2019-1158

United States Court of Appeals for the Federal Circuit

REINALDO CASTILLO, GONZALO PADRON MARINO, MAYDA ROTELLA, JULIA GARCIA, SHOPS ON FLAGER INC., JOSE F. DUMENIGO, DORA A. DUMENIGO, HUMBERTO J. DIAZ, JOSEFA MARCIA DIAZ, LUIS CRESPO, JOSE LUIS NAPOLE, GRACE BARSELLO NAPOLE, BERNARDO D. MANDULEY, NORMA A. MANDULEY, DANILO A. RODRIGUEZ, DORA RODRIGUEZ, AVIMAEL AREVALO, ODALYS AREVALO, DALIA ESPINOSA, DANIEL ESPINOSA, SOFIRA GONZALEZ, LOURDEZ RODRIGUEZ, ALBERTO PEREZ, MAYRA LOPEZ, NIRALDO HERNANDEZ PADRON, MERCEDES ALINA FALERO, LUISA PALENCIA, XIOMARA RODRIGUEZ, HUGO E. DIAZ, and, CONCEPCION V. DIAZ, as Co-Trustees of the Diaz Family Revocable Trust, SOUTH AMERICAN TILE, LLC, GLADYS HERNANDEZ, NELSON MENENDEZ, JOSE MARTIN MARTINEZ, NORMA DEL SOCORRO GOMEZ, OSVALDO BORRAS, JR., LUIS R. SCHMIDT,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case Nos. 1:16-cv-01624 and 1:17-cv-01931, Honorable Marian Blank Horn

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

MARK F. (THOR) HEARNE, II
STEPHEN S. DAVIS
LARSON O'BRIEN LLP
112 South Hanley Road, Suite 200
Clayton, Missouri 63105
(314) 296-4000
thor@larsonobrienlaw.com
sdavis@larsonobrienlaw.com

MEGHAN S LARGENT
LINDSAY S.C. BRINTON
LEWIS RICE LLC
600 Washington Avenue
Saint Louis, Missouri 63101
(314) 444-7704
mlargent@lewisrice.com
lbrinton@lewisrice.com

ABRAM J. PAFFORD
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20036-5342
(202) 857-6000
abram.pafford@arentfox.com

Counsel for Plaintiffs-Appellants

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Reinaldo Castillo and Nelson Menendez and Osvaldo Borras, Jr., (cont.) **v.** United States

Case No. 19-1158

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Petitioner/Appellants

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Avimael and Odalys Arevalo	None	None
Luis Crespo	None	None
Hugo E. and Concepcion V. Diaz as Co-Trustees of the Diaz Family Revocable Trust	None	None
Humberto and Josefa Marcia Diaz	None	None
Jose F. and Dora A. Dumenigo	None	None
Dalia Espinosa, Daniel Espinosa and Sofia Gonzalez	None	None
Gladys Hernandez	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
Arent Fox, LLP, Mark F. (Thor) Hearne, II, Lindsay S.C. Brinton, Meghan S. Largent, Stephen S. Davis, and Abram J. Pafford.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Not applicable

7/31/2019
Date

/s/ Mark F. (Thor) Hearne, II
Signature of counsel

Please Note: All questions must be answered

Mark F. (Thor) Hearne, II
Printed name of counsel

cc: Davene Walker - USDOJ-ENRD

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INTRODUCTION

As any poker player knows, the difference between bluffing and simply betting is whether you are actually holding good cards. The government's response brief brims with confident assertions about the meaning of the various title documents at issue in this case. But when forced to show its hand and identify the legal support for these assertions, the government's tactic is revealed to be a bluff. If the government's arguments were correct, one would expect it to cite at least one Florida case in which the owners of parcels abutting an abandoned right-of-way were denied ownership of the underlying land because somewhere in their chain of title there were documents or records describing earlier conveyances made "subject to," "less," or "excepting" the right-of-way. But it does not, because no such case exists. The government tries to bridge this gap by combining confident assertions with selective quotation of various general principles, without any attempt to consider whether and to what extent these principles are relevant to the specific abandonment and centerline presumption issues at the core of this case. This reveals the government's tactic for what it is – an attempt to bluff out a poor hand that is unsupported by Florida law.

The landowners have cited multiple Florida cases that specifically address the ownership interests of abutting landowners in relation to strips of land underlying an abandoned easement or right-of-way. See Landowners' opening brief, pp. 30-36.

These cases uniformly hold that the abutting landowners will be found to also own the land underlying the abandoned right-of-way or easement, unless there is a clear reservation of that land to the grantors of the parcel on which the right-of-way or easement was originally created. These cases also hold that (1) the burden of establishing this "clear reservation" lies with the party seeking to show that such a reservation exists; and (2) language such as "subject to," "less," or "excepting" is not in-and-of-itself sufficient to reserve the land and defeat the centerline presumption.

