

Railroad Law and Title Insurance Issues

William H. Reetz

Pacific Northwest Underwriting Counsel
North American Title Insurance
Company

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INDEX

1. ORIGINS OF RAILROADS
2. INTRODUCTION OF RAILROADS TO NORTH AMERICA
3. RAILROAD HISTORY IN THE NORTHWEST AND WASHINGTON
4. DECLINE AND RESURGENCE OF AMERICAN RAILROADS
5. FEDERAL REGULATION OF RAILROADS
6. OVERVIEW OF STATE AND FEDERAL CASE LAW
7. RAILBANKING AND RAILS TO TRAILS
8. SAMPLE TITLE EXCEPTIONS

1. Origins of Railroads

Railroads derive from what were known as wagonways which were simple cut grooves or pathways intended to reduce friction in the transport of people or cargo. According to Wikipedia, the first evidence of some form of a wagonway goes back to ancient Greece. Primitive improvement occurred mostly during the sixteenth and seventeenth centuries in Germany and England given the need to move heavy loads of ore and coal. Wooden rails came to be replaced by cast iron rails which proved susceptible to breakage. Wrought iron rails were an improvement but also suffered breakage though at a higher threshold. Steel rails developed through the Bessemer process not only suffered far less breakage than iron but steel's strength allowed for heavier locomotives and loads. The earliest steam engine was developed in the early 1800's and the first steam locomotive in 1804.

The first full-scale working railway is attributed to Richard Trevithick in 1804. The development of the first successful locomotive is attributed to a George Stephenson, the "Father of Railways". His rail gauge of 4 feet 8 1/2 inches continues to be used by most of the world's railways. Why 4 feet 8 1/2 inches? Urban legend has it that Stephenson's gauge was the result of the distance between the ruts caused by Roman chariots. More likely the standardization of that gauge in the United States occurred during the Civil War. Various gauges were in use at that time and the North needed consistency in order to move troops and supplies. The alternative was to stop, unload and reload onto trains operating on a different gauge. In 1862, the United States Military Railroad Organization was created to address a number of railway transportation issues including that of gauge. In 1864, the Pacific Railway Act mandated use of the 4 foot 8 1/2 gauge.

At much the same time, the concept of networked railways developed principally in Great Britain. These networked railways encouraged economic development as transportation costs for products decreased. The faster transport of perishable goods resulted in the decrease of pricing. People could also travel farther, faster and less costly than before. Instead of traveling merely from point A to B, networking allowed travel from point A to B then to C and so on. Historian David Aldcroft noted "in terms of mobility and choice they [railways] added a new dimension to everyday life".

2. Introduction of Railroads to North America

In the United States, the first significant railroad was the Baltimore and Ohio beginning in 1827. Baltimore was the third largest city in the country, was closer to the frontier, and had no canal. Railroads seemed to present the best opportunity to compete with New York and the Erie Canal. During the 1840's, thousands of miles of track were laid. But most railroads were purely localized ("short lines") and were disconnected from other lines. Networking developed in the Northeast but short lines continued to serve much of the South. As the financial interest of Wall Street came about, railway bonds provided financing to larger railroads resulting in consolidation of smaller railroads into larger railroad companies. Larger locomotives allowed greater speeds such that one could travel from New to Chicago in only two days. Plans of crossing the continent began to be made, spurred in large part by the discovery of gold in California.

Two routes were considered, a southern route through Texas, New Mexico, Arizona to Los Angeles. The central route would start at Omaha following the Platte River, across Wyoming, Utah, Nevada and the Sierra Nevada to Sacramento. Congress chose the Central Route and President Lincoln signed the legislation on July 1, 1862. Two railroad companies were selected: the Union Pacific would start from the east and the Central Pacific from the west. The two met at Promontory Summit in Utah on May 10, 1869.

A transcontinental railroad along the southern route was completed in 1881. A northern route generally following the Oregon Trail was not considered viable because of snow.

The legislation awarded land grants along the routes. Each railroad was paid \$16,000.00 per mile over easy grades, double that in the high plains, and \$48,000.00 per mile in the mountains. As one might expect, these terms encouraged the companies to build many extra miles of track.

As with the United States, development of railroads in Canada was seen as a means of populating and reaping the riches of the west. Several railroads such as the Grand Trunk and Canadian Pacific expanded westward and even extended into the American Midwest but government subsidies proved too great and Canada consolidated a number of these into the Canadian National Railways.

3. Railroad History in the Northwest and Washington

Francis Chenowith is credited with operation of the first railroad in the Northwest. Two to four miles long and operating on wooden tracks and pulled by a mule, it allowed passengers and freight to avoid transit through the Columbia Rapids located near what is present day Stevenson. Following Chenowith's departure for the Oregon Territorial Legislature, other legislative positions, and his later appointment to the Washington Supreme Court by President Franklin Pierce, his partner, J.A. Bush, expanded the rail line to six miles. The *Ann*, a duplicate of the *Oregon Pony* which operated along the south shore of the Columbia, began operation in 1863.

As was the case in the American South and Canada, most early Washington railways were short lines which serviced relatively local areas. These short lines gradually came to be merged into three principal railroads: the Northern Pacific, Milwaukee Road and the Great Northern. The Spokane, Portland & Seattle Railroad was created at a later point in time by collaboration between the Northern Pacific and the Great Northern. The Oregon Short Line operated principally in Oregon but had lines in Idaho and Washington came to be part of the Union Pacific system.

The Union Pacific

The Union Pacific's ("UP") presence in the Pacific Northwest begins with the merger of the Oregon Steam Navigation Company and the Oregon Railway and Navigation Company ("OR&N"). The merger included a number of subsidiary lines. Sections of lines were constructed between Whitman and Blue Mountain, OR, Wallula and Ceillo, the Dalles to Wallula, and, in 1882, the various lines were connected to Portland. The OR&N line became part of a transcontinental link when the Northern Pacific completed its line from St. Paul, MN, to Wallula. Following management problems discovered in 1883 at the Northern Pacific, an agreement was reached whereby a Union Pacific subsidiary, the Oregon Short Line, would construct a line westward to the Snake River and the OR&N eastward to the Snake River. In 1886, the entire OR&N was leased to the UP with the UP having control of half of the OR&N' stock. Following the Panic of 1883, OR&N went into receivership and a new company, the Oregon Railroad & Navigation

Company (“ORR&N”) took over operation of the OR&N. Together with the Oregon Trunk Line, railway lines in central Oregon were completed.

In 1906, the UP formed the Oregon & Washington Railroad Company (later known as the Oregon-Washington Railroad & Navigation Company (OWRR&N”)) to develop a line from Portland to Seattle. By 1910, through of construction of its own lines and agreements with the Chicago, Milwaukee, St. Paul & Pacific (the “Milwaukee Road”), trains were running to Seattle. By 1912, river operations along the Columbia ceased. From the 1930’s on, various railway lines were abandoned and the OWRR&N name fell into disuse. Gradually, all locomotive and rolling stock came to be painted in UP colors.

The Northern Pacific

The Northern Pacific (“NP”) was created in 1864 by an Act of Congress signed by President Lincoln. Similar to the intentions associated with the Central Route, the hope was to connect Lake Superior with Puget Sound. By 1870, a line between Duluth and Brainerd, MN, was completed. Construction began in the West around the same time. The site of Kalama, WA, was selected as a starting point as it lay below the ice line of the Columbia River and because the Columbia’s depth at that point was similar to that at the mouth of the Columbia, thus allowing river traffic. By November 1871, track reached Tenino though a terminus site had not been selected. Following extensive surveys of Olympia, Steilacoom, Tacoma, Seattle and Mukilteo, Tacoma was selected as the terminus. By December 1873, the first train reached Tacoma (from Kalama).

In 1873, the country suffered its worst financial crisis since 1837. NP’s financial struggles were compounded by those of Wall Street. Though the NP had been granted ten million acres of land and constructed 600 miles of trackage, it still needed cash. Bonds were difficult to sell and the company went bankrupt. It reorganized in 1875. An extension of its line to Puyallup was completed in 1877 allowing it access to coal mines in the area.

