. 1996) (*Preseault III*).
81. *Id.*
82. *Id.*
83. *Id.* at 1553.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*; *see also* Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981).

interest or claim of inverse condemnation.[90] The Tucker Act grants the United States Court of Claims jurisdiction over "any claim against the Federal Government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract."[91]

The Court's holding reaffirmed the notion state law largely determines a property owner's reversionary interests. Justice O'Connor noted in her concurrence that when determining whether a taking has occurred under the railbanking statute, "[the Court is] mindful of the basic axiom that [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law."[92]

Following the Court's holding in *Presault II*, the case was remanded to the Federal Circuit Court of Appeals (*Presault III*) to determine whether a taking had occurred. The Federal Circuit sitting en banc concluded that a taking had occurred. The court focused, in part, on whether the original railroad deeds to Parcels A, B, and C conveyed an easement or a fee interest to the railroad.[93] If the railroad obtained a fee simple interest and conveyed such an interest to its successors, the Presaults would have no takings claim.[94] On the other hand, if the railroad had acquired easements, and if such easements did not include use as a public recreational trail, the Presaults could have a takings claim for loss of a reversionary interest.[95]

The Federal Circuit concluded, among other things, the rail corridor through Parcels A, B, and C were acquired as easements.[96] The court held that Vermont law empowered the railroad company to acquire only "such real and personal estate as is necessary in the judgment of such corporation, for the construction, maintenance and accommodation of such railroad."[97] Thus, regardless of the documentation and manner of acquisition, a railroad in Vermont could generally acquire only an easement when acquiring land for tracks and operating equipment.[98]

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90. Preseault v. ICC, 494 U.S. 1, 12 (1990) (*Preseault II*).
91. *Id.* (citing 28 U.S.C. § 1491(a)(1)(1982)).
92. *Id.* at 20; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).
93. *Preseault III*, 100 F.3d at 1534.
94. *Id.* at 1533.
95. *Id.*
96. *Id.* at 1535.
97. *Id.* at 1534–35.
98. *Id.* at 1535.

The court's conclusion was particularly significant with regard to Parcel C.[99] The deed to Parcel C purported to convey to the railroad the described strip "[t]o have and to hold the above granted and bargained premises . . . unto it the said grantee, its successors and assigns, forever, to its and their own proper use, benefit, and behoof forever."[100] The deed further warranted that grantors have "a good, indefeasible estate, in *fee simple*, and have good right to bargain and sell the same in manner and form as above written."[101] Unlike Parcels A and B, which were acquired arguably through eminent domain proceedings,[102] the government argued, the Parcel C deed on its face conveyed fee simple title.[103] Nevertheless, the court concluded Vermont state law allowed railroads to "take only so much land or estate therein as is necessary for their public purpose . . . whether the price is fixed by the commissioners or by the parties."[104] Thus, the conclusions reached in *Presault III* with regard, among other things, to deed interpretation would play a large role in future attempts to preserve railroad corridors throughout the nation.

B. Washington State Law

The Washington Legislature has expressly stated that railroad properties are dedicated for public use, such as utility facilities, transportation, and recreational corridors once railroads cease operations within the right of way.[105] The State's lawmakers included ICC railbanked corridors in their definition of railroad properties,[106] thus recognizing Congressional intent to preserve unused rail corridors as a matter of federal public policy. The Washington lawmakers also acknowledged rail corridors as public infrastructure.

However, the lawmakers wrote nothing under the Washington statutes to authorize a public agency to acquire a reversionary interest in a rail corridor without paying just compensation.[107] Thus, while the lawmakers allowed for the federal railbanking statute to preempt lawful abandonment of a rail corridor, they did not intend the statute to preempt reversionary property interests and compensation.

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99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

102. *Id.* at 1534 (noting that rail right of way through parcel was acquired through a "Commissioner Award").

103. *Id.* at 1536.

104. *Id.*

105. WASH. REV. CODE § 64.04.180 (2000).

106. WASH. REV. CODE § 64.04.190 (2000).

107. WASH. REV. CODE § 64.04.180.

III. APPLYING WASHINGTON STATE LAW: THE IMPORTANCE OF DEED INTERPRETATION

A. Acquisition of Easements

Rail corridors conveyed as easements and subsequently converted into recreational trails would generally amount to de facto abandonment and reversion under Washington's law. The Washington court has applied common law principles, looking to the intent of the conveyance at the time of the transaction, to determine whether a deed conveyed an easement, fee simple interest, or something else.

Lawson v. State[108] involved a 4.8-mile rail corridor between the cities of Kenmore and Woodinville, located northeast of Seattle.[109] King County sought to acquire the rail corridor for a recreational trail linking two existing trails. In January of 1985, the county requested the ICC to impose a public use condition upon abandonment pursuant to then existing federal rail abandonment statutes.[110] The ICC authorized abandonment subject to the then 120-day public use condition. Under the condition, the railroad could not dispose of the right of way for 120 days unless it first offered the corridor for public use on reasonable terms.[111] The plaintiffs subsequently filed their action, claiming that the underlying state statutes allowed an unlawful taking of their reversionary interests without compensation.[112] The trial court granted King County's motion to dismiss, concluding "a right of way granted to a railroad is a perpetual public easement; abandonment of a railroad right of way does not occur upon a change in use from railroad purposes to some other form of public transportation."[113] In so ruling, the trial court avoided making a factual determination as to the intent of the original conveyance.

The Washington State Supreme Court accepted direct review of the *Lawson* case.[114] The defendant King County made the following three arguments upon review: (1) the statutes merely embodied common law; (2) the plaintiffs' reversionary interests were not eliminated by the statutes, as plaintiffs could still obtain possession of the land

108. 107 Wash. 2d 444, 730 P.2d 1308 (1986).

109. *Id.* at 446, 730 P.2d at 1310.

110. *Id.*; *see also* 49 U.S.C. § 10906 (1988); 49 C.F.R. § 1152.28 (2001) (taking effect after the Rails-to-Trails Act was signed into law).

111. *Lawson*, 107 Wash. 2d at 446, 730 P.2d at 1310.

112. 107 Wash. 2d at 447, 730 P.2d at 1310.

113. *Id.*

114. *Id.*

once it was free from public use; and (3) the plaintiffs had no vested rights in the corridor, thereby allowing retroactive legislation.[115]

The court rejected all three arguments and reversed the dismissal. First, the court held that the statutes expressly prevent the ripening of the plaintiffs' reversionary interests upon cessation of railroad use and, therefore, do not embody common law.[116] Second, the court concluded, without the statutes, reversionary interest holders would possess the easements in question upon rail abandonment.[117] Reversionary interest holders would not obtain a possessory interest under the statutes.[118] Finally, the court held that while the legislature could enact a retroactive statute, the lawmaking body could not interfere with a vested right.[119] While the court noted that certain remote and speculative future interests were not entitled to constitutional protection,[120] the court concluded reversionary interests were not of such a type.[121]

However, the *Lawson* court concluded the deeds in question conveyed easements for rail purposes *only* and not perpetual public easements, even though the trial court never made such a factual determination.[122] The court rejected the argument that the proposed changes from a railroad corridor to a recreational trail were consistent with the grantor's original intent. The court held that the meaning of a grant will be inferred, absent express language that the grantee is not restricted to the methods used at the time the grant was conveyed.[123] The court held that under common law, a deed conveying a right of way for railroad purposes constituted an easement providing the servient estate with a reversionary interest.[124] Furthermore, the court applied the common law principle: when the particular use of an easement for which the easement was established ceases, the land is discharged and reverts to the original landowner or to the landowner's successor in interest.[125] The court entertained the notion that a grant for railway use without express limiting language could accommodate

115. *Id.* at 453, 730 P.2d at 1313.