At least one Florida case, *Peninsular Point, Inc. v. South Georgia Co-op*, 251 So.2d 690, 691 (Fla. Ct. App. 1971), even gives an example of the type of clear reservation language that will suffice to reserve to a grantor fee ownership of the land beneath a right-of-way, and defeat a claim of ownership by an abutting landowner in a setting where the right-of-way has been abandoned. See Landowners' opening brief, pp. 35-36. No such language is used in the pertinent portions of the conveyance documents in this case, which means the presumption has not been rebutted, and the plaintiffs who own the parcels directly abutting the abandoned railroad right-of-way are also presumed as a matter of Florida law to own the underlying land.

The foregoing points dispose of most of the arguments contained in the government's response brief. Perhaps recognizing the weakness of its legal

arguments, the government also relies heavily on a factual assertion that was not addressed by the Court of Federal Claims (CFC) in the summary judgment proceedings below. The government argues that a 1930s Southern Drainage District tax deed, introduced for the first time by the government in the post-summary judgment reconsideration briefing before the CFC, defeats the landowners' claims by showing that the railroad actually acquired the land beneath its own right-of-way, in fee simple, from the Southern Drainage District. Ergo, according to the government, the railroad has actually owned the land underlying its right-of-way since the 1930s, and still owns it today, meaning nothing was "taken" from the plaintiffs when this former right-of-way was converted to a public recreational trail.

As explained below, there are a host of problems with this argument. For example, the government neglects to mention that the tax deed it relies upon is a quitclaim deed, containing no warranty or other indication that the Southern Drainage District actually held fee title to the 100-foot strip of land underlying the railroad right-of-way referenced in the deed. Indeed, under the applicable Florida statute establishing the Drainage District's taxing power circa the 1930s, the Drainage District could only issue quitclaim deeds, and had no legal authority to issue title documents purporting to warrant title or convey a fee simple interest in land. In addition, the Drainage District tax deed references only a payment of "$1 and other valuable consideration by the railroad," and refers only to the 100-foot

wide strip of land underlying the railroad right-of-way, without any indication of a contemporaneous tax debt owed in relation to any of the parcels directly abutting the right-of-way. This suggests that the tax deed is what it appears to be on its face – a quitclaim document that essentially functioned as a receipt from the Drainage District, designed to clear any lien held by the Drainage District, when the railroad itself paid taxes it owed in relation to the 100-foot wide strip underlying the railroad tracks on its exclusive-use right-of-way easement.

The bottom line is that the government's arguments amount to little more than assertions that a title document differentiating a right-of-way from the abutting parcels constitutes proof that the abutting owner did not acquire title to the underlying land and, thus, does not regain use of that land when the right-of-way is abandoned. The problem is that the government's position turns Florida law on its head – under Florida law, the *centerline presumption* mandates that exclusionary language does not prevent the strip of land underlying an abandoned right-of-way easement from being absorbed into the abutting parcels, and the only *exception* is for instances where a grantor includes clear, affirmative reservation language of a sort not present in any of the title documents at issue in this case.

SUMMARY OF ARGUMENT

Florida law concerning ownership of the land underlying abandoned easements creates a clear presumption in favor of that ownership being joined to the ownership of the abutting parcels to the centerline. The government has no legal support for its assertions that terms such as "subject to," "less," or "except" in title documents or conveyances are sufficient to defeat the presumption, and the government's brief offers no explanation for how the presumption would retain any vitality at all if the government's misguided assertions were accepted. Contrary to the government's arguments, the law of other states does not support the government's position here, and in any event could not overcome the body of Florida law establishing the centerline presumption, and consistently applying it in cases involving ownership of the land underlying abandoned easements and right-of-ways.

Nor can the government sidestep the established presumption via its eleventh-hour claim that a 1930s quitclaim deed from the Southern Drainage District referencing $1 in consideration somehow conveyed to the railroad fee simple title of the strip of land underlying the railroad's exclusive use right-of-way easement. The government's tax deed argument is entirely speculative and wrongly attempts to gloss-over the fact that the tax deed is merely a quitclaim deed, with no reference or warranty to fee simple title, and no evidence in the record to support the speculative and counterintuitive claim that the Drainage District somehow acquired fee title to

the land underlying the railroad right-of-way from some unidentified owner after 1924, and then made a fee-simple sale to the railroad of this land for $1 in the 1930s.

Accordingly, this Court should apply Florida's centerline presumption as Florida courts have consistently applied it and hold these landowners own the fee title to the land underlying the abandoned railroad right-of-way. This Court should remand this case to the CFC for a determination of the just compensation owed these landowners.

ARGUMENT

I. Florida law establishes that the landowner plaintiffs are presumed to own the land beneath the former railroad right-of-way, and the government has not rebutted the presumption.

A. The government has failed to rebut that the presumption applies in this case.

Florida courts consistently hold that the burden of establishing a "clear reservation" of fee title lies with the party seeking to show that such a reservation exists. See, *e.g.*, *Smith v. Horn*, 70 So. 435, 436 (Fla. 1915); *Florida Southern Railway Co. v. Brown*, 1 So. 512, 514 (Fla. 1887); *Servando Building Company v. Zimmerman*, 91 So.2d 289, 293 (Fla. 1956); *Seaboard Air Line Ry. v. Southern Inv. Co.*, 44 So. 351, 353 (Fla. 1907); *Jacksonville, Tampa & Key West Railway Co. v. Lockwood*, 15 So. 327, 329 (Fla. 1894); *United States v. 16.33 Acres of Land in Dade County*, 342 So.2d 476, 480 (Fla. 1977); *Rogers v. United States*, 184 So.3d 1087, 1097-98 (Fla. 2015); *Dean v. MOD Properties, Ltd.*, 528 So.2d 432, 434 (Fla. Ct.

