Staying on Track with Trains and Title Issues: Ownership and Use of American Railroad Rights-of-Way

By Travis A. Beaton, Joanne Darcy Crum, and Kelly Quam

As the deterioration of American infrastructure becomes more widely recognized, the transportation aspect of the crisis—as some have termed it—has arguably garnered the most attention, with various reports emphasizing the declining functionality of the country’s roads, interstates, and bridges. In response, advocates of high-speed rail have touted speedy trains as a potential solution to relieve some of the pressures resulting from the nation’s decaying transportation network. The actual implementation of such plans, however, has proved extremely difficult for supporters of an American high-speed rail system. These setbacks in many ways result from the complex nature of ownership interests in railroad rights of way (ROWs). These interests complicate conservationist efforts to convert abandoned ROWs into green spaces and the potential closures of railroad crossings.

The resolution of these issues depends primarily on whether the nature of the railroad companies’ (RRCOs) interests in the railroad ROWs are classified as fee simple ownership or mere easements. Identifying these interests, in turn, is controlled by the sources of the RRCOs’ titles to the ROWs. This article addresses the classification of property interests in railroad ROWs and summarizes the effect of such classifications on the use of abandoned ROWs for recreational trails, the process of closing railroad crossings, and the attempts at establishing an American high-speed rail network.

Classifying Property Interests in Railroad ROWs—Source of Title

As a preliminary matter, RRCOs’ property interests in railroad ROWs must be classified by their source of title: (1) federal land grants, (2) private land grants, or (3) condemnation or expropriation.

Railroad’s Property Interest From Federal Land Grants

Federal land grants are the primary source of title for most of the property owned or used by RRCOs. From 1803 through the end of the Civil War, federal ownership of vast swaths of land expanded, especially in states west of the Mississippi River. Beginning in the early 1850s, Congress began giving RRCOs large swaths of federal land, located mainly in the western states, the largest being a single grant of an estimated 40 million acres. The property deeded to the RRCOs would often be conveyed in a “checkerboard” pattern—every odd square mile along a proposed railroad route, for example, would be conveyed to the RRCOs to be used for their own purposes (to sell to settlers who would eventually use the railroads, the proceeds financing the construction of the railroads, etc.), while every even square mile would be retained by the federal government, which then granted the RRCOs a mere easement or right-of-way over such parcels. The government-retained parcels were then sometimes deeded to private landowners, subject to the RRCOs’ easement rights.

By the early 1870s, however, public sentiment turned against the RRCOs. The settlers who had initially supported the land grants to RRCOs complained that the RRCOs were not selling the parcels to settlers quickly enough to develop the frontier lands. General public perception of RRCOs as monopolistic and predatory also turned the tide against congressional land grants, the final “checkerboard” style of which was granted in 1871. The government still granted a handful of ROWs or land grants to RRCOs between 1871 and 1875, some in full ownership and some with easement rights only. After enacting distinct legislation for each grant to RRCOs, Congress passed the General Railroad Right-of-Way Act of 1875, which provided that any grants to RRCOs over federal lands were considered “easements” only. 43 U.S.C. § 934.

This 1875 split in the nature of interests granted to RRCOs was first confirmed by the United States Supreme Court in 1942 in Great Northern Railway Co. v. United States, 315 U.S. 262 (1942), in which the Court held that pre-1871 grants to RRCOs conveyed a “limited fee made on an implied condition of reverter,” yet post-1875 grants conveyed only an “easement interest” and nothing more. Id. at 278. The case arose when Great Northern sought to drill for oil under its ROW in Montana, and the federal government claimed that the RRCO enjoyed only an easement interest and that the government retained ownership of the oil underneath the land. The Court rejected Great Northern’s argument that its post-1875 grant was a “limited fee”—meaning that it would own the property and all subsurface minerals until it abandoned the right-of-way, at which point the ownership would revert to the government. Instead, the Court agreed with the government that the conveyance granted nothing more than an easement.

Accordingly, it became well-settled that pre-1871 grants of ROWs to RRCOs conveyed the land in “limited fee simple,” which would revert to the United States upon the RRCO’s abandonment, and that post-1875 grants to RRCOs conveyed only an easement interest that would terminate upon the RRCO’s abandonment, leaving the underlying land unburdened by the easement.