116. *Id.*

117. *Id.*

118. *Id.*

119. 107 Wash. 2d at 454–55, 730 P.2d at 1314 (citing Gillis v. King County, 42 Wash. 2d 373, 376, 255 P.2d 546, 548 (1953)).

120. *Id.* at 456, 730 P.2d at 1315; *see also* Cavett v. Peterson, 688 P.2d 52 (Okla. 1984).

121. *Lawson*, 107 Wash.2d at 456, 730 P.2d at 1315.

122. *Id.* at 449, 730 P.2d at 1311 (emphasis added).

123. *Id.* at 450, 730 P.2d at 1312.

124. *Id.* (citing Roeder Co. v. Burlington N. Inc., 105 Wash. 2d 567, 571, 716 P.2d 855, 859 (1986); Swan v. O'Leary, 37 Wash. 2d 533, 225 P.2d 199 (1950); Morsbach v. Thurston County, 152 Wash. 562, 278 P. 686 (1929)).

125. *Id.*

other uses in place at the time of the grant.[126] The court, however, expressly rejected use of the rail corridor as a recreational trail as consistent with the public travel purpose of the original easement.[127]

The *Lawson* court, in reaching its conclusions, however, did not make clear whether the deeds in question in fact conveyed property for rail purposes only. While the court concluded the conveyance in question constituted an easement exclusively for railroad purposes, Justice Pearson's concurrence and dissent in the case cast doubt upon the court's finding. Justice Pearson noted that the deeds did not mention "railroad purposes," but instead spoke to "benefits and advantages" accruing to the grantors.[128] He concluded the deed's language was unclear as to what "benefits and advantages" were evident at the time of the conveyance.[129] Under Washington's law, when extrinsic evidence is considered, the interpretation of the conveyance becomes a mixed question of fact and law; the question of intent, however, is a factual one.[130] Justice Pearson wrote the "benefits and advantages" were ambiguous on the face of the conveying instrument.[131] Thus, identifying the "benefits and advantages" and deciding whether they could reasonably ensue from the use of the easement as a recreational trail was a factual question not decided at trial.[132]

In his dissent, Justice Utter observed that Washington law recognized that changes in the use of an easement do not necessarily take the easement beyond its originally intended scope.[133] Parties to an easement, he wrote, are presumed to have considered "a normal development under conditions which may be different from those existing at the time of the grant."[134] Under state law, the court considers "normal development" based on "the parties' intentions at the original creation of the easement, the nature and situation of the servient estates, and the history of the easement's use."[135]

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126. *Id.*

127. 107 Wash. 2d at 451, 730 P.2d at 1312; *see also* State v. Dept. of Natural Res., 329 N.W. 2d 543 (Minn.) (holding that abandonment does not occur upon change from railroad use to recreational trail use), *cert. denied*, 463 U.S. 1209 (1983).

128. *Lawson*, 107 Wash. 2d at 462, 730 P.2d at 1318 (Pearson, J., concurring in part, dissenting in part).

129. *Id.*

130. *Id.* (citing Roeder Co. v. Burlington N. Inc., 105 Wash. 2d 567, 571–72, 716 P.2d 855, 859 (1986)).

131. *Id.*

132. *Id.*

133. *Id.* at 465, 730 P.2d at 1319 (Utter, J., dissenting).

134. *Id.* (quoting Logan v. Brodrick, 29 Wash. App. 796, 800, 631 P.2d 429, 432 (1981)).

135. *Id.* at 465, 730 P.2d at 1320 (Utter, J., dissenting) (quoting *Logan*, 29 Wash. App. at 799, 631 P.2d at 431) (citing Evich v. Kovacevich, 33 Wash. 2d 151, 157, 204 P.2d 839, 842 (1949)).

Thus, both the concurring and dissenting opinions in *Lawson* are significant, as the court did not factually determine the intent of the original conveyance. Nevertheless, the *Lawson* majority held that alternate public uses of railroad easements would constitute a taking of a reversionary interest when the deeds in question specifically conveyed an easement solely for rail use. Given the history of how railroads originally acquired rail corridors and the court's struggle to determine the title conveyed and the intent of the parties, it is arguable the court was too hasty in reaching its conclusion.

B. Fee Simple Acquisition

Ten years later, the Washington court revisited the rail corridors issue and set the stage for a significantly different analysis in resolving the rail corridor deed interpretation issue. *Brown v. State* involved title disputes over properties used as a railway in Adams, Kittitas, and Whitman counties located in Central and Eastern Washington. [136] The disputes were between property owners, who were residing adjacent to the rail corridor claiming reversionary interests in the right of way, and the State of Washington, which had purchased the properties for development of a recreational trail.[137] The State claimed it had acquired fee simple title based on the original interests expressed on the Warranty Deed conveyed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, which had operated within the corridor.[138] Adjacent landowners claimed the original deeds conveyed only right of way easements.[139]

The court stated, "[I]n addition to the language of the deed, we will look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties."[140] In making this statement, the court noted its holding and analysis three years earlier in *Harris v. Ski Park Farms.*[141] *Harris* involved a deed containing an ambiguous rail corridor conveyance.[142] Similar to *Brown*, the issue was whether the deed intended to reserve a fee interest or an easement for the property owner.[143] The *Harris* court held that deed interpretation is a

136. 130 Wash. 2d 430, 433, 924 P.2d 908, 909 (1996).

137. *Id.* at 436, 924 P.2d at 911.

138. *Id.* at 433, 924 P.2d at 910.

139. *Id.*

140. *Id.* at 438, 924 P.2d at 912; *see also* Scott v. Wallitner, 49 Wash. 2d 161, 162, 299 P.2d 204, 204–05 (1956); Harris v. Ski Park Farms, Inc., 120 Wash. 2d 727, 739, 844 P.2d 1006, 1012 (1993).

141. 120 Wash. 2d 727, 844 P.2d 1006 (1993)

142. *Id.* at 736–37, 844 P.2d at 1010–11.

143. *Id.*

mixed question of fact and law, consistent with Justice Pearson's concurrence and dissent in *Lawson*.[144] The *Harris* court wrote, "[I]t is a factual question to determine the intent of the parties. Then we must apply the rules of the law to determine the legal consequences of that intent."[145] The *Harris* court further noted the common law principle: a deed should be construed in a manner that gives effect to the intent of the parties.[146] Additionally, the court derives the intent of the parties from the entire conveying instrument.[147] If an ambiguity exists, the court will consider the situation and circumstances of the parties at the time of the grant.[148]

The deed in *Brown* granted the railroad and its successors "a fee simple title to said strip of land, together with all rights, privileges and immunities that might be acquired by the exercise of the right of eminent domain."[149] Following the rules established in *Harris*, the court conducted a seven-factor test to determine what interest the deed ultimately conveyed to the grantee.[150] The court considered (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use and purpose of the land, or in other ways limiting its use; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than the strip itself; (4) whether the deed was granted solely to operate and maintain a railroad; (5) whether the deed contained a clause providing a reversionary interest to the grantor if the railroad ceased operations; (6) whether the deed expressed substantial or nominal consideration; and (7) whether the conveyance contained a habendum clause, or other considerations suggested by the language of the particular deed.[151]

In considering the seven factors, the *Brown* court paid particular attention to the words "right of way" contained in railroad deeds. The court previously noted in *Roeder Co. v. Burlington Northern, Inc.*[152] that the deed in question conveyed "for all railroad and other right of way purposes, certain tracts and parcels of land" and recognized a rail-

144. *Id.* at 738, 844 P.2d at 1011.

145. *Id.*; *see also* Veach v. Culp, 92 Wash. 2d 570, 573, 599 P.2d 526, 527 (1979).