App. 1988). Cf. *Peninsular Point*, 251 So.2d at 693. As the landowners established in their opening brief, Florida courts uniformly hold that the abutting landowners own the land underlying an abandoned right-of-way or easement to the centerline, unless there is a clear reservation of that land to the grantors of the parcel on which the right-of-way or easement was originally created. See Landowners' opening brief, pp. 23-24, 29-36. If this Court were to accept the government's argument, the presumption would become a nullity, and title to strips of land underlying abandoned rights-of-way throughout Florida would be clouded.

In reality, as opposed to the government's fantastical argument, Florida courts have consistently applied the presumption in the context of a parcel abutting an abandoned right-of-way. With only one exception, in all cases involving the presumption where a Florida court has been asked to interpret language in the conveying document that, on its face, suggested that the abutting parcel is separate or excluded from the land within the right-of-way, the court has applied the presumption. See, *e.g.*, *Smith*, 70 So. at 436-37; *Servando*, 91 So.2d at 290, 293; *Dean*, 528 So.2d at 434. The sole exception is *Peninsular Point*, where the Florida Court of Appeals explained just how clear and unambiguous the language in the conveyance needs to be to override the presumption. *Peninsular Point*, 251 So.2d at 691. And the clarity of language evidencing a contrary intent in *Peninsular Point*

is not present here. All of these Florida cases, included *Peninsular Point*, establish that the centerline presumption applies here.

The burden is on the government, here, to present evidence of the grantor's intent that would override the centerline presumption. See *Bischoff v. Walker*, 107 So.3d 1165, 1170 (Fla. Ct. App. 2013). But as the government concedes in its brief, the Florida Supreme Court "indicates that the grantor's ownership of the fee to the roadway *is itself* presumed, absent proof to the contrary…." Gov. brief, p. 23 (quoting *Jacksonville Railway*, 15 So. at 329) (emphasis added by the government). And the alleged "proof" the government presents, an irrelevant tax deed the trial court did not see or consider during the summary judgment briefing, fails to rebut the presumption. See Section II, *infra*.

Needlessly confusing the issue, the government tries to draw a false dichotomy in Florida law between the Florida Supreme Court's decisions in *Jacksonville Railway* and *Smith* regarding which party has the burden of proof of establishing the presumption doesn't apply. See Gov. brief, pp. 23-26 (discussing how *Jacksonville Railway* "articulated a different version of the centerline rule" than *Horn*). This makes no sense. The Florida Supreme Court issued its decision in *Jacksonville Railway* in 1894. Twenty-one years later, in 1915, the Florida Supreme Court decided *Smith*. In *Jacksonville Railway*, the Florida Supreme Court exhaustively reviewed Florida law and decisions of other state courts, holding that

"a description [in a plat] bounding land by a highway conveys to the center of the highway…." *Jacksonville Railway*, 15 So. at 329 (citing *Florida Southern*, 1 So. at 512). The court continued, "The abutting proprietor is prima facie owner of the soil to the middle of the highway, subject to the easement in favor of the public…." *Id.* at 329. The court explained that "the presumption aris[es] from the deed…conveying the land," and because the parcel was "bound[ed]" by the right-of-way, "in the absence of proof to the contrary," the presumption applied. *Id.* "Unless this presumption prevails," the court maintained, "then the title must, in all cases of this kind, where there is such description, be deraigned[1] back to an ownership to such center at the time the street was laid out…." *Id.* Thus, the court held, "the deed is as strong evidence of plaintiffs' title to the center of the street as it is of title to any part of the named lots." *Id.*

Smith does not contradict *Jacksonville Railway* in any sense. The facts of *Smith* simply presented the Florida Supreme Court with an additional circumstance not present in *Jacksonville Railway* – that the platted streets had never actually been constructed or used as streets. *Smith*, 70 So. at 435. Faced with this question, the Florida Supreme Court examined the language of the plat and deed. The court explained that since the plat shows lots "with spaces for intervening streets…and

[1] *Black's Law Dictionary* (10th ed. 2014), p. 536, defines "deraign" as "To dispute or contest."

conveyances in fee of the subdivisions are made with reference to such map or plat," the court will presume that the owner intended to dedicate an easement for a public street. *Id.* at 436. And, the court held, "where such conveyances are made with reference to the map or plat, the dedication of the easement for street purposes cannot be subsequently revoked as against the grantees, and the title of the grantees of subdivisions abutting on such streets, in the absence of a contrary showing, extends to the center of such highway, subject to the public easement." *Id.* In other words, the plat and deed are prima facie evidence that a grantee of a platted lot abutting a right-of-way holds title to the centerline of the right-of-way. And language in the plat stating that the conveyance "*except[ed] such lots or parts of lots* as had been previously conveyed," does not rebut the presumption. *Id.* (emphasis added).