An implicit interpretation of the Court’s decision in Great Northern, however, posed a problem for the government: when RRCOs abandoned ROWs acquired via post-1875 grants, the easement interests were extinguished so that the owner of the underlying land—in many cases, private landowners to whom the government had previously sold off the land—now owned it outright. Thus, the government also lost any interest in the ROW. To rectify this problem, the federal government passed an amendment to the National Trails System Act (Trails Act), which expressly provided that any railroad ROW granted by the government to an RRCO post-1988 would revert to federal government ownership if it were abandoned, even if the underlying land had been sold by the government into private ownership. 16 U.S.C. § 1248.

Finally, in 2014, the Court decided the most recent case to address the issue—Marvin M. Brandt Revocable Trust v. United States, 572 U.S. 93 (2014)—in which the Court confirmed that land grants of ROWs by the government to RRCOs between 1875 and 1988 granted easement interests only, which would simply be extinguished upon the RRCOs’ abandonment of the same. In Brandt, the plaintiff’s family, the Brandts, acquired 83 acres of land in Wyoming from the federal government in 1976, subject to the ROW in favor of the Laramie, Hahn’s Peak & Pacific Railway Company. After the ROW changed hands between various RRCOs, the last RRCO owning the ROW officially notified the Surface Transportation Board (STB) of its intent to abandon the ROW in 1996. By 2004, the RRCO had completed abandonment by disposing of its last tracks and ties, at which point the Brandts, and many other parties owning the land underlying the former ROW, assumed their property was now free of any encumbrances. Instead, in 2006, the federal government filed a suit to quiet title to the ROW in itself. The government settled with, or obtained default judgments against, the owners of 31 of the 32 parcels affected by the ROW. The Brandts were the only party to contest the government’s claim. The Brandts argued that the government had merely granted an easement to the RRCO and did not own any reversionary rights in the land underlying the ROW upon its abandonment because it had since sold off that land to the Brandts. The Court agreed, confirming that only pre-1871 or post-1988 grants include an express reversionary right to the federal government and observing that the government could not take the opposite position as it had in Great Northern simply because of convenience.

As a result of the history of legislation and case law, an RRCO’s property interest can be classified based on the year in which the federal land grant was executed. Pre-1871, the RRCO has a limited fee or fee simple interest in the property, regardless of who owns the underlying land, and if the RRCO abandons, the United States retains rights in it. From 1871 to 1875, the RRCO’s property interest depends on the text of the specific congressional act. If a federal land grant was granted between 1875 and 1988, the RRCO enjoys only an easement interest over the property, and if the RRCO abandons the ROW, then the easement is extinguished, meaning that whoever owns the underlying property (private or government) then owns it outright and unencumbered by the easement. Any grants made post-1988 (of which there are very few) do contain a reversionary clause because of the amendment to the Trails Act, meaning that even if the government sells the land underlying an RRCO’s ROW to a private party, the government will retain its interest in the ROW after the RRCO abandons it.

Railroad’s Property Interest from Private Land Grants

Cases addressing grants by private owners to RRCOs are less common than grants from the government. An RRCO’s property interest that results from a private land grant depends largely on the grantor’s intent. Typically, this intent is determined from the language of the conveying instrument.

Many courts have held that the determinative factor with respect to whether an RRCO holds an easement or fee simple interest is the language in the conveyance instrument rather than the actual nature of the use by the railroad. See Stone v. U.S.D. No. 222, 91 P.3d 1194 (Kan. 2004) (holding that where the deed language was unambiguous and granted an RRCO a fee simple interest in the property, parol evidence regarding its longtime use as an ROW only did not qualify the RRCO’s property interest as an easement only such that its abandonment would allow it to revert to adjacent landowners rather than the school district to which the RRCO had purported to sell the property).

Absent express language granting a fee simple interest, however, courts in other states have held that there is a presumption that a private grant of an ROW to an RRCO is an easement rather than a conveyance of full ownership, “if the deed fails to convey expressly the grantor’s intent to create a fee simple interest.” See Baltimore Cty. v. AT&T Corp., 735 F. Supp. 2d 1063, 1071 (S.D. Ind. 2010) (applying Maryland law).

