IN THE UNITED STATES COURT OF FEDERAL CLAIMS

4023 SAWYER ROAD I, LLC, *et al.*,	)	
Plaintiffs,	)	Case No. 19-757L
v.	)	Judge Edward H. Meyers
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

THE UNITED STATES' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States cross-moves for partial summary judgment pursuant to Rules 5.4(a)(5) and 56 of the Court of Federal Claims ("RCFC"), and responds herein to Plaintiffs' motion for partial summary judgment on liability. In this case, 214 named Plaintiffs allege a taking resulting from the issuance of a Notice of Interim Trail Use ("NITU") by the Surface Transportation Board ("STB") on May 14, 2019.[1] The United States moves for summary judgment with respect to 164 Plaintiffs who have failed to prove that they have a reversionary interest in the rail corridor (hereinafter, "Plaintiffs").

Plaintiffs' Motion for Partial Summary Judgment, ECF No. 111, seeks summary judgment with respect to these same named plaintiffs. However, the Court should deny

[1] The parties have stipulated that the Honore Conveyance, which relates to 49 parcels and 47 named plaintiffs, conveyed an easement for railroad purposes. *See* ECF No. 16; *see also* Pls.' Ex. 1, ECF No. 111-3 at pp. 2-4. Additionally, though the United States' position is that the Court should deny Plaintiffs' motion for summary judgment with respect to three claims the parties have stipulated to the railroad acquiring "by possession," it also posits that the record needs to be developed further on the adverse possession versus prescriptive easement issue before the Court is in possession of all the relevant facts.

Plaintiffs' motion for summary judgment and grant summary judgment in favor of the United States with respect to these Plaintiffs' claims because they have not shown a property interest in the rights-of-way at issue. As a matter of law, the owners of the lands adjacent to these fee segments of the rail corridor have no property interest in the corridor and thus cannot bring a takings claim based on the use of the corridor.

Accordingly, the United States respectfully requests that the Court grant partial summary judgment in its favor. In support of this cross-motion, the United States submits the accompanying memorandum of points and authorities with referenced exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' RESPONSE AND CROSS-MOTION

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I. INTRODUCTION

To prevail, Plaintiffs must prove, among other things, that under applicable Florida law, they had an ownership interest in the rail corridor that adjoins their property when the STB issued the NITU. The Court should grant summary judgment in the United States' favor — and deny Plaintiffs' motion — as to Plaintiffs' claims because Seminole Gulf Railway, L.P.'s predecessors acquired fee simple title to the portions of the rail corridor adjacent to these 164 Plaintiffs. These Plaintiffs have failed to provide evidence to prove an ownership interest in the corridor. For this reason alone, with respect to these Plaintiffs, the Court should grant summary judgment in the United States' favor.

Several of these Plaintiffs' claims also suffer from additional defects, most critically, a lack of adjacency to the rail corridor. For this independent reason, summary judgment is also appropriate in the United States' favor with respect to these particular Plaintiffs identified herein.

II. STANDARD OF REVIEW ON MOTION FOR SUMMARY JUDGMENT

Rule 56(a) of the RCFC allows a party to move for summary judgment by "identifying each claim or defense . . . on which summary judgment is sought." Summary judgment is proper "if the movants show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A genuine dispute is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor, and a material fact is one that could affect the outcome of the suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A movant may support its assertion that a fact cannot be genuinely disputed by "citing to particular parts of materials in the record, including depositions, documents, . . . affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." RCFC 56(c)(1)(A).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party meets its initial burden, the non-moving party must support its assertion that a fact is genuinely disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1). In evaluating motions for summary judgment, courts must view any inferences drawn from the underlying facts in the light most favorable to the non-moving party and may not engage in credibility determinations or weigh the evidence. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

III. STATUTORY AND REGULATORY BACKGROUND

Congress conferred exclusive and plenary authority on the Interstate Commerce Commission (now the Surface Transportation Board ("STB" or "the Board")) to regulate abandonment of nearly all of the nation's rail lines in the Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 456, 477-78 (1920). *See* 49 U.S.C. § 10501(b); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). Rail carriers under the Board's purview must "provide . . . transportation or service on reasonable request," 49 U.S.C. §§11101(a), unless the Board agrees to a temporary discontinuance or permanent abandonment of the rail line, 49 U.S.C. §10903. A discontinuance allows a rail carrier to "cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service," and abandonment removes a line from the national transportation system. *Preseault v. Interstate Commerce Comm'n* (*Preseault I*), 494 U.S. 1, 5 n.3 (1990). A grant of abandonment authority is both time-limited and permissive: the carrier has one year to affirmatively decide to consummate the

abandonment, although extensions may be approved if the railroad requests them. 49 C.F.R. §1152.29(e)(2). The Board may exempt a rail line from formal abandonment proceedings, providing an expedited process to the same end, and does so as a matter of course if the line has been dormant for at least two years. *See* 49 U.S.C. §10502(a).