Furthermore, as explained in the landowners' opening brief, professors and property-law experts Stoebuck and Whitman have opined that the presumption would apply when a deed or plat describes the property as extending "to Main Street," or as here, "to the railroad corridor," without specifically identifying the land underlying the corridor, since the underlying fee owner will be presumed to own to the centerline of the street or corridor, unless a "very clear expression" of intending otherwise is stated.[2] William B. Stoebuck & Dale A. Whitman, *The Law*

[2] See opening brief, pp. 22-23.

of Property (3rd ed.) §11.2. Thus, the government has failed to rebut the application of the presumption here.

While the landowners refer to this as the "centerline presumption," they readily concede that *for a portion* of the right-of-way the "centerline" portion has been rebutted because the landowners trace their title back to three original condemnation orders to the railroad.[3] Two of these orders grant less than half of the right-of-way. The Russo condemnation, which applies to properties between Eighth Street and Fourth Street in what is now Zena Gardens is an irregular-shaped strip 1.2-feet wide to 25-feet wide. Appx708-709. Between Fourth Street and Flagler Avenue, in what is now Princess Park Manor, the Johnson Condemnation condemns an irregular strip 25-feet wide to 50-feet wide. Appx710-711. This is likely because the railroad was not built evenly on both sides of the section line, so the owner at the time only had the portion of the railroad actually built over his land condemned. That same property interest is what these owners claim today. This varying width of the right-of-way from the three original condemnation orders are apparent on the

[3] The Russo Condemnation is at Appx708-709 (describing a strip of land ranging from 1.2-feet wide to 25.33-feet wide); the Stanley Condemnation is at Appx710-711 (describing a strip of land ranging from 25.33-feet wide to 50-feet wide); and the Johnson Condemnation is at Appx712-714 (describing a strip of land 50-feet on each side of the centerline of the railroad). See also Appx630-631 (chart of all plaintiff-landowners and applicable source conveyance for the railroad); Appx633 (overview map of the landowners' parcels in relation to the original source conveyances to the railroad).

plats themselves.[4] Those measurements have not changed over time. This is the type of evidence that will rebut the presumption – proof that the owners on the opposite side of the right-of-way trace their title back to a width beyond the centerline. Therefore, these owners are presumed to own the portion of the easement over their property, but the width of that easement to the centerline has been rebutted for some. This is a perfect illustration of how the centerline presumption and a rebuttal of that presumption works. There is clear proof in the record that *some* of these owners do not own all the way to the centerline. But there is no proof that they do not own the land underneath the portion of the right-of-way that was condemned over their predecessors-in-interest.

B. The government has failed to establish that the Merwitzer and Moss families clearly reserved the fee title underlying the abandoned right-of-way easement.

Florida courts consistently hold that language such as "subject to," "less," or "excepting" is not in and of itself sufficient to reserve the land and defeat the centerline presumption. In *Smith v. Horn*, the court applied the presumption in the face of language in the conveyance stating that the heir of the dedicator of the plat

[4] Compare the plats measurements of the right-of-way to the condemnation orders, Zena Gardens plat (Appx852) corresponds with the exact measurements of the right-of-way described in the Russo Condemnation (Appx708-709); and the Princess Park Manor plat (Appx850) corresponds with the exact measurements of the right-of-way described in the Stanley Condemnation (Appx710-712) and the Johnson Condemnation (Appx713-714).

"conveyed 'all of block fourteen, [in the town of] Memento, *excepting such lots or parts of lots* as had been previously conveyed, such property having come to her as heir of John W. Smith, deceased.'" 70 So. at 436 (emphasis added). The Florida Supreme Court held that "the conveyances of lots abutting on the spaces marked on the map as streets, by construction of law to effectuate the manifest intention of the parties, carries title to the middle of the space marked as streets on the map or plat on file; there being no contrary intent shown." *Id.* at 437. Later, in *Servando*, the Florida Supreme Court expressly followed *Smith* in applying the presumption despite language in the plat stating, "but the private and unconditional ownership of each and all of said alleys and each and all of said parks is hereby *expressly reserved* in said Coral Gables Corporation, its successors and assigns, for private use and disposition." 91 So.2d at 290 (emphasis added). The court held, "the language in the dedication…fails to express the 'clear intent' necessary to avoid application of the 'rule.'" *Id.* at 293 (quoting *Florida Southern*, 1 So. at 513).

In *Peninsular Point* the Florida Court of Appeals held the following language in the recorded plat dedicating the street provided, "and does hereby dedicate to the perpetual use of the public…the streets as shown hereon, *reserving unto itself*, its heirs, successors, assigns, or legal representatives, *the reversion or reversions of the same, whenever abandoned by the public or discontinued by law*." 251 So.2d at 691 (emphasis added). The language of the plat in *Peninsular Point* is an example of the

explicit and unambiguous language a grantor must use to reserve a reversionary interest necessary to overcome the centerline presumption.