Railroad’s Property Interest from Condemnation and Expropriation

Many states have allowed RRCOs to expropriate or acquire private property through condemnation under the justification that RRCOs, though private, serve a public purpose for which private property may be appropriately taken. Federal courts are generally in agreement that state law determines the type of property interest an RRCO has acquired in an ROW via condemnation or expropriation. See Howard v. United States, 106 Fed. Cl. 343, 367 (Fed. Cl. 2012).

Typically, state statutes provide that when an RRCO acquires property via condemnation proceedings, it acquires only an easement rather than a fee simple interest, so the interest will revert to the underlying landowner upon its abandonment. See, e.g., Barlow v. United States, 123 Fed. Cl. 186 (Fed. Cl. 2015) (holding that under the state constitution, an RRCO gains only an easement interest in property acquired via condemnation); Brightwell v. Int’l–Great N.R.R. Co., 121 Tex. 338, 49 S.W.2d 437, 438 (1932) (holding same for Texas). See also Samuel C. Johnson 1988 Tr. v. Bayfield City, Wis., 649 F.3d 799 (7th Cir. 2011) (holding that because an RRCO had acquired its ROW via condemnation under federal law, it held an easement interest only such that when it abandoned the ROW, the underlying property reverted to the neighboring private landowners rather than the federal government).

Courts have held, however, that such statutes do not necessarily apply to conveyances of private property made to RRCOs as part of condemnation settlements, where the conveyance instrument purported to convey a fee simple interest. See Union Pac. R. Co. v. Ameriton Props., 448. S.W.3d 671, 680 n.2 (Tex. Ct. App. 2014) (recognizing that “a railroad may only take a right of way easement via condemnation,” but noting that prior case law was “silent regarding deeds issued in settlement of condemnation proceeding”).

Classification of Adjacent Landowners’ Property Interests

State laws differ widely in their classification of the property interests of adjacent landowners. Iowa and North Carolina, for example, have statutes that provide a presumption of reversion in favor of the adjacent landowners on either side of an abandoned railroad ROW, allowing such landowners to automatically take ownership of the ROW to the centerline. See Iowa Code § 327G.77(1); N.C. Gen. Stat. § 1-44.2(a).

Indiana, however, does not automatically presume that the adjacent landowners on either side of an abandoned railroad ROW are entitled to ownership; instead, it vests reversionary privileges in the holder of any deed that describes the abandoned ROW. More often than not, this would be the adjacent landowners anyway, but there is always the potential for conflicting deeds under this statute. Ind. Code § 32-23-11-10(b). South Dakota has a statute providing that instead of any automatic presumption in favor of adjacent landowners or the holders of any deeds over the abandoned ROW, the RRCO abandoning the ROW must first settle any title claims with adjoining landowners and municipalities. S.D. Codified Laws § 49-16A-115.

Regardless of how state laws classify the ownership interests of adjacent landowners in and to railroad ROWs, it is more often the classification of the RRCOs’ ownership interests in and to the same that is determinative with respect to most title disputes.

Abandoned Railroad Rights of Way—Rails to Trails

The ownership interests in railroad ROWs are of particular significance in the context of railroad ROWs that have been, or are to be, abandoned. One of the best-known and most popular uses of abandoned ROWs are for recreational trails. Congress passed the Trails Act in 1968 and Railroad Revitalization and Regulatory Reform Act in 1976, with the intent of facilitating the conversion of abandoned ROWs into publicly beneficial uses, such as conservation areas and trails. The Trails Act authorized the Interstate Commerce Commission (ICC) to impose public use conditions on the railroad abandonment procedures. The public use condition postponed abandonment approval for 180 days so that state or local governments or trail organizations could negotiate a purchase of the easement from the RRCO. The problem was that if the RRCO had already legally abandoned the ROW under state law, then the RRCO did not have any property interest to convey to the interested parties during the 180-day period. As a result, many parties interested in using the former railroad property for trail use found themselves bogged down in lawsuits with adjacent property owners who claimed title to the former railroad corridor.

To fix these problems, Congress passed an amendment to the Trails Act in 1983. The purposes of the amended Trails Act were “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.” 16 U.S.C. § 1247(d). The amended Trails Act permitted an RRCO to transfer its ROW easement to a trail organization for the interim use as a recreational trail until the RRCO decides to reactivate railroad operations on the line. Id. This process is called “railbanking.”