In 1983, Congress passed the Trails Act, adding a third option for railroads wishing to terminate rail service known as rail banking. When a rail corridor is rail banked, the STB retains jurisdiction over the corridor so that it may be returned to railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a government or private entity, allowing its use in the interim as a recreational trail. *See Preseault I*, 494 U.S. at 6-7. The relevant provision of the Trails Act states that "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. §1247(d). This provision ensures that corridors remain available for future rail use by preventing such corridors from being deemed abandoned under state law during the period of interim trail use.

The rail banking process works as follows. When a rail carrier applies to abandon a rail line or exempt it from the abandonment process, a "state, political subdivision, or qualified private organization" may file a comment indicating an interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. §1152.29(a). If the prospective trail sponsor "is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use," 16 U.S.C. §1247(d), and the rail carrier "agrees to negotiate an interim trail use/railbanking agreement, then the Board will issue a [NITU] to the railroad and to the interim trail sponsor for the portion of the right-of-

way as to which both parties are willing to negotiate," 49 C.F.R. §1152.29(d)(1). The NITU provides a 180-day period for negotiation (which can be extended by mutual request), during which time the rail carrier may "discontinue service, cancel any applicable tariffs, and salvage track and material[s]" after 30 days. 49 C.F.R. § 1152.29(d)(1)(i). If the railroad and prospective trail group reach an agreement, the parties notify the STB and the corridor is then rail banked and remains under STB jurisdiction. If the parties do not reach an agreement, the railroad has one year to decide whether to consummate abandonment of the line. 49 C.F.R. §§ 1152.29(d)(1)(i), (e)(2); *see also Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150-53 (D.C. Cir. 2001); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1286 (8th Cir. 1990).

The conversion of a rail corridor to a recreational trail via the NITU process may or may not result in a Fifth Amendment takings claim. The Fifth Amendment states in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. To prove a Fifth Amendment taking resulting from the operation of the Trails Act, Plaintiffs must prove that "state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." *Caldwell v. United States*, 391 F.3d 1226, 1228 (citing *Preseault v. United States* (*Preseault II*), 100 F.3d 1525, 1543 (Fed. Cir. 1996) (en banc)). The Federal Circuit adopted a three-step framework for analyzing takings claims under the Trails Act. First, Plaintiffs must show that they have an ownership interest in a segment of the rail corridor over which the rail operator holds an easement. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009). If the railroad owns the relevant segment of the rail corridor in fee, the United States is not liable for a taking. *Preseault II*, 100 F.3d at 1533. Second, as to those segments of the rail corridor for which the rail operator possesses an

easement, Plaintiffs must show that trail use falls outside the scope of the easement. *Ellamae Phillips*, 564 F.3d at 1373. If trail use falls within the scope of the easement at issue, the United States generally is not liable. *See Romanoff Equities, Inc. v. United States*, 119 Fed. Cl. 76, 80 (2014) (citing *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010)), aff'd 815 F.3d 809 (Fed. Cir.), cert. denied, 580 U.S. 1031 (2016). Third, even if trail use falls within the scope of the railroad easement, Plaintiffs may establish a taking by showing that the railroad easement was abandoned before the STB issued its NITU. *Ellamae Phillips*, 564 F.3d at 1373.

IV. FACTUAL BACKGROUND

The segments of rail corridor at issue in this case extends approximately 7.68 miles between milepost SW 890.29 and milepost 884.70, and between milepost AZA 930.30 and milepost AZA 928.21 in Sarasota County, Florida.

On March 8, 2019, Seminole Gulf Railway, L.P. ("SGR") filed a Notice of Exemption with the Surface Transportation Board (STB) under 49 C.F.R. § 1152 subpart F to discontinue rail service and trackage rights over the 7.68-mile line of railroad known as the Venice Branch. Def.'s Ex. 1. SGR noted that the rail line had not been used to provide rail service for at least two years and, consequently, qualified for the STB's exemption procedures. *Id.* at 2.