While the Zena Gardens and Princess Park Manor plats contain the same specific and clear reservation of expressly identified reversionary right *in the streets, avenues, terraces, alleys, and courts* as was present in *Peninsular Point*, it is critical to note that the reservation in the Zena Gardens and Princess Park Manor plats make no mention of the *railroad right-of-way*. Thus, the Merwitzer and Moss families deliberately chose not to reserve to themselves the land underlying the railroad right-of-way. Conversely, in *Dean v. MOD Properties*, the Florida Court of Appeals examined Florida law, including *Smith*, *Florida Southern Railway*, *Servando*, and *16.33 Acres*, to conclude that the "less" and "except" language at issue in *Dean* – the same language used by the Merwitzer and Moss families in specific reference to the railroad right-of-way – would not "clearly reserve" to the grantors the reversionary interest in the fee estate underlying the right-of-way. See *Dean*, 528 So.2d at 434 ("A transfer of the land subject to or even excepting the right-of-way passes title to the underlying fee to the grantee.") (quoting 2 *Thompson on Real Property* (1980) §381, p. 513). In both the Zena Gardens and Princess Park Manor plats, the respective use of the words "except" or "less" explicitly references the then-existing "Florida East Coast [Railroad] Right-of-Way," and these references

are completely separate and apart from the express reservation of the reversionary interest in the "streets, avenues, terrace(s), alleys, and courts" that follow.

The government tries to distinguish *Dean* in two ways. First, by arguing that the language in the deed at issue in *Dean* was "less and except" which is not the exact phrasing here, where the plats state "Less" for one portion of the right-of-way, "excepting" in another, and "east of the right-of-way" in yet another. See Princess Park Manor plat (Appx851); Zena Gardens plat (Appx852). The government fails to articulate why using the terms "less and except" together would overcome a reservation of the fee estate in *Dean*, but "less" and "except" on their own would function the opposite and reserve a fee estate in the grantor. Such an outcome would be illogical and finds no support in the Florida case law.

Second, the government tries to distinguish *Dean* by arguing that in *Dean* the deed only described the right-of-way as "less and except," but here the applicable deeds to the owners of the platted lands had deeds that said "less" the right-of-way but "subject to" other public easements for streets. Again, the government does not point to any Florida case to support that the language "less" would have the opposite outcome in *Dean* merely by the presence of other language stating the property was also "subject to" other public easements. And the use of different language here is logical. The public street easements are easements that the owners of the property could use and enjoy. But the railroad easement was not. Railroad easements are

exclusive in nature, giving the easement holder (*i.e.*, the railroad) the right to exclude the underlying fee owner from his own land.[5] This distinction in the type of easement makes it obvious why the grantor would distinguish between the two encumbrances in the land being granted. One easement the owner could enjoy – the abutting street; the other he could not – the exclusive privately held railroad easement.

C. The government's "boundary/edge" theory is borderline-frivolous.

At the end of its brief the government concedes that an owner carries title to the abutting easement if the deed describes the abutting easement as a boundary, but argues the presumption does not apply if the deed describes the *edge* of the abutting easement as the boundary. Gov. brief, p. 41 ("The use of a road as a generic boundary is presumed to reflect he grantor's intent to convey to the centerline, assuming the grantor owns that far, but where (as here) the conveyance clearly identifies the *edge* of a rail corridor as the boundary any presumption that the grantor

[5] *Western Union Telegraph Co. v. Pennsylvania Railroad Co*., 195 U.S. 540, 570 (1904) ("A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. …if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession…. A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass.") (quoting *New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898)).

intended to convey to the center of the corridor is rebutted."). That is not a rule of law or deed construction in Florida and the three cases cited by the government hold directly to the contrary. Florida makes no distinction between referencing the boundary of the property as a right-of-way or *edge* of a right-of-way. And the government cites no Florida case purporting to make such a distinction.[6]

All three Florida cases cited by the government, *Smith*, 70 So. at 436, *Rogers*, 184 So.3d at 1098, and *Bichoff*, 107 So.3d at 1171, instead support the landowners' argument – that Florida will presume a landowner abutting an easement owns the land underlying the easement absent clear evidence to the contrary.[7] This case is missing that clear evidence to the contrary.

The government characterizes the central holding of *Smith v. Horn* as being the "centerline presumption [is] rebutted where [a] deed reveals intent 'to limit the boundary line.'" Gov. brief, pp. 41-42.[8] But in *Smith v. Horn* the Florida court held

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[6] It is not apparent why the government raises this point, as the language in the plats makes a variety of references to the right-of-way, none of which appear to be to the "edge" of the easement. And even if they did reference the "edge" of the right-of-way, Florida law would hold such language insufficient to reserve the fee in the grantor of the plat. See *Smith*, 70 So. at 436, *Rogers*, 184 So.3d at 1098, and *Bichoff*, 107 So.3d at 1171.