146. *Harris*, 120 Wash.2d at 739, 844 P.2d at 1012; *see also* Zorbrist v. Culp, 95 Wash. 2d 556, 560, 627 P.2d 1308, 1310 (1981).

147. *Harris*, 120 Wash.2d at 739, 844 P.2d at 1012.

148. *Id.*

149. Brown v. State, 130 Wash. 2d 430, 435, 924 P.2d 908, 910–11 (1996).

150. *Id.* at 438, 924 P.2d at 912.

151. *Id.*; *see also* Swan v. O'Leary, 37 Wash. 2d 533, 535–36, 225 P.2d 199, 200 (1950).

152. 105 Wash. 2d 567, 716 P.2d 855 (1986).

road can hold rights-of-way in fee simple or as easements.[153] The *Roeder* court concluded the deed in question conveyed an easement because the document conveyed a right of way grant for railroad purposes, and there was no persuasive evidence of intent to the contrary.[154] The holding in *Roeder* was consistent with a line of railroad right of way cases dating back to 1894.[155]

The holding was also immediately distinguishable from *Presault*. While both the *Presault* and *Roeder* courts concluded the deeds in question conveyed easements, the *Roeder* court concluded Washington law allowed railroads to hold right of ways in fee simple. In *Brown*, one deed in question stated in part:

> KNOW ALL MEN BY THESE PRESENTS, That Geo. D. Brown and Annie L. Brown his Wife of Spokane County, State of Washington for and in consideration of Ten & 00/100 Dollars, to them in hand paid, the receipt whereof is hereby acknowledge, do hereby convey, and Warrant unto the CHICACO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON, its successors and assigns, a strip of land, one hundred feet in width . . . .
>
> HEREBY CONVEYING a strip, belt or piece of land fifty feet in width on each side of the center line of the Railway of said Company, as now located and established over and across said land. Also conveying the following extra widths for excavations, embankments, depositing waste earth, and borrowing pits, as follows: Two strip[s] of land each fifty (50) feet in width and bordering one side of the strip of land . . . . And said Grantors, for the consideration aforesaid, for themselves and for their heirs, assigns and legal representative, further grant to said Company, its successors and assigns, the right to protect any cuts which may be made on said land, by erecting on both sides

153. *Brown*, 130 Wash. 2d at 438–39, 924 P.2d at 912 (citing Roeder, 105 Wash. 2d at 569, 716 P.2d at 859).

154. *Roeder*, 105 Wash. 2d at 572, 716 P.2d at 859.

155. *Id.* at 573, 716 P.2d at 859; *see also* King County v. Squire Inv. Co., 59 Wash. App. 888, 890, 801 P.2d 1022, 1023 (1990) (holding that a deed stating that "grant and convey . . . a right-of-way . . . To Have and to Hold . . . so long as said land is used as a right-of-way" grants easement); *Swan*, 37 Wash. 2d at 534, 225 P.2d at 199 (granting property "for the purpose of a Railroad right-of-way"); Morsbach v. Thurston County, 152 Wash. 562, 564, 278 P. 686, 687 (1929) (involving a deed granting "the right-of-way for the construction of said company's railroad in and over"); Pacific Iron Works v. Bryant Lumber & Shingle Mill Co., 50 Wash. 502, 505, 111 P. 578, 579 (1910) (holding that a deed providing "to have and to hold said premises . . . for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors" grants easement, not determinable fee); Reichenbach v. Washington Short Line Ry. Co., 10 Wash. 357, 360, 38 P. 1126, 1127 (1894) (construing the term "so long as the same shall be used for the operation of a railroad" as granting easement).

> thereof, and within one hundred and fifty feet from said center line, portable snow fences. . . .
>
> HEREBY GRANTING AND CONVEYING to said Company, its successors and assigns, a fee simple title to said strip of land, together with all rights, priviieges and immunities that might be acquired by the exercise of the right of eminent domain.[156]

The *Brown* court found no language in the deed limiting the purpose of the conveyed property. The court further concluded there was no question that the railroad acquired the property through federal statute for railroad purposes.[157] Lastly, the court concluded the deed conveyed a defined strip of land.[158]

Landowners, in contending the deed conveyed an easement, made the following three arguments: (1) eminent domain language in the deed authorized railroads to acquire only interests necessary for railroad operations;[159] (2) the "over and across" language found in the deed's description portion is consistent with an easement;[160] and (3) the deeds were negotiated under threat of condemnation, and property owners therefore did not intend to convey more than what the railroad could acquire through eminent domain, or in other words, an easement.[161]

The court rejected the eminent domain argument and considered state law at the time of the conveyance authorizing railroads to acquire "legal title" to land or interests necessary for the operation of a railway.[162] While the court acknowledged the dissent's argument that the Washington State Constitution and statutory law authorized railroads to acquire only easements,[163] the court concluded the conveyances at issue occurred prior to clarifying case law.[164] At the time of the Brown conveyance, the court noted, condemnation statutes were unclear but did allow cities and other entities under similarly worded condemnation statues to acquire fee simple interests.[165] Thus, property owners could have intended to convey to the railroads a fee simple interest at

156. *Brown*, 130 Wash. 2d at 434–35, 924 P.2d at 910–11.
157. *Id.* at 440, 924 P.2d at 913.
158. *Id.* at 443, 924 P.2d at 915.
159. *Id.* at 440, 924 P.2d at 913.
160. *Id.* at 442, 924 P.2d at 914.
161. *Id.* at 442–43, 924 P.2d at 915.
162. *Id.* at 440, 924 P.2d at 913.
163. *Id.* at 460, 924 P.2d at 923 (Sanders, J., dissenting).
164. *Id.*
165. *Id.* at 441, 924 P.2d at 913–14; *see also* Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 278, 79 P. 780, 781 (1905) (involving a situation where Seattle acquired fee simple interest by condemnation).

the time of the conveyance. In addition, the court interpreted the phrase "together with all rights, privileges and immunities that might be acquired by the exercise of the right of eminent domain" to imply a grant of additional rights, rather than a limitation on the interest conveyed.[166] In rejecting the landowner's eminent domain argument, the court also rejected a second underpinning of the Federal Circuit's holding in *Preseault III* that a railroad could not acquire more than what it needed through eminent domain.

In addition to the eminent domain argument, adjacent landowners argued that references to "rights of way" contained within the deed indicated an easement, rather than fee simple title.[167] In response, the court noted the term "right of way" can have two meanings under Washington case law. First, "right of way" can qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement), or, second, it can describe the strip of land being conveyed to a railroad for constructing a railway.[168] The Washington court is consistent with other state courts in considering dual meanings of "right of way."[169] In *Brown*, the court found the term "right of way" inconclusive, as a railroad can own a right of way in fee simple if so conveyed.[170]

The court also rejected the property owners' "over and across" argument, concluding the deed language was ambiguous. While property owners argued the language was consistent with granting an easement across fee simple property, the court held it was equally possible the parties used the term "over and across" to simply locate the corridor.[171] The court further concluded the ten dollar payment for the conveyance was similar to other such deeds at the time and inconclusive as to whether the railroad acquired a fee simple estate or an easement.[172]

Finally, the *Brown* court rejected the notion that the railroad's quasi-governmental authority coerced property owners under threat of condemnation into conveying a greater estate than intended. The court noted that even if railroads could only acquire easements at the time of conveyance, many property owners welcomed the economic benefits of railroads and willingly sold property hoping to encourage

166. *Brown*, 130 Wash.2d at 441, 924 P.2d at 914.