In June 1879, a proposed route east from Puget Sound through the Washington territory was offered to the Secretary of the Interior. It was approved and construction of that portion commenced. But gaps existed so NP struck a deal with the ORR&N to allow use of its main line on the south side of the Columbia.

Work started to connect NP from Pasco to Wallula and Pasco to Spokane Falls. Work also began eastward from Yakima.

During this period, the ORR&N had a virtual monopoly on Columbia River traffic and its line eastward from Portland that it wanted to protect. Its President, Henry Villard, organized a “blind pool” in order to purchase NP stock. Shortly thereafter, he became NP’s President. In August, 1882, survey crews identified the location for the 1.8 mile tunnel through Stampede Pass but efforts to connect east and west were postponed due to Villard’s competing goals. NP began construction of a line along the west bank of the Columbia with ferry service to connect at Kalama. After completing the last link to Helena, MT, and the Columbia Riverline, America had another transcontinental railroad. NP brought a new ferry in over 57,000 pieces by ship to shuttle rail cars across the Columbia. At that time, it was the second largest ferry in the world.

Villard lost control of NP in 1884. The Stampede Pass tunnel work commenced but NP established a temporary route over the summit using a series of switchbacks, horseshoe curves and towering trestles. Despite the inherent dangers, no serious accidents occurred. The grade was 5.6% in places. Trains were sometimes limited to five cars with locomotives at each end. Despite the hardships, NP now had an uninterrupted railway line over its own tracks that extended from Lake Superior to Puget Sound. This being only 24 years after President Lincoln signed the formative legislation.

More activity ensued along the stretch between Portland and Kalama but eventually NP acquired what local railroads were then operating in that area. By 1910, capacity along the Portland to Tacoma stretch required the addition of a second track. The line sometimes saw 22 passenger trains and 18 freight trains per day. Grades were reduced and a new Point Defiance tunnel was dug.

For all practical purposes, the NP ceased to exist in 1970 following the Burlington Northern merger.

The Milwaukee Road The Chicago, Milwaukee, St. Paul and Pacific

The Milwaukee Road was first incorporated in 1847 as the Milwaukee and Waukesha Railroad. After several name changes and receivership in 1859, the

successor was combined with the Milwaukee & St. Paul. A year after completion of a line between Chicago and Milwaukee, the Milwaukee & Mississippi became known as the Chicago, Milwaukee & St. Paul Railway Co. The railroad continued to expand and by 1867 was the largest railroad in the Midwest, operating 820 miles of track. By 1874, it had lines running through Wisconsin, Minnesota, Iowa, South Dakota and Michigan's Upper Peninsula. The Milwaukee Road was innovative. Its employee, Gustavus Swift introduced the first refrigerator car that allowed the transport of butter and eggs. By the end of 1876, the Milwaukee Road was so successful, it was free of debt.

The expansion came to an end in April 1887, when its principal, Alexander Mitchell died. William Rockefeller (brother of John D. Rockefeller), and Henry Flagler became majority stock holders. The impact wasn't felt until the Panic of 1893 when the two took control of the voting stock. Similar to the ambitions of the Northern Pacific and Great Northern, the directors of the company saw the railroad's future in the Pacific Northwest. Rockefeller held control of the Anaconda Copper Company with its copper mine and smelter near Butte, MT. Rockefeller wanted a third transcontinental railroad to reap the riches of the west and trade with Asia.

A survey conducted in 1901 estimated construction costs to be \$45 million which was later increased to \$60 million. Unlike the NP and UP, the Milwaukee Road didn't have the benefit of the large land grants that had been awarded to NP and UP. Construction costs were high in large part because the route would cross five mountain ranges: the Belts, Rockies, Bitterroots, Saddles and Cascades. But Rockefeller money allowed the Pacific Extension to proceed. Rockefeller obtained his right-of-way before the national forests in Montana and Idaho were designated as such by President Theodore Roosevelt and Gifford Pinchot. The 22 mile section through the Bitterroots required construction of 21 bridges, 16 tunnels, and seven high trestles. The railway was completed in March 1909 just in time to carry passengers to the Alaska-Yukon-Pacific Exposition in Seattle.

1910 saw the devastating fire that burned a vast area of Idaho and the West (described in Timothy Burn's book *Big Burn, Teddy Roosevelt and the Fire that Saved America*). The Milwaukee Road lost at least a dozen bridges including one 725 feet long.

Between 1912 and 1914, the Milwaukee Road constructed a 2.3 mile tunnel under Snoqualmie Pass. The surface route was abandoned and a few years later a

two-lane road, called the Sunset Highway, was constructed near the Milwaukee Road's surface route, connecting eastern and western Washington.

The Road also had a hand in developing skiing in the Northwest. Seeing Averell Harriman's and the UP's success in Sun Valley, Milwaukee Road opened the Hyak Ski Bowl in 1938 at its Snoqualmie Pass stop. Passengers accessed the Ski Bowl by a two hour train trip from downtown Seattle. Hyak had a modern lodge, lighted slopes to allow night skiing and the first J-bar lift. Ski lessons brought students on weekends. A ski jump was built and the National Four-Way Championships were held at the Ski Bowl in 1940. WWII forced closure of the Ski Bowl but it re-opened in 1947 and hosted the ski jumping tryouts for the U.S. Olympic Team prior to the St. Moritz Olympics in 1948. Unfortunately, the Lodge burned to the ground in 1949. The costs to re-build were too great and the area remained unused until 1959 when the Hyak Ski Area opened.

The company was the first to utilize electrification in the West but connecting the line from Othello to Tacoma and Seattle proved to be extraordinarily expensive. The railroad dieselized in the 1950's replacing most of its steam locomotives by 1955. In association with the Union Pacific, it acquired a number of passenger trains including the City Los Angeles, the City of Portland and others. Its most famous passenger train was the Hiawatha.

By the end of the 1950's and early 1960's, the railroad industry began its decline. The Milwaukee Road saw its best means of survival as a merger with the Chicago and Northwestern but that merger was blocked by the ICC. In contrast, the merger of the Great Northern, Northern Pacific, Burlington Route and, later the Spokane, Portland & Seattle Railway was approved. That merger effectively surrounded the Milwaukee Road. Efforts at merger with a larger railroad continued but were unsuccessful. Fortunately, the Burlington Northern merger required that it open its markets to more competitors. The Milwaukee Road saw its share of container traffic leaving Puget Sound increase to 50% overall. But, because of deferred maintenance costs and the practice of sale-leasebacks of its freight cars resulted in sales of its freight cars. Electrification was scrapped and its track lines became badly in need of repair. The company filed bankruptcy proceedings in 1977 resulting in abandonment of its Pacific Extension. Very interestingly, the ICC auditors discovered that the expenses of company's Pacific Extension had been double entered and, in fact, the Extension was profitable.

The Milwaukee Road's Washington right-of-way was transferred to the State by quit claim deed. It is now managed by the Washington State Parks and Recreation Commission as the John Wayne Pioneer Trail. The rail corridor is "rail banked" for future recreational use.

The Milwaukee Road is sometimes referred to as "the railroad that should never have been built".

The Great Northern Railway

The Great Northern story begins with a man named James J. Hill and a small defunct railroad named St. Paul & Pacific in Minnesota. It's pioneer wood-burning locomotive, named the William Crooks, still bears No. 1 on the Great Northern's roster. Hill began his legendary career as an adventurer who left his birthplace on a small farm in eastern Ontario to travel west and become a sea captain in the Oriental trade. In 1856, he arrived in St. Paul. Needing work, he took a position as a shipping clerk. Thus, his career in transportation began.

He later worked in the steamship business and as an agent for the First Division of the St. Paul & Pacific. In 1878, Hill persuaded a group of wealthy bankers and executives to invest in the purchase of several railroads including the St. Paul & Pacific and the Minneapolis & St. Cloud Railway, the latter of which existed primarily on paper but held land grants throughout the Midwest and Pacific Northwest. Several were reorganized in 1879 as the St. Paul, Minneapolis & Manitoba Railway Company ("Manitoba Railway"). In September 1889, the name of the Minneapolis & St. Cloud Railroad Company was changed to the Great Northern Railway (the "GN"). Shortly thereafter, the Great Northern took over the Manitoba Railway. When 1890 ended, the Great Northern operated on 3,260 miles of track and had lines that ran throughout Minnesota, Wisconsin, North Dakota and eastern Montana. Hill acquired part of the Mesabi Range in Minnesota and began shipping iron and copper to the East.