[7] That is, of course, why the landowners cite two of these cases, *Smith* and *Bischoff*, multiple times in their brief. See Landowners' opening brief, pp. 7, 24, 30-33. *Rogers* too supports the landowners' argument, and cites the same cases the landowners' rely on, such as *Smith* and *Servando*.

[8] Every deed will have an intent to "limit the boundary line." That is one of the core functions of a deed.

that owners of platted lots were presumed to own the land to the centerline of any abutting easement. *Smith*, 70 So. at 436. The landowners in *Smith*, like the landowners here, held deeds to specific lots within a platted subdivision. *Id.* at 435. The heirs of the original grantor of the platted subdivision claimed that upon vacation of the public street it was them, not the abutting owners, who owned the land underneath the easement. *Id*. The Florida Supreme Court disagreed and found that no evidence of an intent to limit the boundary line, relying on a treatise at the time that stated:

> "Unless the deed manifests an intention on the part of the grantor to limit the boundary line, the line, when the land is bounded by a nonnavigable stream or highway, extends to the center of such stream or highway, if the grantor is the owner of the fee. Hence, where a deed describes the land conveyed as extending 500 feet to a street or avenue, and thence at right angles along the street 120 feet, etc., to the place of beginning, the fee of the land to the center of the street is conveyed subject to the public easement, notwithstanding the line of 500 feet extends only to the side of the street, and not to its center. When the avenue is no longer used as a street, the land is freed from the easement."
>
> *Id.* at 436 (quoting 2 Devlin on Deeds (3rd ed.) §1024).

In *Bichoff*, the Florida Court of Appeals held that the centerline presumption in Florida can only be rebutted by "evidence of the grantor's intent *not to convey to the centerline of the easement.*"[9] See also Landowners' Opening Brief, p. 32. Put another way, it is the landowners who enjoy the presumption of ownership, and it is

[9] 107 So.3d at 1170 (emphasis added).

the government that must show the clear intent of the grantor to reserve for himself or herself the fee estate in the small discrete strip.

The government points to *Rogers*, 184 So.3d at 1098, a case certified to the Florida Supreme Court from this Court on appeal from the CFC, in which a question of whether certain deeds to a railroad conveyed and easement or the fee estate. The Florida Supreme Court, unremarkably, held that the abutting landowners would not be presumed to own the land underneath the right-of-way when the railroad held the fee estate. The Florida Supreme Court, though, recognized the law of the state was that such a presumption does apply to owners of platted lots who abut a railroad *easement*:

> In *Seaboard Air Line Ry. v. Southern Investment Co.*, 53 Fla. 832, 44 So. 351 (1907), and *Florida Southern Ry. v. Brown,* 23 Fla. 104, 1 So. 512 (1887), this Court recognized that when a street or highway is the boundary of a lot or piece of land, the owner of the lot owns to the center of the street or highway, subject to the right of the public to use the public street or highway. "The rule seems to be based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to the adjoining land." *Id.* at 513-14. In *Smith v. Horn*, 70 Fla. 484, 70 So. 435 (1915), a subdivision plat was mapped out showing blocks and lots with spaces for streets running in between them. The plat showed the owner's intent to create public easements for the streets. The purchasers of the lots were presumed to have received title to the land extending to the center of the street abutting their lots. Upon the subsequent abandonment or surrender of a street easement, the abutting owners owned the property to the center of the street free of the easement. *Id.* at 436-37. This outcome was based on the presumed intent of the grantor in the absence of a contrary showing. *Servando Bldg. Co. v. Zimmerman*, 91 So.2d 289 (Fla. 1956), recognized that the rule applied in *Horn*, *Southern Investment*, and

> *Brown* is a rule of construction that is employed to aid in determining the grantor's intent. Under this body of caselaw, a conveyance of a lot bordered by a street is presumed to carry title to the center of the street. This rule of construction does not apply if a contrary intention is made clear by the language of the deed. To the same effect is the decision in *United States v. 16.33 Acres of Land,* 342 So.2d 476 (Fla. 1977). The presumption is also inapplicable if the strip of land being claimed is titled in someone else. See *Paine* [*v. Consumers' Forwarding & Storage Co.*], 71 F. [626,] 629 [6th Cir. 1895].

Rogers, 184 So.3d at 1098.

Here, like in *Smith*, it is undisputed that these owners hold title to certain lots in platted subdivisions that abut a railroad right-of-way. Nothing in the plats *reserves to the grantors* the fee underlying the railroad right-of-way. To the contrary, the language in both the Zena Gardens plat and the Princess Park Manor plat simply reiterate the language in the deeds by which those grantors acquired the property, evidencing that the grantor was platting everything he or she owned. *Cf.* Appx897-898 (deed from Hollett to Merwitzer), Appx852 (Merwitzers' plat of Zena Gardens), Appx945-946 (deed from Magraw to Mosses), and Appx850 (Mosses' plat of Princess Park Manor). Furthermore, the exact dimensions of the railroad corridor are included on the plats themselves. Appx850 (Princess Park Manor Plat); Appx852 (Zena Gardens Plat). And, importantly, on this record, the government has not established anyone other than the abutting owners owns the land underneath the portions of the railroad right-of-way. The parties agreed it was not the railroad (although the government attempts to now dispute this on appeal), leaving open the

fundamental question: if these landowners did not own the land underneath the right-of-way and the railroad did not own the land underneath the right-of-way, then who did own this land?