167. *Id.*

168. *Id.*; *see also* Morsbach v. Thurston County, 152 Wash. 562, 568, 278 P. 686, 688 (1929); Harris v. Ski Park Farms, Inc., 120 Wash. 2d 727, 737, 844 P.2d 1006, 1011 (1993).

169. City of Manhattan Beach v. Super. Ct., 914 P.2d 160, 166 (Cal. 1996); Sowers v. Illinois Central Gulf R. Co., 503 N.E. 2d 1082, 1088 (1987).

170. *Brown*, 130 Wash. 2d at 442, 924 P.2d at 914.

171. *Id.*

172. *Id.*

rail activity in the area.[173] The court cited case law indicating that railroad construction was, at times, a highly favored enterprise.[174] Thus, the court concluded the landowner's suggestion of coercion by the railroad was inconclusive at best.[175]

In ruling for the State, the court concluded the deeds in question fell squarely within the rule that the conveyance shall be construed as fee simple title absent any language limiting either the purpose of the grant or the estate conveyed as pertaining to a definite strip of land.[176]

C. Federal Easements and Land Grants

A second issue in *Brown* involved railroad titles conveyed under the General Railroad Right of Way Act of 1875.[177] The Act, now codified at 43 U.S.C. § 912,[178] was drafted following a change in federal policy regarding the nation's railroads. In 1850, Congress began subsidizing railroad construction through lavish public land grants.[179] Some of the grants involved millions of acres from the public domain.[180] The public disfavored the policy, leading the House of Rep-

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173. *Id.* at 443–44, 924 P.2d at 915; *see also* Ira A. Nadeau, *Railroad Situation in Washington*, WASH. MAG., Apr. 1906, at 2 ("The coming of the railroads made the settlement of the greater portion of our state possible.").

174. *Brown*, 130 Wash. 2d at 443, 924 P.2d at 915 (citing State Rd. Comm'n v. Johnson, 161 A.2d 444 (Md. 1960)).

175. *Id.* at 442–43, 924 P.2d at 915.

176. *Id.* at 443, 924 P.2d at 915; *see also* Swan v. O'Leary, 37 Wash. 2d 533, 536, 225 P.2d 199, 200 (1950).

177. *Brown*, 130 Wash. 2d at 444, 924 P.2d at 916.

178. § 912 provides, 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 for its railroad . . . and use and occupancy of said lands for such purposes has ceased or shall hereafter cease . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad . . . expect lands within a municipality the title to which, up forfeiture or abandonment . . . shall vest in such municipality . . . *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyances be among those which . . . may . . . before such forfeiture or abandonment be validated and confirmed by any such Act of Congress.

179. Great N. Ry. Co. v. United States, 315 U.S. 262, 273 (1942).

180. *Id.* at 273 n.6 (citing the Northern Pacific Grant Act of July 2, 1864, 13 Stat. 365, as the largest grant involving an estimated forty million acres).

resentatives Resolution to end outright grants for railroads.[181] Nevertheless, Congress still encouraged the railroads to lay tracks to develop the West.[182] Subsequent acts of Congress, however, generally inferred the conveyance of an easement to railroads.[183] While these subsequent acts did not expressly call the conveyances easements, the language generally granted railroads rights of way through the United States public land.[184] Congress passed at least fifteen such conveyances between 1871 and 1875, all granting railroads "right of way" through public lands.[185]

The numerous pieces of special legislation prompted lawmakers to adopt a general right of way statute.[186] The Court subsequently concluded the Act granted railroads an easement, rather than a fee.[187] Congress expressly noted as such in subsequent legislation.[188] For example, lawmakers declared that, upon a forfeiture of unused rights of way, "the United States . . . resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement."[189]

The Washington State Supreme Court in *Brown* considered whether the easement subsequently reverted to the abutting property owner.[190] The court held it did not[191] and recognized that Congress intended under 43 U.S.C. § 912 that the purchaser of the right of way, rather than the owner of the abutting property, expressly retained a reversionary interest in the right of way.[192] The court further recognized that Congress partially divested the government's reversionary interest by granting reversionary interest to owner of the legal subdivi-

181. *Id.* at 273–74 ("*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.") (citing CONG. GLOBE, 42d Cong., 2d Sess., 1585 (1872)).

182. *Id.* at 274.

183. *Id.*

184. *Id.* at 274 n.10 (noting that, in reporting a bill granting a right of way to the Dakota Grand Trunk Railway, the committee chair said, "This is merely a grant of "right of way") (citing CONG. GLOBE, 42d Cong. 2d Sess., 3913 (1872)).

185. *Id.* at 274 n.9.

186. *Id* at 275.

187. *Id.* at 275 n.13.

188. *Id.* at 276.

189. *Id.* (noting that the language is repeated in the Forfeiture Act of February 25, 1909, ch. 191, 35 Stat. 647, and passed on June 26, 1906 in an act confirming "the rights of way which certain railroads had acquired under the 1875 Act in the Territories of Oklahoma and Arizona").

190. *Brown*, 130 Wash. 2d at 445, 924 P.2d at 916.

191. *Id.* at 448, 924 P.2d at 917.

192. *Id.*

sion previously traversed by the right of way.[193] The Washington court considered a local municipality's reversionary interest in federal railroad grants in *City of Buckley v. Burlington Northern Railroad Corp.*[194] The case was one of first impression in the country.[195]

The purpose of § 912 is the disposition of the federal government's reversionary interest in rights of way granted pursuant to federal railroad land grants.[196] The dispute in *City of Buckley* was whether federally granted rail rights of way reverted to the underlying incorporated municipality or to the railroad operator.[197] The court focused its reasoning around the Congressional intent of § 912, specifically recognizing later drafts of the enabling legislation and the municipal reversion provision.[198] The court's reasoning was further supported by federal district court dicta noting a municipal reversionary exception in separate but similar federal statutes addressing railroad rights of way.[199] In other words, the *City of Buckley* court noted that through § 912, Congress recognized a public value or interest in maintaining railroad right of ways even after railroad use had ceased.

The court deciding *Brown* ten years later similarly upheld the possibility of alternate public uses for unused railroad corridors by ruling against adjacent property owners claiming a reversionary interest in the right of way.[200] Property owners claimed the interest as rightful owners in the "legal subdivision previously traversed by the railroad" as provided for in § 912.[201] Abutting owners argued that the State purchased the right of way for a recreational trail following a (railroad) reorganization court order for rail abandonment, and therefore, reversion to the underlying servient estate had already occurred.[202] Conversely, the State argued it purchased the underlying property prior to any abandonment proceedings "validated and con-

193. *Id.* at 445, 924 P.2d at 916 (citing 43 U.S.C. § 912).

194. 106 Wash. 2d 581, 723 P.2d 434 (1986).

195. *Id.* at 583, 723 P.2d at 435.

196. *Id.* at 583, 723 P.2d at 436.

197. *Id.* at 581–82, 723 P.2d at 435.

198. *Id.* at 584–85, 723 P.2d at 436 (noting that amended versions of House and Senate bills prior to final passage in 1922, now codified as 43 U.S.C. § 912, added the municipal exception to railway corridor reversions).

199. *Id.* at 587 n.2, 723 P.2d at 437 n.2 ("Viewing the narrow strips as of little or no use or value to the Government, Congress passed Section 912 providing that the abandoned right of way vested in the person or entity owning the land traversed by the railroad line, *except* when the right of way was within a municipality, in which case it then vested in the municipality.") (emphasis added).

200. *Brown*, 130 Wash. 2d at 445, 924 P.2d at 916.

201. *Id.*

202. *Id.*

firmed by any Act of Congress," and therefore, the State held title to any reversionary interest.[203] The court agreed with the State.