As with the Northern Pacific and Milwaukee Road, Hill's plans were to extend his railroad to the west. Crossing the Rockies and Cascades was a formidable task. Hill's chief engineer, John Stevens is credited with discovering Marias Pass, at the headwaters of the Marias River in Montana. A bronze statue of Stevens stands in Summit, MT, 12 miles west of Glacier Park Station. At 5,215 feet, Summit is the highest point on the GN's transcontinental line.

The Great Northern chose the most northern route across the country. Construction on the western extension began at Havre, Montana, in 1890. The final spike was driven in Scenic, Washington, on January 6, 1893.

Hill knew that the success of his venture depended upon rapid and successful colonization. The success of the early settlers meant more would follow. A visionary, Hill advocated crop diversification and imported purebred cattle from abroad.

The GN's expansion was unique in that government grants of lands or land were neither sought nor given. The only land grants it held were attached to 600 miles of land in Minnesota acquired from predecessor companies.

The railway extended from Minnesota (and, eventually Chicago), through what later became Glacier National Park, over Stevens Pass and on to Seattle. A route was also developed extending from the Columbia River to California and connecting with the Western Pacific and Atchison, Topeka & Santa Fe Railroads. This allowed for serious competition with the Southern Pacific. Crossing the Cascades presented difficulties. What became known as Stevens Pass was steeper and rougher than Snoqualmie Pass. The original Cascade Tunnel was built in 1900 to avoid a series of eight switchbacks. It was 2.63 miles long at an elevation of 3,382 feet. Smoke caused by steam locomotives caused problems and the line was later electrified. But the elevation of the tunnel exposed it to avalanche issues. A replacement tunnel was constructed in 1929 which, while longer, was at an elevation of 2,281 feet. Various sections of the line between Wenatchee and Skykomish were eliminated.

In February 1910, heavy snow and avalanches stalled the Seattle Express, a passenger train, and the Fast Mail no. 27 at Wellington Station on the western terminal of the Cascade Tunnel. A foot of snow fell every hour with 11 feet falling on the worst day. By February 28th, the snow gave way to rain. A ten foot high slab of snow broke free and plunged the two trains into the Tye Valley. Ninety-six passengers and employees died in the worst train disaster in U.S. history.

Hill is referred to as "The Empire Builder". The most famous of the Great Northern passenger trains was similarly named. Hill remained involved in crop development, restoration of soil fertility, irrigation and other conservation minded objectives. Glacier National Park was created in 1910. But, hotels, chalets,

and other services were initially developed by the Great Northern Company in order to attract visitors to the West.

In 1970, the Great Northern merged with the Northern Pacific, Chicago, Burlington and Quincy (Burlington Route) and Spokane, Portland & Seattle railroads to form the Burlington Northern. Later, in 1996, the Burlington Northern merged with the Atchison, Topeka & Santa Fe Railroad to form the Burlington Northern and Santa Fe Railroad (“BNTF”).

Spokane, Portland and Seattle Railway

The Spokane, Portland & Seattle Railway was chartered in 1905 by James J. Hill who owned or controlled the Great Northern and Northern Pacific Railways. Hill’s objective was to run a line from Spokane to Portland and draw some of the lumber trade in Oregon. The route extended from Spokane to Pasco, along the northern bank of the Columbia River, to Vancouver, WA. The SP&S later acquired lines extending from Portland to Eugene, to Seaside, and from Wishram, WA, to Bend, OR. The SP&S tracks are now used by BNSF trains carrying cargo along the relatively flat route along the Columbia River.

The SP&S 700, an E-1 Class steam locomotive still exists and is owned by the City of Portland. The 700’s wheel configuration is known as a 4-8-4, one of the most powerful steam locomotives ever built. The 700 has been restored and makes occasional excursion tours.

Mergers

An outline of the myriad of mergers that have taken place in connection with the consolidation of railroads would require far more time and space than is feasible. With respect to the Union Pacific, in 1968 it acquired the Mount Hood Railroad. In 1982, the National Rail Passenger Service Act transferred most passenger service to Amtrak. Some railroads held out. In 1982, the UP, Missouri Pacific and Western Pacific merged. As a condition, the Southern Pacific and the Denver, Rio Grande Western gained certain trackage rights. In 1988, the UP acquired the Missouri-Kansas-Texas Railroad. The same year, the D&RGW and Southern Pacific merged retaining the Southern Pacific name. In 1994, UP made an competing offer to that made by BN to acquire the Atchison, Topeka, & Santa Fe Railroad (“AT&SF”). That effort failed. But, in 1995, UP merged with the Chicago & Northwestern Railroad and, a year later, UP gained control of the Southern Pacific.

The merger history of the Burlington Northern Santa Fe Railroad (“BNSF”) is equally as complicated as that of the UP. Some of the later developments have been described above. The Aurora Branch Railroad (“ABR”) was founded in 1849 as was the Pacific Railroad of Missouri (“PRM”). ABR eventually became the Chicago, Burlington & Quincy Railroad; the PRM became the St. Louis-San Francisco Railway (“Frisco”). The Atchison, Topeka & Santa Fe was chartered in 1859. It built one of the earlier transcontinental railroads linking Chicago with Southern California.

The Burlington Northern Railroad (“BN”) resulted from the merger of the Chicago, Burlington & Quincy Railroad with GN, NP, and the Spokane, Portland & Seattle Railway in 1970. The Frisco was merged in 1980.

In 1994, the BN announced its intention to merge with ATSF. The UP made a competing offer but the Interstate Commerce Commission approved the BN-ATSF merger forming BNSF.

4. Decline and Resurgence of American Railroads

While the use of railroads was becoming more efficient the 1950’s with the ascendancy of diesel powered locomotives and their lower maintenance costs, the overall health of the railroad industry declined. Many railroads suffered serious financial troubles which forced mergers. The names of many of the eastern seaboard lines (New York Central, Pennsylvania, Atlantic Coast Line, Lackawanna, Erie, and so on) disappeared. Passenger service all but disappeared as automobiles became more popular and affordable. Only the price of gasoline argued against the use of rail for long distance travel. Together with air travel which reduced travel time tremendously, why would one travel by train? Only a few passenger trains, for example, the Great Northern Empire Builder and the Santa Fe’s Super Chief still carried full passenger service, including sleepers. Trucking also became a more efficient means of delivering goods to specific locations. In 1968, the New York Central and the Pennsylvania merged to form the Penn Central but declared bankruptcy two short years later. Other lines such as the Lehigh Valley, Reading, Lehigh and Hudson, Erie Lackawanna, Delaware and Hudson which had depended upon the Penn Central to move freight faced considerable difficulty.

In 1976, the federal government created the Consolidated Rail Corporation, or Conrail for short. By the later 1980’s, Conrail became profitable, largely due to the

abandonment of unnecessary trackage and upgrades to that which required upgrading. As for passenger service, President Nixon signed into law the Rail Passenger Service Act in May 1971 which created Amtrak. While some rail companies declined to add their passenger service to Amtrak, for the most part, private railroad passenger service ended with the creation of Amtrak.

Consolidations and mergers continued apace with the creation of the Chessie System and the Burlington Northern. The disappearance of familiar rail lines like the Milwaukee Road, Southern Railway, Norfolk and Western, Rio Grande continued. However, the Railroad Revitalization Regulatory Reform Act (the "4R Act") of 1976 began deregulation of railroads and authorized implementation details of Conrail. The subsequent Staggers Act passed in 1980 continued the deregulation of railroad operations. The Act curtailed the authority of the Interstate Commerce Commission to control rates.