Unable to cite a single Florida case that would support its argument, and after citing three Florida cases that prove the landowners' point – *Smith*, *Bischoff*, and *Rogers* – the government includes a footnote that cites to several non-Florida cases as purportedly being in "accord" with Florida. See Gov. brief, n.6. None of these cases mentions Florida law, and none of these cases are relevant.[10]

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[10] *Swaby v. Northern Hills Regional Railroad Authority*, 769 N.W.2d 798, 816 (S.D. 2009) and *Alabama Great Southern Railroad Co. v. Owens*, 118 So. 332, 333 (Ala. 1928), were both cases in which the railroad owned the fee estate in the land comprising its right-of-way, so there was no application of any presumption. In *Standard Oil Co. v. Milner*, 152 So.2d 431, 436 (Ala. 1963), *Betcher v. Chicago, Milwaukee & St. Paul Railway Company*, 124 N.W. 1096, 1099 (Minn. 1910), and *Severy v. Central Pacific Railroad Co.*, 51 Cal. 194, 196-97 (1875), those state courts interpreted phrases such as "to the southerly right-of-way line" as not extending the abutting owner's title to the centerline. These holdings are directly contrary to Florida law as stated in *Smith*, which is, "Hence, where a deed describes the land conveyed as extending 500 feet to a street or avenue, and thence at right angles along the street 120 feet, etc., to the place of beginning, the fee of the land to the center of the street is conveyed subject to the public easement, notwithstanding the line of 500 feet extends only to the side of the street, and not to its center." *Smith*, 70 So. at 436 (quoting the contemporaneous treatise 2 Devlin on Deeds (3rd ed.) §1024).

In *Amaliksen v. United States*, 55 Fed. Cl. 167, 172-73 (2003), the CFC struggled with Vermont law and found a distinction between the deed's legal description as being "along the enclosure" of the rail road. The CFC's decision has no bearing on Florida law.

And *Detroit Lumber Co. v. Arbitter*, 233 N.W. 179, 180, 183 (Mich. 1930), is distinguishable on its own unique facts, where a deed conveying land "East of the

II. The Southern Drainage District tax deed introduced by the government during reconsideration briefing below does not defeat the plaintiffs' claims.

During reconsideration briefing below, the government introduced a 1930s tax deed from the Southern Drainage District. This tax deed was a quitclaim deed. It contained no indication of what legal interest the Drainage District actually held in relation to the 100-foot strip of railroad right-of-way referenced in the deed. It also contained no details of any kind concerning the tax debt that led to a payment to the Drainage District in the first place. The CFC gave no weight to this deed and literally made no mention of it in its lengthy order denying the landowners' motion for reconsideration.

The government's arguments on appeal in relation to this deed are readily disposed of. The first and most glaring flaw is that for all the space the government devotes to this issue, it never acknowledges that the Drainage District deed is merely a quitclaim deed. It contains no warranty or representation suggesting a conveyance of fee title, and there is literally no evidence in the record (below or on appeal) to suggest that the Drainage District somehow, at some point in time prior to the 1930s, acquired fee simple title to the land underlying the railroad right-of-way. Any such

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[railroad] right-of-way" was held not to extend to the centerline because it would have frustrated the grantor's intent to divide her parcel into three equal portions.

suggestion would be especially implausible in the light of the fact that all parties to this case agree that the railroad itself acquired its right-of-way easement via three separate condemnation decrees in 1924, meaning that any possible acquisition of title by the Southern Drainage District would have to have occurred in the narrow window between 1924 and the issuance of the tax deed in the 1930s. Furthermore, this particular tax deed does not appear in the two chains of title the landowners attached to their Motion for Reconsideration at Appx882-970.[11] The possibility of this unlikely scenario (upon which the government's argument depends, and for which there is no evidence in the record) is also undermined by the 1927 Florida statute governing the Drainage District's taxing power, which made clear that the Drainage District had no legal authority to warrant or represent fee ownership of land subject to its taxing authority, and which limited the Drainage District to issuing quitclaim deeds in instances where unpaid tax debts were resolved and paid. See *Addoms v. Dolan*, 667 So.2d 213, 214 (Fla. 1953) (quoting from the relevant statute for the issuance of tax deeds by the Southern Drainage District, "'All deeds executed and delivered pursuant to this Act shall have the same probative force as deeds

[11] The landowners included two chains-of-title, one for Plaintiff Reinaldo Castillo who owns land in Zena Gardens subdivision, and one for Nelson Menendez who owns land in Princess Park Manor subdivision.

executed under judgment and decrees in other civil actions.' Section 11 of Chapter 8907, Acts of 1921."). [12]

The deed itself is a "quitclaim" deed, and states, "This deed acknowledges receipt of Southern Drainage District taxes for the years 1932, 1933, 1954, 1935, and 1936 on the above named Lands." Appx989-991. Under Florida law a deed in this form would only convey title to what the grantor (or, here, the delinquent tax payer) actually owned. See *Florida East Coast Ry. Co. v. Patterson*, 593 So.2d 575, 577 (Fla. Ct. App. 1992) ("[I]t is well established that a quitclaim deed only conveys such title or interest as possessed by the grantor at the time of the making of the deed.") (collecting cases)).