The majority in *Brown* concluded in order for reversionary interests to vest under § 912, the railroad must first cease "use and occupancy" of the rights of way and a court of competent jurisdiction or a Congressional act must next "declare or decreed" abandonment.[204] The *Brown* court noted that the reorganization court had authorized abandonment of the right of way prior to the trustee selling the corridor to the state.[205] The court recognized, however, that the reorganization court also directed the trustee "to fully pursue all possibilities for sale of portions of these lines for continued rail operation or other public use before he disturbs any tracks of facilities west of Miles City, Montana . . ."[206] The "'use and occupancy' of the right of way had apparently ceased" before the right of way sale to the State.[207] Nevertheless, "authorizing conditional abandonment and declaring a railway abandoned are two separate acts."[208] In this particular case, "no court of competent jurisdiction has declared or decreed the railway abandoned even though abandonment has been authorized."[209] In addition, the *Brown* court concluded that since federal "easements" on public land are granted by Congress, the easements are subject to Congressional desires rather than common law.[210] Lastly, as Congress authorized the sale of the right of way for non-railroad purposes, the court concluded, "Congress intended the reversionary interest to vest in the purchaser of the right of way rather than the owner of the abutting property."[211]

The court's holding in *Brown*, while perhaps controversial, is a significant moment in the rail-to-trails issue in Washington State. The court had established specific factors to be used when determining whether a railroad deed conveyed a fee interest or an easement.[212] The court also recognized the public value Congress has placed in unused railroad corridors across the country. In addition to providing a

203. *Id.* at 446, 924 P.2d at 916.

204. *Id.* at 447, 924 P.2d at 917 (citing Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1337 (9th Cir. 1990); Idaho v. Oregon Short Line R.R., 617 F. Supp. 207, 216, 218 (D. Idaho 1985)).

205. *Brown*, 130 Wash. 2d at 447, 924 P.2d at 917.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 447–48, 924 P.2d at 917 (citing Idaho v. Oregon Short Line R.R., 617 F. Supp. 207, 212 (D. Idaho 1985)).

211. *Id.* at 448, 924 P.2d at 917.

212. *Id.* at 438, 449, 924 P.2d at 912, 918 ((1) the deed language, (2) circumstances surrounding the execution of the deed, and (3) subsequent conduct of the parties).

state or municipality with new public recreational or bicycle trails, vacated rail corridors can also provide valuable right of ways for water and sewer lines, fiber optic cable, and high speed Internet connections.[213]

D. The Dissent

Critics of the *Brown* court contend the court overreached in its analysis of what the deeds in question actually conveyed. For example, in his dissent, Justice Sanders, a former property rights lawyer,[214] noted the majority's acknowledgment that the deeds showed the Milwaukee Railroad acquired the disputed property for railroad purposes.[215] Hence, he argued, the court did not need to go further in determining the intent of the conveyance.[216] He also argued the court erred in construing the deeds as conveying a fee interest, rather than an easement based on previous court holdings interpreting ambiguous conveyances.[217]

The dissent's arguments, however, do little to shed light on what the grantors in question ultimately intended to convey. First, the dissent relied heavily on *Morsbach*, which held that a grant of a right of way for a railroad passes as only an easement.[218] He also cited to legal scholar William B. Stoebuck who wrote, "Washington decisions involving disputed language seem to favor the granting of an easement, though they do not say so in so many words."[219] The dissent argued the search for a grantor's intent ends once the purpose for the conveyance is found.[220] The *Morsbach* deed, however, never mentioned the word "fee."[221] The court instead focused on the phrase "right of

213. *See* Wright & Hester, *supra* note 32.

214. David Postman, *Supreme Court Justice Isn't Afraid to be Different*, SEATTLE TIMES (Sept. 3, 1998), *available at* http://archives.seattletimes.nwsource.com/c/s.dll/texis/web/vortex/display?slug=sand&date=19980903.

215. *Brown*, 130 Wash. 2d at 449, 924 P.2d at 918 (Sanders, J., dissenting).

216. *Id.*

217. *See id.* at 450–61, 924 P.2d at 919–25 (Sanders, J., dissenting).

218. *See id.* at 451, 924 P.2d at 919 (Sanders, J., dissenting).

219. 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 7.9, at 462, 464 (1995).

220. *Brown*, 130 Wash. 2d at 451, 924 P.2d at 919 (Sanders, J., dissenting).

221. *Morsbach*, 152 Wash. 562 at 564–65, 278 P. at 687. The deed said:

> Know all men by these presents, that Edward Kratz of Thurston county, Washington territory, in consideration of two hundred dollars ($200) paid by the Northern Pacific Railroad Company and other good and valuable considerations, the receipt whereof is hereby acknowledged, do by these presents give, grant, bargain, sell and convey unto said Northern Pacific Company, or its assigns the following described premises, viz: the right of way for the construction of said company's railroad in and over the south half of the northeast quarter of section twenty-two and the west half of the northwest quarter of section twenty-three of township fifteen north of range two

way."[222] In interpreting the *Morsbach* deed, the court looked to case law and noted, "[T]he construction of a deed must be made upon the entire instrument, and the intention of the grantor, as derived from the deed itself should be sought."[223] The court examined the entire deed and noted that the deed expressly conveyed land "for the construction of said company's railroad."[224] The court further noted that the document did not contain a reverter clause, or a clause reserving the right of re-entry in the event the railroad abandoned the property, possibly indicating a fee interest.[225] Nevertheless, the court concluded the use of the term "right of way" does not reflect an intention to convey a fee simple interest, but reflects a grant of an easement.[226] Thus, the court looked to the intent of the parties as manifested on the deed in question, rather than making a conclusion after finding the deed's purpose.[227]

While there is no question the grantors in *Brown* intended to convey land for railroad purposes, the deed did not limit the grant to such purpose. The deed also expressly attempted to convey a fee simple interest.[228] In Washington, a railroad can hold a fee interest in land used for railroad purposes.[229] The court has long held that when parts of a deed seem inconsistent, the court will try to harmonize them

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west, situate in Thurston county, Washington territory, and the construction of certain canals, whereby the channel of Skookumchuck is changed and prevented from infringing upon said railroad including the land necessary for said roads and canals, hereby acknowledging satisfaction in full for all damages therefrom.

To have and to hold the general premises with the privileges and appurtenances thereto belonging to the Northern Pacific Railroad Company its successors and assigns to their use and behoof forever. And the said Edward Kratz for himself and his heirs, executors and administrators does covenant with said Northern Pacific Railroad Company its successors and assigns that he is lawfully seized of the aforesaid premises, and that they are free from all incumbrances, that he has good right to sell and convey same to said Northern Pacific Railroad Company as aforesaid and that he will and his heirs, executors, and administrators will warrant and defend the same to the Northern Pacific Railroad Company its successors and assigns forever against the lawful claims and demands of all persons.

In witness whereof I have hereunto set my hand and seal this 12th day of November in the year of our Lord Eighteen Hundred and Seventy-two.

Id.

222. *Id.* at 568, 278 P. at 688 ("It will be observed that the granting clause creates a right of way without any specific width or length . . . .").

223. *Id.* at 571, 278 P. at 689.

224. *Id.* at 564, 278 P. at 687.

225. *Id.* at 567, 289 P. at 688.

226. *Id.* at 574–75, 278 P. at 690.

227. *Id.* at 575, 278 P. at 690.