Current Events

A matter of considerable controversy at this time concerns the transport of Bakken Crude from North Dakota and eastern Montana to a refinery in Anacortes, Washington. Bakken Crude is particularly volatile and railroad accidents have resulted in significant numbers of deaths. BNSF's rail line runs across its northern lines through Spokane and along the northern shore of the Columbia River. The line continues north along the Columbia and the South Sound (recall scenes of trains passing along the shore during this year's U.S. Open at Chambers Bay) to Seattle where it passes through a tunnel located under downtown Seattle office buildings, emerging along the waterfront, continuing along shore to Everett. Several areas along these shorelines suffer occasional mudslides. The route terminates at the Anacortes refinery. The Swinomish Tribe has demanded that BNSF abide by an easement agreement that had settled an earlier lawsuit filed by the Tribe. The agreement limits the number of trains and cars passing through the Swinomish Reservation to one train daily with no more than 25 cars. The demand was either rejected or ignored. The Swinomish Tribe has filed a complaint in U.S. District Court to enforce the easement agreement and to enjoin further overuse of the easement.

Conclusion

The rail history of the Pacific Northwest and Washington State offers an interesting story. Not unlike other areas, rail service developed from localized

short lines to major national railroads because of both service needs and financial issues. Railroad names that we all grew up with (Atchison, Topeka & Santa Fe, the Rio Grande, New York Central, Pennsylvania, for example) have disappeared in the wake of consolidations. Though the Milwaukee Road ceased operations and sold off (or gave away) its assets, the Great Northern, Northern Pacific and SP&S do live on in the form of the BNSF.

5. Federal Regulation of Railroads

The United States Constitution contains three provisions of importance to federal regulation of railroads:

Article 1. Legislative Department

Sec. 8. The Congress shall have the power ... To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;

Article IV. Admission of New States to Union; Property of United States

...

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Amendment V. Rights of Persons

... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Some “strict constructionists” opposed the use of subsidies of transportation improvements on the grounds that such grants of public land were unconstitutional. Proponents argued that the same would confer a benefit by encouraging settlement. The completion of the Erie Canal in 1825 was regarded to support the latter view.

Rights of Way and Land Grants

Around 1827, the practice of “checkerboard” land grants began. One of the earliest grants was to the State of Illinois for construction of a canal. The grant

included land equal to one-half of five sections in width lying on each side of the canal. The remaining lands were reserved by the government.

During this early period, railroads were primitive but improving and becoming more popular year by year. In 1833, Congress authorized the State of Illinois to use an existing canal for railroad purposes. But as a result of the depression brought about by the Panic of 1837, railroad activity virtually ceased.

Beginning in 1850, Congress embarked upon a policy of subsidizing railroad construction through large grants of public land. Typical of these was the Illinois Central Grant, Act of September 30, 1850, c. 61, 9 Stat. 466. In 1862, in order to encourage construction and completion of transcontinental railroads, Congress granted to railroads sections of land alternating with government lands located along the railroad right-of-way. Among these grants were:

Union Pacific Grant, Act of July 1, 1862, c. 120 12 Stat. 489

Amended Union Pacific Grant, Act of July 2, 1864, c. 216, 13 Stat. 356

Northern Pacific Grant, Act of July 2, 1864, c. 217, 13 Stat. 365

Other non-transcontinental railroads received similar grants. Technically, the grants were made to states through which the railroad would pass. The states in turn would assign the land grants to the railroad. The railroad was required to survey the routes and file their maps in order to identify the lands to be selected.

Congress reasoned that the subsidies were necessary to both fund and allow completion of the transcontinental lines by encouraging settlement and would make government reserved lands more valuable. Court decisions involving these grants have generally characterized the nature of the interest granted as a "limited fee" having the characteristics of a fee determinable (i.e. right-of-way so long as used for railroad purposes) or a fee subject to a condition subsequent (i.e. a right-of-way for railroad purposes but if not so used ...). But for ease of convenience, the term "limited fee" has been the most frequently used term.

By the late 1860's, criticism grew over the "giveaway" of public land as the railroads were not quick to sell the granted lands. In 1872, the House of Representatives passed the following Resolution:

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 public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.

Cong. Globe, 42nd Congress, 2nd Session., 1585 (1872). The Record reveals no discussion of the Resolution. But following 1871, the practice of outright grants of federal lands to railroads discontinued. Specific Acts were passed to allow railroads to lay tracts across public land but the grant were described in the Congressional Record as rights-of-way. So, one wonders if the lack of discussion merely represents the acceptance of the current practice.

In 1875 the issue of whether use of the term “right-of-way” was either an easement or limited fee was either resolved or further confused with passage of the General Railway Right of Way Act (“GRRWA”), codified as 43 U.S.C. Sec. 934. The Act provided in part:

§934. Right of way through public lands granted to railroads

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Two provisions of the Act were especially significant: first, the Act incorporated the condemnation provisions of the 1864 Act; second, it allowed railroads to file a route map in advance of construction, thus preventing speculators from interfering with the railroad’s right-of-way. Further, the Act provided that after location of the right-of-way, “all such lands over which such right of way shall be

disposed of subject to such right of way”. This provision was of significance to the Supreme Court’s *Great Northern* decision.

Interstate Commerce Commission

Congress created the Interstate Commerce Commission (“ICC”) by passage of the Interstate Commerce Act in 1887. At the time, Western farmers believed that railroads had excessive economic power and political influence. Because railroads were essentially monopolies, they could set rates in the absence of competition. States had made attempts earlier to regulate railroads but states were powerless to regulate interstate commerce. The ICC initially had difficulty exercising regulatory power; its mission was undefined. The Hepburn Act of 1906 made the Commission’s mission more clear and empowered the Commission to adjust a railroad’s rate to that which was “just and reasonable”. The Mann-Elkins Act in 1910 placed the burden of proof on the railroad.

President Woodrow Wilson seized American railroads in 1918 to assist in the WWI effort. The Esch-Cummins Transportation Act of 1920 returned railroads to private hands but gave the ICC the power to determine rates, compel mergers between smaller and larger railroads, and dictate the extension and abandonment of routes. In 1921, Congress enacted 43 U.S.C. Sec. 912 which further regulated the disposition of abandoned rights-of-way. If the right-of-way was deemed forfeited or abandoned, the Act provided that title could revert to a patentee subject to certain exceptions: a) if the right-of-way was converted to a public use, b) if it was located within a municipality but, in either case, mineral rights were reserved by the government.

Interstate Commerce Commission Termination Act and Staggers Act

The Interstate Commerce Commission Termination Act of 1995 (ICCTA”) abolished the ICC and gave the Surface Transportation Board (“STB”) exclusive jurisdiction over a railroads rates, practices, routes, etc. In addition, the STB was granted jurisdiction over the construction, abandonment, relocation of tracks and such even if located entirely within a state. The ICCTA preempts state law. (For example, see *Auburn v. Burlington*, below).

The Federal Railroad Safety Act of 1970 provides for the setting of uniform safety regulations. The Noise Control Act of 1972 sets maximum noise levels for railways.

By the 1970's the railroad industry was on the brink of collapse. Airline travel had replaced passenger rail service and trucking had largely displaced freight traffic. A problem was that railroad operations had become overregulated. In 1970, following the bankruptcy of Penn Central, Congress created Amtrak to assume the company's passenger service under the Rail Passenger Service Act. Three years later, Congress passed the Regional Rail Reorganization Act of 1973 (the "3R Act") which created Conrail. The first significant change was with passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (referred to as the "4-R Act"). The 4-R Act eased regulation on rates, line abandonment, and mergers. Following the 4-R Act, Congress passed the Staggers Rail Act of 1980 which allowed greater pricing freedom, expediting the rail abandonment process, and permitting confidential contracts with shippers. Railroads divested themselves of unprofitable passenger service and concentrated on core freight business. According to the American Association of Railroads, railroads have reinvested over \$575 billion in their own funds to improve service and keep track and equipment in satisfactory condition. Interestingly, short line and regional railroads have reemerged and operate about 49,000 miles and employ 18,000 workers.

6. Overview of State and Federal Case Law

Washington

Morsbach v. Thurston County, 152 Wash. 562 (Wash. 1929)

Facts: In 1910, Edward Kratz executed a deed in favor of the Northern Pacific Railway for certain lands located in Thurston County. The deed read in part:

Know all men by these presents that Edward Kratz, of Thurston County, Washington territory, in consideration of two hundred dollars (\$200.00) 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 ... and the construction of certain canals ...