On April 22, 2019, the Sarasota County Board of County Commissioners ("the County") filed a Request for Public Use Condition and Request for Interim Trail Use with the STB, wherein the County requested that the STB find that the corridor is suitable for trail use. Def.'s Ex. 2. The County also issued a statement of willingness to assume financial responsibility arising out of the transfer of use of the corridor from railway to recreational trail. *Id.* at 2.

On May 14, 2019, the STB issued a Decision and Notice of Interim Trial Use or Abandonment ("NITU") for the Venice Branch. Def.'s Ex. 3. The NITU provided SGR and the

County 180 days to negotiate an interim trail use agreement. *Id.* at 2. The NITU further provided that the parties were to notify the STB within ten days of an interim trail use agreement being reached and that if no agreement were reached the modified certificate would be considered terminated as of the end of the 180-day period (November 10, 2019). *Id.*

On July 16, 2019, the County, SGR, and the owner of the underlying land, CSX Transportation, Inc., filed an interim trail use agreement with the STB. Def.'s Ex. 4. Pursuant to the terms of the lease, the County assumed full responsibility for management of the right-of-way, legal liability arising out of the transfer or use of the right-of-way, and payment of any and all taxes that may be levied against the right of way. *Id.* at 7.

V. ARGUMENT

A. Under Florida Law, Railroads Can Receive Fee Title for Real Property for Railroad Right-of-Ways

Florida law recognizes that railroads can and have in fact acquired fee simple title to rights-of-way in the state. *See, e.g.*, *Rogers v. United States*, 184 So. 3d 1087, 1095-96 (Fla. 2015) ("*Rogers III*"). The determinative factor in identifying the nature of the railroad's interest in the right-of-way is the language of the deed when the language is clear. *Id.* at 1096. And the deeds at issue here are unambiguous in granting fee simple title to the railroad.

This Court has identified deeds conveying fee simple interest to railroads under Florida law. *See, e.g.*, *Andrews v. United States*, 147 Fed. Cl. 519 (2020). In *Andrews*, the Court noted that the first determinative question in a "rails-to-trails" takings claim is whether the railroad acquired an easement or a fee simple estate. *Id.* at 524. If the railroad acquired a fee simple interest, the analysis stops there. It is only when the Court determines that the railroad acquired an easement that it asks whether the terms of the easement were limited to use for railroad purposes or included future use as a public recreational trail. *Id.* "[N]o statute, state policy, or

factual considerations prevail[] over the language of the deeds when the language is clear." *Rogers v. United States*, 814 F.3d 1299, 1309 (2015) ("*Rogers IV*").

B. The Relevant Source Deeds and Conveyances Demonstrate that the Railroad Received Fee Title to the Subject Right-of-Ways

Plaintiffs are not entitled to just compensation because they did not have a valid property interest at the time of the taking alleged here. *See Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). Rather, by either conveyance or condemnation, the railroad had acquired fee simple title to the subject right-of-way. And "[i]f a railroad owns in fee simple the land underlying and immediately surrounding a railroad right of way at the time of the alleged taking, another party cannot be owed just compensation for the taking of that land." *Whispell Foreign Cars, Inc. v. United States*, 97 Fed. Cl. 324, 330 (2011).

The text of the relevant conveyance instruments plainly demonstrates that the grantors conveyed fee simple title to the railroad. First, the language of the conveyance instruments detailed below is "clear and certain" in granting fee simple title to the railroad. *See Rogers III*, 184 So. 3d at 1095. There is no ambiguity in the language the grantors employ in conveying fee simple title to the railroad. *Id.* Second, none of the conveyance instruments contain any restrictions on land use or reversionary clauses that might otherwise "suggest[] an intent to create an easement or convey something less than a fee estate." *Rogers v. United States*, 107 Fed. Cl. 387, 396 (2012). Rather, these conveyance instruments "lack[] any restrictive or reversionary clauses" and instead have "expansive granting clauses, granting all right, interest and title" to the railroad, which suggests that the grantor intended to grant fee simple title to the railroad. *Id.*

The 164 claims at issue are grouped by conveyance instrument below. Included in each grouping is a full analysis of the text showing the expansive granting of fee simple title to the

railroad, and therefore, the absence of any reversionary interest in the landowners necessary to support a Fifth Amendment takings claim.

i. Sarasota Land Company Conveyance

The parties have stipulated that claims concerning 66 parcels and 61 named Plaintiffs turn on a proper reading of the railroad source deed recorded at Book 19, Page 415[2] ("the Sarasota Land Company Conveyance"), Def.'s Ex. 5. *See* Joint Title Stipulations, ECF No. 70; *see also* Pls.' Ex. 1, ECF No. 111-3 at pp.7-9.