228. Brown v. State, 130 Wash. 2d 430, 435, 924 P.2d 908, 911 (1996).

229. *See* Roeder Co. v. Burlington Northern, Inc., 105 Wash. 2d 567, 716 P.2d 855 (1986).

so as to give them all effect.[230] The rule is applicable even when considering railroad deeds. While the grantors in *Brown* intended to convey the property for railroad use, there is no evidence limiting the conveyance to rail use. If the grantors intended to convey a fee simple interest, merely concluding they did not is a factual determination inconsistent with the deed. Furthermore, looking outside the four corners of an ambiguous railroad deed to determine whether the document conveyed a fee interest or easement is also consistent with other court decisions.[231] While the dissent in *Brown* contended the deeds conveyed land for railroad purposes only, and therefore conveyed only an easement, the documents are far from clear on the matter. Merely stating a purpose does little to shed light on the grantor's intent.

Secondly, the dissent contended the nominal consideration of ten dollars is more consistent with the lesser estate of an easement, rather than the greater fee estate.[232] However, courts around the country have concluded the consideration paid may evince a party's intent but is not dispositive in determining the interest conveyed. A Nebraska appellate court has held that consideration as low as one dollar did not changed the nature of a fee conveyance.[233] An Arkansas court has concluded benefits from the building of a railroad did not create an ambiguity in a deed conveying a fee simple interest as such consideration could have been valuable.[234] A Florida appellate court has held that sufficiency of consideration is not a relevant basis upon which to void a deed.[235] While the dissent may conclude the nominal consideration in *Brown* is indicative of an easement, the evidence suggests otherwise.

Lastly, the dissent argued the "eminent domain" language included in *Brown* implies that the land was acquired through condemnation.[236] The dissent may have a point, although the majority construed the eminent domain reference as granting additional rights, rather than limiting rights.[237] Whether the land was acquired through

230. STOEBUCK, *supra* note 219 (citing Maxwell v. Harper, 51 Wash. 351, 98 P. 756 (1909)).

231. *See* City of Manhattan Beach v. Super. Ct., 914 P.2d 160, 169 (Cal. 1996) (holding that words "right of way" was ambiguous and admitting extrinsic evidence); *see also* STOEBUCK, *supra* note 219 (citing Moore v. Gillingham, 22 Wash. 2d 655, 157 P.2d 598 (1945)).

232. *Brown*, 130 Wash. 2d at 458, 924 P.2d 923.

233. Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305, 308 (Neb. Ct. App. 1993) (holding that nominal monetary consideration alone does not make the instrument ambiguous nor create an easement).

234. Coleman v. Missouri Pac. R.R., 745 S.W.2d 622, 624 (Ark. 1988).

235. Kingsland v. Godbold, 456 So. 2d 501, 502 (Fla. App. 1984), *see also* Hunter v. Milhous, 305 N.E.2d 448 (Ind. Ct. App. 1973).

236. *Brown*, 130 Wash. 2d at 459, 924 P.2d at 923.

237. *Id.* at 441, 924 P.2d at 914.

eminent domain proceedings is not clear. Whether the grant of fee simple title conveyed a fee simple absolute or a fee simple determinable interest is also ambiguous. The dissent correctly argues the term fee simple may connote a determinable fee, more akin to an easement. The deed in question, however, does not mention a right of re-entry or possibility of reverter, indicating that the deed may convey a fee simple absolute. While the dissent does raise valid points with regards to deed language, his arguments do little to clarify what was contemplated at the time of conveyance.

*E. Other "*Brown*" Cases*

Whether *Brown* changed, or merely refined, Washington law pertaining to railroad deed interpretation is subject to debate. Of more importance is how state and federal courts have incorporated the *Brown* analysis into subsequent case holdings. Four years after *Brown*, the Washington State Court of Appeals heard *Roeder Co. v. K & E Moving & Storage Co. Inc.*[238] The case involved a 1901 conveyance of a fifty-foot wide strip of land for a railroad right of way.[239] The issue was whether the deed conveyed a fee interest or an easement.[240] The matter came up again one year later in federal court, in *King County v. Rasmussen*.[241] At issue in *Rasmussen* was a deed granting a 100-foot wide railroad right of way (fifty feet either side of centerline), allowing the railroad to clear trees hazardous to rail operations up to 200 feet from centerline.[242] As in *Roeder*, the issue involved whether the railroad received a fee simple interest in the corridor or an easement.[243] In both cases, the courts found the deeds ambiguous on their face with no limiting language and considered extrinsic evidence in resolving the ambiguities. More significantly, the courts in both *Roeder* and *Rasmussen* applied the procedures adopted in *Brown* to reach the conclusion that the deeds in question conveyed a fee simple interest, rather than an easement. The *Rasmussen* court derived a three-step analysis from *Brown* and considered: (1) the language of the deed, (2) subsequent behavior of the parties regarding the use of the land in question, and (3) circumstances at the time of execution of the deed.[244] In both cases, the court quieted title in favor of local municipalities looking to use the unused railroad corridors for public purposes. In *Rasmussen*,

238. 102 Wash. App. 49, 4 P.3d 839 (2000).
239. *Id.* at 51, 4 P.3d at 840.
240. *Id.* at 52, 4 P.3d at 840.
241. 143 F. Supp. 2d 1225 (W.D. Wash. 2001).
242. *Id.* at 1226.
243. *Id.* at 1228.
244. *Id.* at 1229.

the court found the legal issue settled and dismissed the Rasmussen's claim to the adjacent railroad property on summary judgment.[245]

The Washington court is not unique in construing railroad deeds without limiting language to convey a fee simple absolute interest. An Indiana appellate court addressed the issue in *Clark v. CSX Transportation, Inc.*[246] The court examined numerous rail conveyances in a class action suit brought by residents opposing a recreational trail.[247] The court found no limiting language in all but one of the deeds included in a subclass and held that the deeds conveyed a fee simple absolute interest.[248] When a deed in question included the limiting clause, "so long as the railroad continues to operate service," the court held the deed conveyed an easement.[249] The Indiana court relied on similar principles of deed construction as the Washington court used in *Brown*.[250] The Indiana court stated the object of deed construction is to ascertain the intent of the parties from the language of the deed.[251] In construing a deed, the court should consider the entire deed so no part is rejected.[252] If an ambiguity exists, the court may look to parole evidence to explain the instrument, not to contradict it.[253]

The Illinois State Supreme Court concluded likewise in *Urbaitis v. Commonwealth Edison*.[254] The case also involved a recreational trail. Adjacent homeowners argued the railroad was granted an easement.[255] The railroad argued it was granted fee simple title.[256] The court held for the railroad, concluding the deeds conveyed a fee simple interest.[257] The court noted that where a deed conveys a definite parcel of land without limiting language, the deed grants a fee simple estate.[258] In holding for the railroad, the court expressly rejected the plaintiffs' argument that the term "right of way" conveys an easement.[259] The court wrote, "[T]here is no *per se* rule that the mere inclusion of the term 'right of way' in any deed to a railroad negates the possibility that

245. *Id.* at 1232.
246. 737 N.E.2d 752 (Ind. Ct. App. 2000).
247. *Id.* at 755.
248. *Id.* at 760–64.
249. *Id.* at 763.
250. *Id.* at 757–58.
251. *Id.* at 757.
252. *Id.*
253. *Id.* at 758.
254. 575 N.E.2d 548 (Ill. 1991).
255. *Id.* at 462.
256. *Id.*
257. *Id.* at 555.
258. *Id.* at 552.
259. *Id.* at 553.

title in fee simple was conveyed."[260] The court concluded such a rule would allow form to predominate over substance, and would frustrate the otherwise demonstrated intent of the parties.[261] Lastly, the court concluded even use of the term "right of way" did not embrace such a per se rule even when grantors intended to convey an easement.[262]

IV. THE IMPACT OF BROWN AND ITS PROGENY

The Washington court's adoption of *Brown* was a positive step in the ongoing controversy over recreational trails for three reasons. First, the holding and subsequent application of the court's reasoning clarifies many of the acquisition issues which arise when planning a new trail. Such clarity is welcome as trail opponents and adjacent property owners often attempt to obfuscate legal issues for public relations reasons when opposing trail development. Second, the holding and reasoning in *Brown* allows municipalities to fulfill Congressional intent to maintain valuable public corridors and to pursue local public land use policy goals. Lastly, *Brown* and its progeny make recreational trail construction and railway corridor preservation more appropriately a legislative or political issue, rather than a legal matter.