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 ... does covenant ... that he is lawfully seized of the aforesaid premises ... and that he has good right to sell and convey ...

Northern Pacific later acquired a different right-of-way and in 1913 moved its tracks, fences and telegraph lines to that new location. NP then quit claimed the parcel to the State of Washington which granted an easement to Thurston County to construct a county road. Morsbach sued contending that the conveyance granted an easement only. Judgment was entered in favor of Morsbach. Thurston County appealed.

Held: Thurston County argued that, were it not for the words "right-of-way for the construction of said Company's railroad, the grant would convey a fee. The Supreme Court disagreed. It noted that the deed did not fully describe the property conveyed; rather, it stated that what was conveyed was a "right of way ..." over a general description. The Court noted that the conveyance of a right-of-way can have a twofold meaning: conveyance of a fee and conveyance of an easement. In this case, the Court indicated that had the grant ended after the first paragraph, the conveyance would be only that of an easement. The issue concerned the second clause, that containing the covenants, otherwise known as

the habendum clause. The Court reviewed an extensive number of decisions but concluded that based upon the intention of the parties, only an easement was conveyed.

Swan v. O'Leary, 37 Wn.2d 533, 225 P.2d 199 (Wash. 1950)

Facts: In 1909, Minnie Swan executed a deed in favor of D.H Draham in which Minnie conveyed:

... for the purpose of a railroad right-of-way to-wit a strip of land 50 feet in width extending through the E ½ of the NE ¼ of Section 24 in Township 18 north, Range 3 West W.M. said strip to be located 25 feet on either side of the permanent survey line thereof through said land ...

A printed deed form was used with certain keep parts in handwriting. The grantee had acquired the land, along with other parcels, for the purpose of hauling timber to Mud Bay. A railroad was constructed and operated until logging operations ceased. In 1942, the rails were removed. Four years later, the strips were conveyed to the O'Leary.

As in other railroad right-of-way cases, the question was one of what the intention of the parties was at the time of conveyance. The Court noted that the case law seemed to be in hopeless conflict but recognized that Courts have considered a number of factors in reaching conclusions:

- 1) whether the consideration was substantial or nominal;
- 2) whether the land conveyed was a strip, piece, parcel or tract; and did or did not contain additional language relating to the use or purpose which the land was to be put or in other ways limiting the estate conveyed;
- 3) whether the deed conveyed a strip of land limiting its use its use to a specific purpose;
- 4) whether the deed conveyed a right-of-way over a tract of land than over a strip, piece or parcel;
- 5) whether the deed granted only the privilege of constructing, operating or maintaining a railroad over the land;
- 6) whether the deed contained a reverter clause in the case

that railroad operations ceased.

Held: The Court indicated that the Swan deed was ambiguous. On the one hand it conveyed a fifty foot wide strip of land for a railroad right-of-way. On the other hand it conveyed a strip fifty feet in width. The Court made its ruling on the basis of subsequent circumstances. The grantee acquired the strip for the purpose of hauling its timber. When operations ceased, the rails were removed, and further use of the strip was abandoned. The trial court had held that *Morsbach* controlled and ruled that only an easement was conveyed.

Zobrist v. Culp, 18 Wn.App. 622 (Wash.App.Div. 1 1977), 570 P.2d 147

Facts: In 1901, Watson conveyed a 100 foot right-of-way by SWD to Bellingham Bay & Eastern Railroad Co. over and across the NW $\frac{1}{4}$, Sec. 26, T. 37N, 4 E.W.M. in Whatcom County . The deed provided in part:

Said right-of-way is hereby granted of running and operating a railroad ... and first party reserves the right to free access to pass and repass and go over and return on the said R.R. ... except when trains are being operated thereon. Provided always however that if second party shall at any time cease or fail to use the right-of-way herein mentioned and described for the purpose of running and operating a railroad over the same for a period of 12 consecutive months then and from thenceforth this instrument and the estate hereby granted shall cease and revert to the first party.

In 1972, Cascade Recreation Inc. ("CRI") acquired from Burlington Northern ("BN") approximately 5 Miles of its branch line running from Wickersham to Blue Canyon. That line was part of an earlier railway line that ran to Bellingham. BN obtained approval from the ICC to abandon the line in 1971 and ended service in July 1971. Until then BN maintained several stations the line and listed them in its official inventory list. After abandonment, BN continued operations on the line as late as February 1972. CRI began operating its railroad equipment over the line in May 1972 and had operated continuously since. In her complaint, Zobrist alleged that Culp (owner of CRI) had destroyed a fence located along the boundary between the two properties. An amended complaint alleged that BN had ceased operations for a time period sufficient to cause a reverter.

The Court had to consider three questions: 1) what are the respective rights of the parties? 2) what does “running and operating a railroad” mean, and 3) does a genuine issue of material fact exist such that summary judgment was improper.

Held: The Court reiterated the Washington rule that “when the granting clause of a deed declares the purpose of the grant to be a right-of-way for railroad purposes the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title”. No mention had been made specifically in the deed of the grantor’s intent to convey fee title. Again, in this case the grant was made for the purpose of operating a railroad subject to the limitation that if the easement was not used continuously for 12 months, the estate reverts to the grantor. The Court then went on to consider questions 2 and 3 but neither are relevant here.

Veach v. Culp, et al., 21 Wn.App. 454 (Wash.App. Div. 1 1978), 585 P.2d 818

Facts: The Veaches filed suit seeking removal of a chain link fence erected by Culp along the common line between their two properties. The deed through which the Culp property derives conveyed

“a right-of-way one hundred feet wide, being fifty (50) feet on each side of the center line of the B.B. & Eastern R.R. as now located ... excepting all rights for road purposes that may have heretofore been to Whatcom County and particularly reserving all littoral and riparian rights to the said Fred and Mattie A. Zobrist.

The Veaches own several acres adjoining the right-of-way strip plus a strip along the shore of Lake Whatcom lying south of the right-of-way. A portion of the right-of-way also abuts the Lake.

Culp and the Lake Whatcom Railway (present name of CRI) maintained that the original grant conveyed fee title and the absolute right to erect a fence in order to prevent trespassing. The Veaches contended that the grant conveyed an easement only and that the fence unlawfully restricts their enjoyment of their riparian rights and access to their waterfront.

Held: The deed conveyed fee title. The Court cited *Morsbach v. Thurston County*, 152 Wash. 562, 278 P. 686, for the proposition that a “right-of-way” may have a

twofold meaning: the mere right of passage over a tract of land and a strip of land that railroad companies purchase or acquire outright on which to construct a railroad. Whether the Zobrist conveyed an easement or fee depends upon the intent of the parties. In attempting to determine that intent, the Court will look to several factors: the amount of consideration, whether the deed contained language limiting use to a particular purpose, whether the deed conveyed a right-of-way rather than a strip, whether the deed granted only the right to construct, operate and maintain a railroad, etc. Here, the deed contains no limitation on the use to which the property may be put nor does it mention any possibility of reverter. The Court further denied the Veaches claim of a quasi-easement.

The Roeder Company v. Burlington Northern, et al. 105 Wn.2d 567 (Wash. 1986)
717 P.2d 855

Facts: This case involves very complicated facts. It concerns claims made by various parties relating to an abandoned railroad right-of-way located in Bellingham. The appeal concerns two of those cases. In 1914, the Bellingham Bay Improvement Company ("Improvement Company") conveyed a fifty foot wide strip of property to the Bellingham and Northern Railway Company ("Bellingham Railway"). The deed stated that the grantor "conveys and warrants unto Bellingham Railway ... for all railroad and other right-of-way purposes, certain tracts and parcels situate in the City of Bellingham ...". Bellingham Railway later conveyed its interest in the strip to the Milwaukee Road. The Milwaukee Road ceased operations over the property in 1976 and conveyed portions of the property to defendants by quit claim deeds. The deeds by which defendants acquired title to their adjoining property contain metes and bounds descriptions using the railroad right-of-way as a boundary. Though the companion case contained some different facts, the Roeder Company's claims derived from the same conveyance history. Important to the decision, the Roeder chain of title included a "catchall" provision which purportedly conveyed all other property of the grantor. The Court was asked to decide three questions: 1) did the Improvement Company convey an easement or fee simple; 2) is a "catchall" description in a deed valid to convey title? And 3) do the abutting owners become owners to the centerline when the right-of-way is abandoned?