Indeed, the information that can be gleaned from the face of the tax deed itself strongly suggests a much simpler explanation than the government's speculative and implausible theory. The only land referenced in the tax deed is the 100-foot wide strip that was condemned as a right-of-way easement for the exclusive use and benefit of the railroad in 1924. And the only consideration referenced in the tax deed

[12] The previous statute authorizing the Southern Drainage District to issue tax deeds had been declared completely null and void and the drainage district was made to reimburse all purchasers of tax deeds. See *Southern Drainage District v. State*, 112 So. 561, 566 (Fla. 1927) ("Section 2 of chapter 8906, Laws of Florida, Special Acts of 1921, canceled and declared null and void all tax certificates and tax deeds issued under chapter 7761, Laws of Florida, Special Acts of the Legislature 1918, and section 6 of chapter 8906…provided for the reimbursement by the Southern drainage district of all owners or holders of such tax certificates or tax deeds.").

is "$1 and other valuable consideration" paid by the railroad. There is no indication in the tax deed of any broader tax default by all of the owners of all of the parcels abutting the right-of-way in an entire section, Section 2, and no reference to payment of a purchase price that would be commensurate with a sale by the Drainage District of valuable land to which it held fee-simple title.

These facts give rise to a strong yet straightforward inference – the railroad itself was taxed on its exclusive use right-of-way easement after it acquired the easement via condemnation decree in 1924. At some point the railroad apparently fell behind on its tax payments owed to the Drainage District. In order to clear this debt, the railroad paid the taxes owed. In return, it received a boilerplate quitclaim deed from the Southern Drainage District, with a generic reference to "$1 and other valuable consideration," reflecting the clearance and removal of the Drainage District tax lien.

While the foregoing scenario is not definitively established in the record, it is at least consistent with the underlying legal framework that governed Drainage District taxing activities in the 1920s and 1930s. The government's contrary scenario is entirely speculative, and wrongly attempts to gloss-over the fact that the tax deed is merely a quitclaim deed, with no reference or warranty to fee simple title, and no evidence in the record to support the speculative and counterintuitive claim that the Drainage District somehow acquired fee title to the land underlying the

railroad right-of-way from some unidentified owner after 1924, and then made a fee-simple sale to the railroad of this land for $1 and other unstated consideration in the 1930s.

At a minimum, the government's arguments implicate a series of unsupported factual claims and a number of disputed issues of fact, none of which were evaluated or addressed by the CFC. As such, the government's late-breaking "tax deed" theory would not be an appropriate basis for summary judgment even at the trial court level, and it certainly cannot provide a valid basis on appeal for affirming the CFC's improper and legally unsupportable grant of summary judgment in favor of the government.

CONCLUSION

This Court should call the government's bluff and reverse the decision of the CFC. For over a century, Florida law has included and Florida courts have consistently applied a clear presumption in favor of ownership being joined to the ownership of the abutting parcels to the centerline of an abandoned right-of-way easement, and no Florida court would hold the language in these plats would override this strong presumption. Furthermore, the Drainage District tax quitclaim deed produced by the government and not mentioned in the CFC's decision is proof of nothing and a pointless distraction this Court should find irrelevant.

This Court should find, as a Florida court would, that these landowners hold fee title to their land underlying the abandoned railroad right-of-way and remand this case to the CFC to determine the amount of just compensation owed these landowners.

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
Stephen S. Davis
LARSON O'BRIEN LLP
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 296-4000
thor@larsonobrienlaw.com

Abram J. Pafford
ARENT FOX LLP
1717 K Street, NW
Washington DC 20006
(202) 857-6000
abram.pafford@arentfox.com

Meghan S. Largent
Lindsay S.C. Brinton
LEWIS RICE LLC
600 Washington Avenue, Suite 2500
St. Louis, Missouri 63101
(314) 444-7704
mlargent@lewisrice.com

Counsel for Plaintiffs-Appellants

United States Court of Appeals
for the Federal Circuit

Castillo v. US, 2019-1158

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LARSON O'BRIEN LLP, counsel for Appellants to print this document. I am an employee of Counsel Press.

On **July 31, 2019,** counsel has authorized me to electronically file the foregoing **Reply Brief of Plaintiffs-Appellants** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the other parties:

Kevin William McArdle, -
U.S. Department of Justice
Environment & Natural Resources Division
PO Box 7415
Washington, DC 20044
202-305-0219
kevin.mcardle@usdoj.gov
Counsel for the Appellee

Six paper copies will be filed with the Court within the time provided in the Court's rules.

July 31, 2019

/s/ Robyn Cocho
Counsel Press

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/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
LARSON O'BRIEN LLP
Counsel for Appellants