The real opposition to recreational trails is no better demonstrated than in *King County v. Rasmussen*[263] where the defendants claimed that, in addition to property rights violations, the construction of a public recreational trail adjacent to their home violated their First, Second, Fifth, and Fourteenth Amendments rights under the U.S. Constitution.[264] The Rasmussens further argued developing a recrea-

260. *Id.*

261. *Id.*

262. *Id.*

263. 143 F. Supp. 2d 1225 (W.D. Wash. 2001).

264. *Id.* at 1227. The Rasmussens also charged King County with violating Article I, § 16 of the Washington State Constitution:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

tional trail on a former rail bed violated their civil rights under 42 U.S.C. § 1983 and, lastly, challenged the STB's handling of rail abandonment proceedings.[265] The court dismissed the defendant's civil rights and constitutional claims as having no merit, and dismissed STB abandonment challenge as outside the jurisdiction of federal district court.[266]

Such legal challenges, which have little to do with property rights, nevertheless have increased the public costs of trail projects for taxpayers and have delayed construction of some trails for years.[267] Incorporating *Brown* and establishing procedures for utilizing extrinsic evidence in determining the intent of a conveyance will help provide municipalities with more certainty when planning future railroad corridor acquisitions. Greater certainty would also provide prospective homeowners with greater knowledge and notice when deciding to purchase lots adjacent to inactive rail corridors.[268] Reducing uncertainty as to future land interests of all parties will help reduce litigation expenses and avoid costly delays in trail planning.

Second, Congress has long recognized the value of the country's investment in a nationwide transportation network through the enactment of § 912 and other statutory provisions such as the National Trail System Act. Critics of corridor preservation argue the likelihood of reactivation of an abandoned rail corridor is remote.[269] Railbanking opponents further contend the true purpose of policymakers in enacting the railbanking statute was less to prevent the abandonment of rail lines and more to promote the creation of recreational trails.[270] Nevertheless, even though the United States Supreme Court acknowledged in *Presault II* that preserving rail corridors for future train use could be tenuous,[271] preserved rail corridors have reverted to rail use in parts of the country.[272] In addition, the policy of preserving rail corridors for

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Id.

265. *Id.*

266. *Id.* at 1231–32. The civil rights claim, along with claims of Constitutional violations were brought as counterclaims in a quiet title action. *Id.* The court summarily dismissed the counterclaims as the defendants failed to show unconstitutional behavior on the part of the County, or so any unconstitutional conduct resulting from official policy, practice, or custom. *Id.*

267. *Id.* at 1226. Burlington Northern sold the railroad corridor in 1997. *Id.*

268. Arguably, a twenty-foot wide corridor through a property should provide a prospective homeowner with sufficient notice of the potential for alternate public uses.

269. *See* Drumm, *supra* note 28.

270. *Id.*

271. 494 U.S. 1 (1990).

272. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE SAM BROWNBACK, U.S. SENATE, SURFACE TRANSPORTATION, "ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS" (Oct. 1999).

future rail use was never predicated on the certainty that rail service would return to a corridor, but only on the premise that the rail or transportation services could return to a corridor.[273] Indeed, one suburban city in Washington State has actively considered reestablishing an inactive rail line for economic development and transportation purposes.[274] More importantly, Congress has embarked on preserving rail corridors as a matter of public policy because once these assets are lost, reestablishment would lead to prohibitive costs for railroads or public entities and disruptive and potentially expensive condemnation proceedings involving private landowners. Allowing a court to consider railroad deeds as possibly conveying a fee interest or allowing federal railroad easements to revert to the underlying city, state, or public landholder would provide local municipalities the option to preserve needed corridors for local public uses.

Lastly, if acquiring unused rail corridors does not constitute an unconstitutional taking as a matter of law, the issue of creating a recreational trail becomes a legislative or political question, rather than a judicial one. Placing the recreational trail issue in the hands of the legislative or executive branch of government is appropriate, as the controversy over recreational trails has rarely been about property rights, compensation, or whether a corridor is held in fee or as an easement. The opposition to trails have generally centered on landowner's objections to a public park, albeit a linear one, adjacent to homes, or through farmland.[275] Recreational trail critics, usually adjacent property owners, traditionally cite nuisances such as additional trail noise and loss of privacy as placing increased burdens on the property.[276] Landowners also cite reports characterizing trespassing trail users as presenting significant security problems or nuisance.[277] The Federal Circuit paid homage to such objections in *Presault III*. The court concluded:

> [N]oisy though they may be [trains] are limited in location, in number, and in frequency of occurrence . . . . When used for public recreational purposes, however, . . . the burden imposed

273. *Preseault II*, 494 U.S. at 19 ("Congress apparently believed that every line is a potentially valuable asset that merits preservation even if no future rail use for it is currently foreseeable.").

274. Mike Lindblom, *Trolley May Soon Troll in Issaquah*, SEATTLE TIMES, Sept. 5, 2000, *available at* http://archives.seattletimes.nwsource.com/c/s.dll/texis/web/vortex/display?slug=rail05m&date=20000905.

275. Mike Lewis, *A Trail of Fears Pits Rich Against Public: County to vote on opening path that divides estates and provokes hostility*, SEATTLE POST-INTELLIGENCER, Nov. 6, 2000, *available at* http://seattlep-i.nwsource.com/local/samm06.shtml.

276. *See* Drumm, *supra* note 28, at 165.

277. *Id.* (citing Whitely, *Study Shows Benefits*, *supra* note 20).

> by the use of the easement is at the whim of the many individuals, and . . . has been impossible to contain in numbers or to keep strictly within the parameters of the easement.[278]

Railbanking critics further contend the reduced privacy and increased likelihood of trespassing lowers property values adjacent to the corridor. Critics say property values near, but not adjacent to, Seattle's popular Burke-Gilman trail experienced anywhere from a 72.9 to 113.78 percent increase in value between 1979 and 1988.[279] Homes next to Burke-Gilman, on the other hand, appreciated only 26.62 percent during the same time period.[280] Railbanking critics contend the gap in appreciation rates illustrates the undesirability of living next to a recreational trail, as opposed to the desirability of having a trail in the neighborhood. They also cite dramatic increases in crime, including three homicides during the history of the Burke-Gilman itself.[281]

Such arguments are inconclusive at best and imaginative at worst. For example, studies between 1979 and 1997 showed that vandalism and break-in incidents along the Burke-Gilman were well below the neighborhood average.[282] Anecdotal reports from local law enforcement officers have also noted that trails in their respective municipalities have "not caused any increase in the amount of crimes reported"[283] and "probably [deter] crime since there are so many people, tourists and local citizens using the trail."[284] A 1995 annual survey of thirty-six urban trails covering 332 miles with an estimated five million users reported substantially low rate of assault, rape, and murder on public recreational trails as compared to national averages.[285] The study showed that while the national rate of urban assaults was 531 incidents per 100,000 inhabitants, there were only three urban

278. Preseault v. United States, 100 F.3d 1525, 1543 (Fed. Cir. 1996).

279. Welsh, *supra* note 23.

280. *Id.*

281. *Id.*

282. Tammy Tracy & Hugh Morris, *Rails-Trails and Safe Communities, The Experience on 372 Trails, in* RAILS-TO-TRAILS CONSERVANCY 2 (Jan. 1998) (citing SEATTLE ENG'G DEP'T & OFFICE FOR PLANNING, EVALUATION OF THE BURKE-GILMAN TRAIL'S EFFECTS ON PROPERTY VALUES AND CRIME (May 1987)).