Held: 1) Since the granting clause of the Improvement Company's deed declared a purpose, only an easement was conveyed; 2) the "catchall" provision in the earlier deed was valid to convey title notwithstanding the fact that certain land was not specifically described; 3) where a deed describes the land conveyed with a metes and bounds description that does not include a railroad right-of-way, the presumption that abutting owners take to the centerline of the right-of-way upon abandonment is rebutted. A critical fact in the holding is that since only an easement was conveyed and, upon abandonment title did not revert to the adjoining owners, title reverted to the original grantor, the Improvement Company and Roeder succeeded to title via the "catchall" phrase.

Brown, et al. v. The State of Washington, et al., 130 Wn.2d 430 (Wash. 1996) 924 P.2d 908

Facts: This case involved claims made by plaintiffs located in three counties: Adams, Kittitas and Whitman. The State of Washington had acquired certain strips of land previously held by the Milwaukee Road. Plaintiffs contended that title reverted to them as adjoiners when Milwaukee ceased use for railroad purposes. Milwaukee Road had acquired most of the property at issue between 1906 and 1910 for construction of a railroad to run from Seattle and Tacoma to Idaho and then to the Missouri River. The Milwaukee Road had acquired through deeds from the federal government which were pre-printed blank forms in which names and legal descriptions were filled in by hand. The deeds included language stating that "fee simple title to said strip, together with all rights, privileges and immunities that might be acquired by eminent domain". Milwaukee Road later went through Reorganization. The Reorganization Trustee was unable to find a buyer interested in railroad use and applied to the Court for permission to sell the strips of land to the State of Washington. The land was sold in 1981 to the State conveyed by QCD's.

Held: In looking at the question of whether fee title or an easement is conveyed, the Court reiterated the need to determine the intent of the parties to the deed(s). The Court noted that the deeds clearly contemplated use for a railroad but in the absence of limiting language, that purpose was not determinative. A railroad may use its fee interests or easement rights for railroad purposes. The plaintiffs also maintained that the eminent domain language suggested that there remained some interest that could be condemned. A similar argument was made

with respect to the “over and across” language. The Court found these arguments unpersuasive. Justice Sanders concurred in part and dissented in part to the majority’s decision.

City of Auburn v. The United States Government, et al., United States Court of Appeals nos. 96-71051, 97-70022 and 97-70920 (September 3, 1998).

Facts: Burlington Northern (“BN”) held rights to trackage between Cle Elum and Pasco and from Cle Elum to Auburn. In 1986, BN sold a portion of the easterly line to Washington Central. In 1996, BN applied to the Surface Transportation Board (“STB”) for permission to reacquire that section. While BN had submitted certain permit applications to local authorities, it later maintained that federal preemption precluded the authority of local government to approve or disapprove its intentions. King County requested an informal opinion from STB on the issue of federal preemption. The STB determined that the line was not subject to local permit authority.

Held: The Court ruled that the Interstate Commerce Commission Termination Act (“ICCTA”) gave the STB exclusive jurisdiction over projects such as Stampede Pass. The Court also ruled that there was no evidence that the STB had abused its discretion or acted in an arbitrary manner when it approved the Stampede Pass line reopening without its requiring a full environmental impact statement.

Lake Whatcom Railway Company v. Alar, et al., (citation)

Facts: In the continuing saga involving the Lake Whatcom Railway (“LWR”) and adjoining owners, LWR sought reversal of certain trial court orders and asked the appellate court to revisit its decision in *Veach v. Culp* in which the Supreme Court held that an easement was conveyed and not fee title. LWR also sought damages arising from Alar’s standing on the rails, blocking maintenance, dumping dirt and burying the tracks erecting signs, and so forth. Alar moved to re-open *Veach*, substituting himself in *Veach*’s place and LWR in place of Cascade Recreation. The trial court entered an extensive list of prohibited actions. LWR argued that federal law applied and the Court had no jurisdiction.

Held: Re-opening *Veach* did not have the effect of vacating the earlier Court's judgment and federal did not apply. Lastly, the appellate court ruled it had no authority to overturn the Supreme Court's decision in *Veach*.

Federal Decisions

Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903)

Facts: Owners of properties located in Wadena County, MN, claimed ownership of certain portions of a Northern Pacific Railroad right-of-way by adverse possession. The Northern Pacific Railroad Company had been created by an Act of Congress, approved July 2, 1864, 13 Stat. 365. Section 1 created the corporation and empowered NP to construct a continuous railroad and telegraph lines from Lake Superior to an indeterminate location in Puget Sound. Section provided that the width of the right-of-way was to be 200 feet on both sides of the center line together with the right to take from adjacent public lands any earth, stone, timber, etc. necessary for construction. Throughout the several sections was mention of the grant being one of public lands and reserved certain rights to the federal government. Section 18 provided that NP was to obtain the consent of the Legislature of any state through which any portion of the railroad line might pass. Minnesota had given its consent.

During the period of construction on the land at issue, the land remained public land in which the Government held full title. Patents were later issued in which the land transferred erroneously omitted the right-of-way. Defendants occupied certain portions of the right-of-way lying between 50 and 100 feet from the centerline.

NP filed an action for ejectment. The case was tried to the trial court which held that NP held paramount title to the right-of-way. The Minnesota Supreme Court reversed and ruled that defendants held title by adverse possession. The matter was then brought to the U.S. Supreme Court.

Held: The issue to be decided by the Court was whether title could be acquired by adverse possession under state law where the land had been taken out of the category of public land by an Act of Congress. Though the grant by Congress was

subject certain conditions, title had passed to NP in fee. The title acquired was a limited fee subject to reverter. Because the railroad was not free to alienate any portion of the land which was to be used for railroad purposes, similarly the State of Minnesota was not free to apply its law in such a way as to accomplish the same result.

Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942)

Facts: The Great Northern Railway Co. (“GN”) claimed ownership of oil and minerals lying underneath a right-of-way located in Glacier County, MT. GN claimed that it had acquired the right-of-way from the St. Paul, Minneapolis & Manitoba (“Manitoba”) which Manitoba had been granted pursuant to the Act of March 3, 1875. The government contended otherwise. GN filed this suit to have fee title confirmed in it. The District Court ruled in favor of the government and the Court of Appeals affirmed. GN appealed to the Supreme Court.

Held: Grants made pursuant to the Act of March 3, 1875 “the “1875 Act”) conveyed an easement only; fee title remains in the United States. Section 1 of the 1875 Act indicates that the right is one of “passage”. Section 2 provides that any railroad whose right-of-way passes through a canyon, pass, etc. may not prevent any other railroad from the use and occupancy in common with road located first. Section 4 provides that the right-of-way granted shall be noted in the local land records and any subsequent disposal of the land shall be made subject to the right-of-way.

GN’s claim rested in large part on prior decisions that had described the grants as ones of a limited fee. The Court disagreed and further explained the change in temperament that had occurred over the years.

Beginning in 1850, Congress began the policy of subsidizing construction of railroads through the grant of lands within the public domain. This policy included the grant of large tracts adjoining the rights-of-way. These grants of land, including the rights-of-way, were grants of fee title. The policy incurred great criticism. In March 1872, the House of Representatives had passed a Resolution which stated:

Resolved, that, in the judgment of this House, the policy

of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.

The Court indicated that after 1871, outright grants of public lands seemed to have stopped though grants of rights-of-way by specific Acts of Congress continued to be made. The fact that these Acts granted only an easement was inferred from Committee remarks. Administrative interpretations also described the rights-of-way granted to be easements. By the Right of Way Act of 1875, legislative policy was believed to have resolved any issue in declaring that grants made after the date of the 1875 Act were of easements only. The Court clarified a prior decision of the Court in which the grant was described as a “limited fee” used inaccurate language.