Guiding the analysis with respect to this and the other conveyance instruments at issue is Section 689.10, Florida Statutes (2014), which provides:

> Where any real estate has heretofore been conveyed or granted or shall hereafter be conveyed or granted without there being used in the said deed or conveyance or grant any words of limitation, such as heirs or successors, or similar words, such conveyance or grant, whether heretofore made or hereafter made, shall be construed to vest the fee simple title or other whole estate or interest which the grantor had power to dispose of at that time in the real estate conveyed or granted, unless a contrary intention shall appear in the deed, conveyance or grant.

See Rogers III, 184 So. 3d at 1096. In other words, under Florida law, a deed is presumed to convey the maximum interest the grantor had power to convey, in most instances, that being fee simple title. *Id.* at 1095 n.5. Moreover, "the Court's function in interpreting and enforcing a contract is to determine the parties' intent from the express test of the Contract," and not to "endeavor to discover the intent of the parties based on circumstances surrounding the deed's enactment." *Rogers v. United States*, 93 Fed. Cl. 607, 618 (2010) ("*Rogers II*") (quoting *Fin. Healthcare Assocs. v. Public Health Trust*, 488 F. Supp. 2d 1231, 1239 (S.D. Fla. 2007).

[2] Unless otherwise specified, all "Book __, Page __" references will refer to the official land records of the Clerk of the Circuit Court and County Comptroller of Sarasota County, Fla. A reference to "Plat Book __, Page __" shall refer to the separate plat book records therein,

a. The Sarasota Land Company Conveyance Granted Title in Fee Simple

The Sarasota Land Company Conveyance clearly grants fee simple title to SGR's predecessor-in-interest, Seaboard Air Line Railway. First, the granting clause plainly reads that Sarasota Land Company "hereby grants, bargains, sells and conveys" to Seaboard Air Line Railway the described land. Def.'s Ex. 5. This Court has previously recognized that an identical granting clause conveyed fee simple title. *Compare Rogers II*, 93 Fed. Cl. at 621 (recognizing that granting clause whereby the grantor "granted, bargained, sold and conveyed" real estate "does not restrict the transfer of such lands for use as a railroad or for railroad purposes" and resulted in the transfer of title in fee simple).

Second, the description of the property conveyed refers not to an interest, but rather to "[a] strip of *land* one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the Seaboard Air Line Railway[.]" Def.'s Ex. 5 (emphasis added). Again, this Court has already held in *Rogers II* that nearly identical property descriptions support the conveyance of fee simple title. 93 Fed. Cl. at 616, 621 (concluding that property described as "[*a*] *strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor*" was evidence of "the parties' intent to convey land, rather than a right to use the land for railroad purposes").

Third, in describing the nature of the property right conveyed, the conveyance provides that the Sarasota Land Company granted to Seaboard Air Line Railway "all their right, title and interest, of any nature whatsoever[.]" Def.'s Ex. 5. This is in stark contrast to the Honore Deed at issue in *Rogers I* in which the grantor conveyed property for its "own proper use, benefit and behoof forever *for railroad purposes*." *See Rogers II*, 93 Fed. Cl. at 620 ("The Honore

conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes."). There is no such limitation here.

In sum, the Sarasota Land Company Conveyance plainly grants to Seaboard Air Line Railway fee simple title to the land at issue. The 61 Plaintiffs whose land is adjacent to the Sarasota Land Company Conveyance therefore have no property interest in the conveyed land and summary judgment should be granted on their 66 claims in the United States' favor.

b. The Flaherty, Messick, and Herring Properties are Not Adjacent to the Rail Corridor

Even if plaintiffs Mark T. and Angela D. Flaherty, Robert E. and Michelle S. Messick, and Timothy G. and Alisa J. Herring could show that the railroad acquired only an easement interest in the corridor, and they cannot, they must as a threshold matter show that "they owned land adjacent to the railway when the taking allegedly occurred." *Rogers I*, 90 Fed. Cl. 418, 428. The legal description in their deeds, an intervening ownership interest, and GIS imaging demonstrate that these plaintiffs cannot make that threshold showing.