The STB—successor to the ICC—administers the railbanking program by approving RRCOs’ proposed abandonments of their ROWs and issuing Certificates of Interim Trail Use (CITUs). The STB has exclusive jurisdiction over all railroad lines operating freight service in interstate commerce, which constitute the majority of railroad lines in the United States. The STB does not, however, have jurisdiction over spurs, industrial, team, switching, or side tracks.

The railbanking program offers a relevant example of the interplay between condemnation or expropriation for public purposes and the claims brought by private landowners for taking. In Burnett v. U.S., 139 Fed. Cl. 797 (Fed. Cl. 2018), 38 plaintiffs filed suit against the federal government, challenging its issuance of a CITU with respect to an abandoned ROW owned by the Missouri Central Railroad Company (the MCRC), which ran adjacent to the plaintiffs’ property. The court first observed that rails-to-trails takings cases must be evaluated according to a three-pronged analysis, to determine: the nature of RRCO’s interest in the ROW; in the case of an easement interest, whether the easement is limited to railroad purposes; and, if the easement is broad enough to encompass recreational trail use, whether the easement was still in effect at the time of the alleged taking. With respect to the portions of the ROW over which the MCRC held only an easement interest, the court held that MCRC’s easement interest was broad enough to encompass trail purposes because Missouri law did not automatically limit railroad easements to railroad purposes; the plain language of the easement did not provide any limit on the easement’s purpose and use, and secondary conveyances to the MCRC of additional land for embankment purposes did not limit the easements. Accordingly, the court’s holding in Burnett provides a roadmap for evaluating whether an abandoned railroad ROW is eligible for a CITU and the railbanking program.

The STB’s jurisdiction over the railbanking program also presents unique issues and concerns for title companies seeking to insure properties being sold by RRCOs. From a title insurer’s perspective, several threshold issues must be analyzed when insuring an abandoned railroad right of way. These include the nature of the RRCO (easement vs. fee simple), the date of the abandonment of the easement interest, and whether the RRCO obtained the proper federal and state approvals for such abandonment. Disputes have arisen when title companies have insured sales of railroad ROWs after relying on the RRCOs’ representations that their abandoned ROWs were not subject to STB jurisdiction (because of the ROWs being considered a spur or switching track) and thus freely alienable. When such a representation by a RRCO is inaccurate or rejected by the STB, litigation has ensued. Accordingly, title insurers should tread carefully when insuring such transactions and should perform their own due diligence with respect to any such representations made by RRCOs. In some ways, therefore, the railbanking program has arguably further complicated the assessment of an RRCO’s ability to sell its property.

Particularized Issues at Railroad Crossings

Another unique issue is posed by railroad crossings that are situated in railroad ROWs. Whether an RRCO’s interest in the ROW is classified as an easement or as fee simple will also determine its authority to close any vehicular or pedestrian crossing over such ROW. In some cases where RRCOs have attempted to close crossings without complying with administrative processes, courts have rejected such attempts based on the RRCO’s underlying interest. In Faulk v. Union Pacific Railroad Co., 172 So. 3d 1034, 1039 (La. 2015), for example, Union Pacific (UP) attempted to close various private crossings in Ouachita Parish, Louisiana, that had been installed for the convenience of private landowners whose properties were bisected by the tracks. The plaintiffs alleged that their farm operations would be disrupted by the inability to move farm machinery across the railroad tracks from one part of their land to another.

The plaintiffs filed suit, contending that UP failed to comply with a recently enacted statute that required an RRCO to first submit notice of its intention to close any crossing to the Louisiana Public Service Commission (LPSC), which would then decide whether or not to permit such a closure after a public hearing. UP petitioned the court to declare the statute unconstitutional by asserting that a refusal by the LPSC to allow the closure of such crossings would amount to a taking of its property. The court disagreed and held that since UP’s rights in the ROW were limited to a “right of use” (similar to an easement), it could not close the crossings against the objection of the underlying landowners. To consider such prohibition a taking would be to afford UP greater rights than it enjoyed by virtue of its “right of use” nature of ownership. See also Henry v. Union Pacific R.R. Co, 2012 WL 6602074 (La. App. 2012) (case remanded to determine retroactive application of statute requiring UP to reopen crossings that it had closed based on its alleged ownership of same).