Marvin M. Brandt Revocable Trust, et al. v. United States, Supreme Court of the United States, No. 12-1173 (Decided March 10, 2014)

Facts: This case presents an interesting summation of the country’s motivations with respect to western expansion and the laws that regulated that expansion. Plaintiff, Marvin M. Brandt (“Brandt”), acquired ownership of a sawmill located in Fox Park, Wyoming. In 1976, the US issued a patent to an 83 acre parcel to Melvin and Lulu Brandt (Marvin’s parents). The patent conveyed to the Brandts fee simple title to the land “with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging unto said claimants, their successors and assigns, forever”. The patent included certain limitations and exceptions. For example, the patent reserved to the United States a right-of-way for ditches or canals; a right-of-way for the existing Platte Access Road and Dry Park Road. But the patent further provided that if the roads ceased to be used within five years, the easement reserved would terminate. Relevant to this case, the patent was “subject to those rights for railroad purposes as have been granted to the Laramie, Hahn’s Peak & Pacific Railway Company, its successors and assigns”. (“LHP&P”). Its plans were to become the primary railroad serving parts of Wyoming, Colorado and Utah but that never happened. After changing

hands numerous times, it was acquired by the Union Pacific. Eventually, a successor applied to the Surface Transportation Board (“STB”) for permission to abandon the line. The tracks and ties were removed and abandonment was completed. Thereafter, the United States commenced a declaratory action against 31 parcels seeking to quiet title to the abandoned right-of-way in the United States. The Government settled or obtained defaults against all but Brandt. Brandt asserted, of course, that the right-of-way was a simple easement that extinguished upon abandonment. The Government maintained that it held a reversionary interest. The district Court ruled in favor of the Government. The Court of Appeals affirmed. The Supreme Court granted certiorari.

Held: As the Court put it “The Government loses that argument today”. The Government’s position was considered somewhat disingenuous because it had maintained the exact opposite position in *Great Northern Railway v. United States*, 315 U.S. 262 (1942) and won. In *Great Northern* (“GN”), GN contended that under the General Railway Act of 1875, it held a reversionary interest in a right-of-way that allowed it to drill for newly discovered oil. The Government maintained that its grant of a right-of-way pursuant to the 1875 Act granted only an easement. Land grants made before a prior Act in 1871 may have conveyed a fee simple interest given the surrounding circumstances of populating the American West but that was not the case following enactment of the 1875 Act. In *Great Northern*, the Court accepted the Government’s position in full. The Court explained the historical background leading to the 1875 Act, including administrative and legislative interpretation all dictated against the Government’s position in *Brandt*. The Court rejected the Government’s arguments that later enactments implied an interpretation of grants made under the 1875 Act.

7. Railbanking and Rails to Trails

During the late 19th and early 20th century, railroads were at their peak. In 1916, it is reported that over 270,000 miles of track crisscrossed the country carrying both freight and passengers. But just as the miles of rail lines peaked, other forms of transportation began to make inroads and diminish the power and popularity of railroads. The automobile made short distance travel more feasible and efficient. Airplanes began to replace passenger trains for long distance travel. Railroads became underused and unprofitable. Their difficulties were compounded by the extensive regulatory structure maintained by the federal government. Since passage of the Interstate Commerce Act in 1887 and the creation of the Interstate Commerce Commission (“ICC”), railroads were unable to abandon unprofitable lines or merge with other railroads in order to reduce inefficiencies.

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (“the 4-R Act”) which imposed conditions to prevent disposition of rights-of-way for 180 days in order provide the opportunity for public use. The Staggers Rail Act followed four years later in 1980. It required the ICC to exempt most rail abandonments from regulation. Subsequent abandonments by major carriers reduced the 270,000 mile system to 141,000 miles by 1990.

Concerned with the loss of so many rail corridors potentially available for public use, Congress passed the National Trails System Amendments of 1983 amending the National Trails Act of 1968. Its purpose was twofold: preserve the ability of railroads to discontinue use of unprofitable lines but allow for the opportunity to transfer interim use as recreational trails. A significant hurdle to this objective was that under both federal and state court decisions, many of the rights-of-way were determined to be easements. Were the rights-of-way to be formally abandoned, title to the easement would revert to the adjacent owner(s). Congress addressed this problem through “railbanking”. The

Act authorizes public or private entities to purchase inactive or unused rights-of-way from the rail companies and convert them to recreational use. Railbanking prevents the right-of-way from being deemed abandoned. The railroad retains the option to reacquire the line if it becomes desirable in the future to resume service. The acquiring agency must agree to maintain the line in the interim.

The plan was not without opposition however. Adjacent owners often maintained that public trails exposed their properties to risk of trespassing, vandalism, reduced privacy and reduced property values. As the following court decisions illustrate, the principal objection was that the transfer accompanied by a use not contemplated in the original easement grant constituted a “taking” under the Fifth Amendment and/or was unconstitutional.

Federal Decisions

The decisions most often cited on the federal level all involve the same parties and facts. The decisions are referred to as Preseault I, Preseault II, and Preseault III.

Facts: plaintiffs owned several parcels lying adjacent to a railroad right-of-way. The Rutland-Canadian Railroad Co., a corporation organized under the laws of Vermont in 1899, acquired the rights-of-way at issue, installed its tracks and operated a railroad. Ownership of the right-of-way passed through several successor railroads with different names. In 1962, the last owner conveyed the right-of-way to the State of Vermont which leased it to the most recent Railway. For convenience, the Court refers to all as the “Railway”. The Railway ceased active operation of the line in 1970 and subsequently used the right-of-way solely to store railway cars. In 1975, the Railway removed the rails and other track material. In 1985, the State of Vermont and the Railway filed a verified Notice of Exemption with the ICC seeking approval of a 30 year lease

with the City of Burlington. In its submission, the State recognized that railroad operations had ceased and future use of the line was not foreseeable.

The Preseaults filed an action in Vermont State Court seeking a declaratory judgment that the right-of-way easement had been abandoned. The Vermont Supreme Court held that the ICC had not authorized abandonment and the easement remained subject to ICC jurisdiction. The Preseaults then filed a petition with the ICC seeking the same relief. The ICC ruled in favor of the State of Vermont.

Held: in *Preseault I*, the Preseaults maintained that the Rails to Trails' Amendment ("the Amendment") was unconstitutional under the Commerce Clause because it did not serve a rational, legal purpose and that it effects a taking without just compensation. The Court of Appeals ruled that the Amendment did serve a rational, legal purpose in that it preserved rail corridors for possible future use without their being abandoned and dismissed that claim. As for the taking claim, the Court ruled that no taking had occurred. If the Preseaults owned a reversionary interest, its being postponed by railbanking was no different than its remaining subject to ICC jurisdiction.

Preseault II: the Preseaults appealed to the U.S. Supreme Court. In an unanimous decision, the Court concluded that the plaintiffs' taking claim was premature because it must first be presented to the U.S. Claims Court pursuant to the Tucker Act. As for Commerce Clause claim, the Court held the Amendment constitutional in that the Amendment was reasonably adapted to the goal of encouraging recreational trails. Justice O'Connor joined in the result but in her concurring opinion emphasized that whether a taking had occurred would be determined by state law.

Preseault III: the Preseaults had filed their claim for compensation with the Federal Court of Claims. The Court of Claims entered summary judgment in favor of the government and against the Preseaults. The

Preseaults appealed. In a very long opinion, the Court considered the nature of the interest created, the impact of federal legislation, the scope of the easement, abandonment, the nature whether a taking occurred, and other issues. A majority of the Court of Appeals held that an easement was created and that the fee remained with the Preseaults. The majority also affirmed the District Court's decision that the easement had been abandoned long before creation of the trail. In a vigorous dissent, Judge Clevenger concluded that Vermont had not abandoned its easements and that no greater burden is imposed upon the servient estate than was the use to continue to be that of a railroad.