283. *Id.* at 4. The authors quoted Charles R. Tennant, Chief of Police, Elizabeth Township, Buena Vista, PA, who said:

> The trail has not caused any increase in the amount of crimes reported and the few reported incidents are minor in nature . . . . We have found that the trail brings in so many people that it has actually led to a decrease in problems we formerly encountered such as underage drinking along the river banks. The increased presence of people on the trail has contributed to this problem being reduced.

284. *Id.* (quoting Pat Conlin, Sheriff, Green County, WI, who said, "The trail does not encourage crime, and in fact, probably deters crime since there are many people, tourists and local citizens using the trail for many activities at various hours of the day").

285. *Id.* at 5 (comparing FBI Uniform Crime Reports for 1995 with RTC survey results).

rails-trails assaults reported in 1995 and 1996.[286] The study further showed that while the national rate of burglaries in urban areas was 1,117 incidents per 100,000 inhabitants, there were no reports of burglary from homeowners living adjacent to a recreational trail in 1996.[287] The figures were similar for both suburban[288] and rural trails.[289] Suburban trails reported one break-in to an adjacent property in 1996, as compared to a national burglary rate of 820 incidents per 100,000 inhabitants.[290] Rural trails reported three break-ins in both 1995 and 1996, when compared to a national burglary rate of 687 incidents per 100,000 inhabitants.[291]

With regard to property values, a study comparing similarly valued property on and off the Burke-Gilman showed property bordering the trail selling for six percent more than other comparably sized houses.[292] Another study reported that a developer, who donated a fifty-foot-wide and seven-mile-long easement along a popular trail, sold all fifty parcels bordering the trail in four months.[293] Furthermore, there is no evidence that the prospect of converting a railbed into a recreational trail curtails home construction and sales adjacent to the corridor.[294] In addition, other studies concluded trails can add significant amounts of annual revenue to local communities.[295] After years of testimony in an extremely controversial rails-to-trails case, the

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286. *Id.* at 8 (noting that only five percent of urban rails-trails reported trespassing, twenty-six percent reported graffiti, twenty-four percent reported littering, twenty-two percent reported sign damage, and eighteen percent reported unauthorized motorized usage).

287. *Id.*

288. *Id.* at 9 (noting that three percent of suburban trails reported trespassing, seventeen percent reported graffiti, twenty-four percent reported littering, twenty-two percent reported sign damage, and fourteen percent reported unauthorized motorized usage).

289. *Id.* (noting that four percent of rural trails reported trespassing, twelve percent reported graffiti, twenty-five percent reported littering, twenty-three percent reported sign damage, and twenty-three percent reported unauthorized motor usage).

290. *Id.*

291. *Id.*

292. STEVE LERNER & WILLIAM POOLE, THE ECONOMIC BENEFITS OF PARKS AND OPEN SPACE (Trust for Pub. Land 1999) *available at* http://www.tpl.org/tier3_cdl.cfm?content_item_id=1145&folder_id=727 (citing Elizabeth Brabec, On the Value of Open Space, Scenic America, Technical Information Series (vol. 1, no. 2 1992)).

293. *Id.* (citing NAT'L PARK SERV., RIVERS TRAILS AND CONSERVATION ASSISTANCE PROGRAM, ECONOMIC IMPACTS OF PROTECTING RIVERS, TRAILS, AND GREENWAY CORRIDORS (4th ed. 1995)).

294. Mike Lindblom, *Lakeside Trail May Be Running Up Home Sales*, SEATTLE TIMES, May 8, 2000, *available at* http://archives.seattletimes.nwsource.com/cgibin/texis/web/vortex/display?slug=prop08m&date =20000508.

295. LERNER & POOLE, *supra* note 292, at 13 n.64 (citing ROGER MOORE ET AL., THE IMPACTS OF RAILS-TRAILS: A STUDY OF USER AND PROPERTY OWNERS FROM THREE TRAILS (July 1992) (noting that the National Park Service found three trails in Iowa, Florida, and California contributed between $1.2 million and $1.9 million annually to their local communities)).

Maryland Supreme Court reached a conclusion, diametrically opposite to the view of the federal court as expressed in *Presault III*. The Maryland court concluded, "bikers and walkers, even in large groups, simply cannot be said to be more burdensome than locomotive engines pulling truck-sized railroad cars through the corridor."[296]

Even if recreational trails somehow impose minor incremental burdens on neighboring property owners, no one in our country is immune from collateral impacts from public amenities. Residents living miles away from an airport nevertheless find themselves under noisy flight paths. Neighborhoods located near sporting venues have experienced roads jammed with traffic on game days. Homeowners in once outlying, rural areas may now find themselves living next to gravel quarries, timber operations or industrial work sites needed to support the local or regional infrastructure. Such is the nature of a modern society. Despite their objections to recreational trails, not one trail critic has ever volunteered to cease flying, stop driving, give up attending sporting or public entertainment events, or swear off using natural resources.

In Washington, state and local officials are not required by statute to preserve public rail corridors. State law, however, does expressly provide for the acquisition of open space for natural and recreational areas when appropriate as a matter of public policy.[297] Furthermore, Washington's 1990 Growth Management Act attempts to encourage urban development, to reduce suburban sprawl, to preserve natural resources, and to encourage efficient transportation.[298] Converting railroad corridors into recreational trails furthers growth management policy goals by providing alternate transportation opportunities[299] as well as by accommodating the public desire or need for neighborhood and community recreational facilities.[300]

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296. Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1078 (Md. 1999), *cert denied* 121 S. Ct. 380 (2000).

297. WASH. REV. CODE § 79A.15.005 (2000) ("It is therefore the policy of the state to acquire as soon as possible the most significant lands for wildlife conservation and outdoor recreation purposes before they are converted to other uses . . . .").

298. WASH REV. CODE § 84.14.010 (2000).

299. *See* Roger L. Moore & D. Thomas Ross, *Trail and Recreational Greenways: Corridors of Benefits, Parks & Recreation* (Jan. 1, 1998) *available at* 1998 WL 10426775 (noting that trails provide alternative transportation routes to work, shopping, schools, and parks state that trails serve to protect open space and the environment).

300. Elizabeth Williams, *Survey: Sammamish Wants Better Parks and Open Space*, EASTSIDE J., Aug. 31, 2000, *available at* http://www.eastsidejournal.com/sited/story/html/27909.

V. CONCLUSION

The recreational trail issue in Washington State remains hotly contested both in the court of law and in the court of public opinion. Despite recent judicial holdings on the matter, the specter of a recreational trail will no doubt lead to significant litigation. Nevertheless, the *Brown*, *K &E Moving & Storage Co., Inc.*, and *Rasmussen* decisions have helped to clarify significant legal issues pertaining to corridor acquisition. The cases can serve as a guide when navigating the often-murky waters of railroad deed conveyances and serve as a beacon when factual conclusions as to scope and intent are unclear. Under these holdings, the courts are to consider state and federal statutes as well as state property law pertaining to railroad land transfers and reversions. More importantly, however, the courts will give effect to Congressional intent and sound public policy, while maintaining the integrity of some fundamental tenets of common law. As Washington's population continues to grow, particularly around urban centers, public open space is becoming an increasingly rare and much sought after amenity. In addition to providing recreational activity for the young and old, trails provide for alternate, nonpolluting forms of transportation. The Washington Supreme Court in the new millennium has appropriately left state and local lawmakers the option to accommodate such public policy goals by recognizing the value property owners placed in rail corridors centuries ago.