When an RRCO owns the property under the ROW outright, however, (holding a fee simple interest), it is much easier for it to close the crossing. In Frank’s Investment Co., LLC v. Union Pacific Railway Co., 2011 WL 6157484 (W.D. La. 2011), the plaintiff, Frank’s, had purchased land adjacent to a UP ROW. UP had acquired the property underlying the ROW in full ownership before Frank’s acquisition of the neighboring property. The deed contained a clause that provided that UP would fence and maintain the ROW and provide three crossings through it.

Because of some unique Louisiana law nuances, the cause of action that the plaintiff selected (a possessory action) had significant bearing on the case’s outcome. In a possessory action, the actual title or the language of the deed and the existence or non-existence of a servitude (easement) created thereby is immaterial. Instead, in a possessory action, title is irrelevant, and only the possesion of the plaintiff is determinative. Here, the court found that although Frank’s met one of the requirements for proving possession (animus) by its physical acts, the fact that it used the crossings with UP’s permission meant that it was a “precarious” rather than “adverse” possessor. Frank’s never actually intended to maintain the crossings itself and always “possessed” with UP’s permission—therefore, its possessory claim failed. Had Frank’s brought a petitory action (in which a party claims ownership, rather than possession) to claim ownership of a servitude acquired via the language of the deed, it may have been successful, but that point was not addressed, nor did the plaintiff retry the case under that theory. In such instances, an adjacent landowner should carefully evidence their possessory intent when using the crossing, depending on what state law requires for any claims that might be brought.

Implications for High-Speed Rail

An American high-speed rail network has been discussed for decades as a means of solving America’s growing infrastructure decay and traffic congestion. The United States lags significantly behind other countries—especially in Europe and Asia—that have extremely efficient, safe, and profitable high-speed rail networks.

A threshold issue facing many proponents of high-speed rail is where to build. Developers have the option either of building on existing tracks, which require significant upgrades, or of laying new tracks. Upgrading existing tracks poses issues for capacity and interruption of service; by upgrading rails, service necessarily must be suspended, and many carriers cannot afford to suspend their freight or passenger rail service. AMTRAK has turned to building parallel tracks to be used while it upgrades existing tracks—these parallel tracks have been laid in existing powerline rights-of-way, implicating the age-old dispute between utility and RRCOs with respect to parallel ROWs. Although RRCOs and telegraph lines grew in tandem throughout the 19th century and beyond, utilities and RRCOs often battled over the rights to use the ROWs adjacent to the railroad tracks. States often grant expropriation power to telecommunications and utility providers as well but sometimes subject such power to the RRCO’s option to relocate such utilities if it interferes with the RRCO’s use. See, e.g., S.C. Code Ann. § 58-9-2030.

Another option for developers is to lay new train tracks. But to acquire property to lay new train tracks, they must either purchase it from private landowners or expropriate it, as federal land grants are no longer a widely available option. Texas Central, a private development company, has been attempting to press forward with its plans to bring high-speed rail to the corridor between Dallas and Houston. Various county courts, however, have held that the company is not a true “railroad” within the meaning of the Texas statutes that afford RRCOs the power of eminent domain, because it is not yet operating any railroads. One court in Harris County, however, issued a ruling that held the opposite. It remains to be seen whether Texas legislators will attempt to pass legislation that will assist Texas Central in its development objectives or further hinder it. Either way, the status of the RRCOs seeking to construct such high-speed rail lines, as well as their ownership interests in any existing ROWs, will likely have significant bearing on the future of an American high-speed rail network.

Conclusion

The title issues surrounding railroad ROWs are numerous and complex, and their resolution has often required judicial intervention or clarification. Courts have provided guidance with respect to the threshold issue of classifying the ownership interests of RRCOs and other parties in and to railroad ROWs, and it is now well-settled that the nature of these interests is most often the primary determinative factor with respect to what use the ROW may be put and the extent of the authority of a RRCO—or any other party—to dictate that use. As infrastructure pressures increase nationwide, the current framework for evaluating the ownership and available uses of active and abandoned railroad ROWs will only become more significant and will ultimately play a major role in determining the future and feasibility of the objectives sought or advanced by advocates of high-speed rail, proponents of railbanking, landowners requiring railroad crossings, title insurers, and the RRCOs themselves. To avoid their positions from being sidetracked or railroaded, these key players should take care to consider the interplay and implications of these important title issues before proceeding full steam ahead.

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