Washington State Court Decisions

Lawson v. State, 107 Wn.2d 444 (Wash. 1986), 730 P.2d 1308

Facts: plaintiffs Wright owned property bisected by a ROW located along the east shore of Lake Sammamish. Northern Pacific Railroad operated along this stretch of the Lake. The remaining plaintiffs (for convenience "Lawson") own property located along a different ROW located between Kenmore and Woodinville. The Burlington Northern operated a railroad over this ROW but had petitioned the ICC for permission to discontinue service. In January 1985, King County requested that the ICC impose a public use condition that would allow a public use or purpose. Its intention was to connect the Burke Gilman trail with the Lake Sammamish trail. In June, the ICC authorized abandonment but imposed a 120 day condition during which the ROW could not be disposed without its being offered for sale for public purposes on reasonable terms. Both sets of plaintiffs filed separate actions claiming that they held reversionary interest that the County sought to extinguish without payment of just compensation. Plaintiffs also sought to have two Washington statutes pertaining to trails declared unconstitutional.

Held: One of the statutes at issue simply described the public purpose concerning recreational trails; the other provided that utility and transportation corridors retain their public use character which is not subject to reversion or any other property interest which ripens upon cessation of railroad operations. The Supreme Court held the second part above (RCW 64.04.190 (b)) to be unconstitutional. The Court held that a change in use from “rails to trails” constitutes an abandonment of the easement originally granted for railroad purposes. The Court was not persuaded by the County’s argument that the plaintiffs really didn’t lose the reversionary interests held under common law. The Court further refused to accept that those interests may be affected by legislation. Though the Court found Sec. 190 (b) unconstitutional, it made clear that it was not making a determination as to what interests the plaintiffs actually held. Nor did the Court want leave any impression that public recreational trails were not desirable goals.

In a very practical dissent, Justice Utter described purpose of rail use to be for transport of freight or passenger. A change in the mode of transport was not material.

Brown, et al. v. The State of Washington, et al., 130 Wn.2d 430 (Wash. 1996), 924 P.2d 908

(see above, Overview of State and Federal Cases)

King County v. Rasmussen, 143 F.Supp. 2d 1225, USDC, W.D. Washington

Facts: Defendants Rasmussen own a parcel located along the east shore of Lake Sammamish. The dispute concerns a 100’ strip The original homesteaders of that land, the Hilchkanums, initially claimed the strip and surrounding land in 1876. They received a final ownership certificate in 1884 and patent in 1888. A year prior to issuance of the patent, the Hilchkanums conveyed to the Seattle Lake Shore and Eastern Railway a strip of land 100’ wide that read in part as follows:

... we do hereby donate, grant and convey unto said Seattle Lake Shore Railway Company a right-of-way one hundred (100) feet in width through our lands in said County described to wit as follows:

(legal description)

The deed further stated that the strip was to be fifty (50) feet on each side of the centerline of the railway track and granted the right to go upon the land adjacent to the line a distance of two hundred (200) feet on each side for the purpose of cutting dangerous trees.

Mary Hilchkanum later conveyed her interest to her husband “less (3) three acres right-of-way for Rail Road”. Later conveyances either used the same terminology or excepted the ROW from the legal description. Seattle Lake Shore and its successor, Burlington Northern (“BN”), built and maintained tracks along the strip. In 1997, BN sold its ROW to the Land Conservancy of Seattle which petitioned the Surface Transportation Board to abandon the line for rail service under the National Trail System Act. The STB approved use by King County for interim trail use and the County then purchased the strip from the Conservancy. The Rasmussens opposed the project. The County obtained an injunction against them to halt interference with work. The Rasmussens removed the case to Federal Court.

Held: after disposing of several procedural errors by the Rasmussens, the Court addressed the issue of what interest the Rasmussens might have, if any. The Court reiterated the rule in Washington concerning construction of deeds. The Court will look to the language of the deed; b) subsequent behavior of the parties regarding the land; and, c) circumstances at the time of execution. The Court found the language used in the deed to be unambiguous. Taken as a whole, the Hilchkanums conveyed fee to the strip together with a right or license to go upon the adjoining land. No limitations were contained in the

deed. Further, because the Hilchkanums were homesteaders without benefit of a patent, they were required to use the term “right of way”. The use of the term carried no special importance.

As for later behavior, legal descriptions in later deeds were consistent with that in the grant. The Court found that deeds in the same period for the same ROW contained differing language, some with restrictions, some without.

Thus, the Court granted motions to strike the Rasmussens’ defective filings, summary judgment in favor of the County, quieting title, and held that the County has the right of quiet enjoyment without interference by the Rasmussens.

Sample Title Exceptions

(Courtesy of Rush N. Riese, former Vice President and Agency Manager of LandAmerica's Title Insurance Companies, Fidelity National Title Insurance Company's Companies, and First American Title Insurance Company, now retired, and why he's hanging on to Railroad Title Exceptions, I don't have a clue.)

And credit be given to anyone else who had a hand in composing these exceptions and the thoughts behind them.

Railroad Exceptions

1. Any question of the nature of the estate insured by reason of the decision by the Supreme Court in the case of *Veach Vs. Culp*, 92 Wn. 2d 570, wherein the court held a conveyance of a railway right of way to be an easement; or any claim or determination that the estate conveyed by said Deed is less than a fee simple indefeasible.

1. Loss or damage by reason that there appears to exist no insurable right of access to and from the land herein described to a public right-of-way. Unless this matter is solved to the satisfaction of the company, the forthcoming policy/endorsement will contain an exception to coverage for loss or damage by reason of lack of right of access to and from the land.

1. Private access to said premises is across a railroad right of way. This company will require that the "Private Roadway and Crossing Agreement", and any assignments or modifications thereof which were issued by the Railroad Company, be submitted for examination. the coverage then afforded under any policy(ies) issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of right of access to and from the land across a railroad right of way.

1. Access to and from the property herein described is over and across the Southern Pacific Railroad. Continued use of this crossing cannot be insured.

1. Any right or title that the United States of America might have to the land lying within 100 feet of the original main line of the railroad, as established under the Act of Congress dated March 3, 1875 (43 U.S.C. 934 et seq.), and amendments thereto.

1. The right of access to and from the land is subject to the rights for a railroad as granted under the Act of Congress dated March 3, 1875 and the terms and conditions contained in the act as may be amended.

1. Any rights for a railroad as granted under the Act of Congress dated March 3, 1875 (43 U.S.C. 934 et seq.).

1. Any right, title or interest that the U.S. and others may have lying within 100 feet of the center of the main line of the railroad, as established under the Act of Congress dated March 3, 1875 (43 U.S.C. 934 et seq.) and amendments thereto.

1. Any right or title that the United States of America might have to subject property lying within 100 feet of the original main line of the [TEXTa], as established in [TEXTb] in accordance with the Act of Congress dated [TEXTc], and amendments thereto.

Railroad Exceptions

Access:

Loss or damage by reason that there appears to exist no insurable right of access to and from the land herein described to a public right-of-way. Unless this matter is solved to the satisfaction of the company, the forthcoming policy/endorsement will contain an exception to coverage for loss or damage by reason of lack of right of access to and from the land.

Private access to said premises is across a railroad right of way. This company will require that the "Private Roadway and Crossing Agreement", and any assignments or modifications thereof which were issued by the Railroad Company, be submitted for examination. The coverage then afforded under any policy(ies) issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of right of access to and from the land across a railroad right of way.

Rights of the USA and Others:

Any failure to comply with any requirement of approval, consent, exemption or other action by, or notice to or filing with the United States of America, United States Congress, Interstate Commerce Commission, municipality, or any public utility commission or other similar regulatory authority relating to the abandonment, cessation of rail operations, or other disposition of that portion of said land lying within the right of way granted to the Northern Pacific Railroad by the United States Government.

The existence of any ownership interest, reversionary interest, possibility of reverter, power of termination, right of first refusal or similar interest of the United States of America, a municipality, adjoining property owners, or any other person or entity in that portion of the land lying within the right of way granted to the Northern Pacific Railroad by the United States Government.

Any right or title that the United States of America might have to the land lying within 100 feet of the original main line of the railroad, as established under the Act of Congress dated March 3, 1875 (43 U.S.C. 934 et seq), and amendments thereto.

The right of access to and from the land is subject to the rights for a railroad as granted under the Act of Congress dated March 3, 1875 and the terms and conditions contained in the Act as may be amended.