The legal descriptions in the Flaherty, Messick, and Herring deeds show that a five-foot wide strip of land separates their respective parcel's eastern boundary and the rail corridor. *See* Def.'s Ex. 6-8. All three of these deeds clearly state that there is five feet of intervening land between the eastern boundary of each parcel. *See, e.g.*, Def. Ex. 6 ("Less the easterly 5 feet thereof, and together with a stirp of land 5 feet wide, adjacent thereto, and lying between said tract 7 and East Forest Lakes Drive, as per plat of Forest Lakes unit one[.]"). A deed to Old Forest Lakes Association, Inc. confirms its ownership of that intervening land. Def.'s Ex. 9. GIS imaging illustrates that five feet of intervening land relative to the Flaherty, Messick, and Herring parcels and shows that these plaintiffs' respective properties do not abut the rail corridor. That gap between these three parcels and the rail corridor is further illustrated in Def.'s Ex. 10,

showing the valuation map of the rail corridor in purple, the three parcels in blue, and the intervening land owned by Old Forest Lakes Association.

In short, on the date of the taking in this case, the parcels owned by plaintiffs Mark T. and Angela D. Flaherty, Robert E. and Michelle S. Messick, and Timothy G. and Alisa J. Herring were not adjacent to the Legacy Trail due to the intervening five-foot strip of land owned by Old Forest Lakes Association, Inc. Without owning land adjacent to the Legacy Trail, these plaintiffs cannot establish that there was any taking involving their respective properties. Accordingly, summary judgment should be granted in the United States' favor for this independent reason.

ii. Burton Conveyance

The parties agree that the claims concerning 44 parcels and 43 named Plaintiffs[3] turn on a proper reading of the railroad source deed recorded at Book 23, Page 58 ("the Burton Conveyance"). Def. Ex. 11.

The Burton Conveyance was a transaction in which Oscar A. Burton and Alice H. Burton ("the Burtons") and Sarasota Land Company granted fee simple title to SGR's predecessor-in-interest Seaboard Air Line Railway. The Burton Conveyance describes a contract of sale in which the Burtons sold some of their lands to third parties. Those third parties then transferred to Sarasota Land Company "all their right and interest in and to said contract of sale." *Id.* at 58. Together, the Burtons and Sarasota Land Company "agreed to convey" to Seaboard Air Line

[3] Plaintiffs Elmer H. Nolt and Lena M. Nolt, as Trustees of the Elmer H. Nolt and Lena M. Nolt Revocable Living Trust own the properties identified by parcel ID number known as 0053-14-0006 and 0053-14-0007. *See* Fourth Am. Compl. ¶¶ 393-96, ECF No. 34; Pls.' Ex. 1, ECF No. 111-3 at p. 6.

Railway the land described in the Burton Conveyance, "a portion of which" included land that was contained "within the aforesaid contract of sale." *Id.*

For several reasons the Burton Conveyance granted fee simple title to Seaboard Air Line Railway, and thus SGR. First, like in *Rogers II* the granting clause does not contain any language limiting the interests conveyed to certain railroad uses or railroad purposes, nor does it reference an easement or any other intent to transfer a mere right of use. *Id.* ("[T]he [Burtons] do hereby grant, bargain, sell and convey unto [Seaboard Air Line Railway] the following property . . . "). This Court has previously recognized that a nearly identical granting clause conveyed fee simple title. *Compare Rogers II*, 93 Fed. Cl. at 621 (recognizing that granting clause whereby the grantor "granted, bargained, sold and conveyed" real estate "does not restrict the transfer of such lands for use as a railroad or for railroad purposes" and resulted in the transfer of title in fee simple).

Second, the description of the property conveyed refers not to an interest, but rather to "[a] strip of *land* one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the Seaboard Air Line Railway-as located across the lands owned by the [Burtons] . . . TOGETHER with . . . *every right, title or interest*, legal or equitable . . . ." Def.'s Ex. 11 at 58 (emphasis added). Again, this Court has already held in *Rogers II* that nearly identical property descriptions support the conveyance of fee simple title. 93 Fed. Cl. at 616, 621 (concluding that property described as "[*a*] *strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor*" was evidence of "the parties' intent to convey land, rather than a right to use the land for railroad purposes"). In fact, the property description here is even more indicative of an intent to convey land in fee simple than in *Rogers II* because the Burton deed makes clear that the "strip of land" also

included "every right, title or interest, legal or equitable" associated with that land. Def.'s Ex. 11 at 58.

Third, the habendum clause (characterizing the estate conveyed) provides that the Burtons granted the property to Seaboard Air Line Railway "its successors and assigns, to its or their own proper use, benefit and behoof forever." *Id.* The clause continues and provides that the Sarasota Land Company also "sell[s], transfer[s] and assign[s] unto [Seaboard Air Line Railway] its right, title and interest in and to the aforesaid contract of sale . . . so far as the same affects the property hereby conveyed, and hereby consents to this conveyance of said property." *Id*. This is in stark contrast to the habendum clause in the Honore Deed at issue in *Rogers I* in which the grantor conveyed property for its "own proper use, benefit and behoof forever *for railroad purposes*." *See Rogers II,* 93 Fed. Cl. at 620 ("The Honore conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes."). Here, the clause contains no such limitation. Although the clause also does not expressly state that it is delivering title in "fee simple," under Florida law, "a deed is presumed to convey fee simple title, or whatever title the grantor had power to convey, unless a contrary intention is shown by the language of the deed." *Rogers III,* 184 So.3d at 1095 n.5.

Plaintiffs' arguments that the Burton Conveyance transferred only an easement are without merit. Plaintiffs' reliance on the term "across" in the property description as indicative of an easement is misplaced. Like the nearly identical language in *Rogers II,* the language "across the lands owned by" the Burtons "merely describes the location of the strip of land conveyed to Seaboard and does not define or characterize the nature of the property interest conveyed to Seaboard." 93 Fed. Cl. at 621 (holding that the language "through the lands of the

grantor" "in no way qualified or limits the property interests the parties intended to convey"). Plaintiffs also contend that the attestation attached to the deed evidences an intent to grant an easement because it contains the phrases "for such purposes . . ." and "for the uses and purposes therein expressed." Pls.' Brief in Support of Their Motion for Partial Summary Judgment, ECF No. 111-1 at p. 65. As an initial matter, witness statements provided by notaries cannot contradict the intent of the parties expressed in the language of the deed itself and should not be considered by the Court. *See Rogers II*, 93 Fed. Cl. at 618 ("[W]hen interpreting a deed under Florida law, a court does not endeavor to discover the intent of the parties based on circumstances allegedly surrounding the deed's text . . . . On the contrary, the Court's function in interpreting and enforcing a contract is to determine the parties' intent from the express text of the Contract." (internal quotation marks omitted)). But even if the notaries' statements could be considered, with respect to the former, earlier language in that very sentence makes clear that the "purpose" for which the deed was executed was "the purpose of forever selling, transferring, conveying, renouncing and relinquishing all [Alice Burton's] dower and right of dower and all her right, title and interest in and to the lands . . . ." Def.'s Ex. 11 at 58. As for the latter, the witness statement merely acknowledged that representatives of the Sarasota Land Company executed the deed "for the uses and purposes therein expressed"—that is the complete conveyance of the property described without limitation.

In sum, there is no language in the Burton conveyance indicating that it was made for any limited use or purpose, such as for railroad purposes. In fact, the language employed by the parties, like nearly identical language in *Rogers II*, clearly indicates that the parties intended to convey the land in fee simple. The 43 Plaintiffs whose land is adjacent to the Burton

Conveyance therefore have no property interest in the conveyed land and summary judgment should be granted on their 44 claims in the United States' favor.

iii. Florida Mortgage & Investment Co. 536 Conveyance

The parties agree that claims concerning 21 parcels and 21 named Plaintiffs[4] turn on a proper reading of the railroad source deed recorded at Book 10, Page 536 ("FMIC 536 Conveyance"), Def.'s Ex. 12. *See* Joint Title Stipulations, ECF No. 70; Pls.' Ex. 1, ECF 111-3 at pp. 10-11.

The FMIC 536 Conveyance grants fee simple title to Seaboard's predecessor-in-interest, Florida West Shore Railway. Florida Mortgage & Investment Co. "granted, bargained and sold" to Florida West Shore Railway its entire interest in the right-of-way. Def.'s Ex. 12 at 2. The granting clause here does not contain language limiting the interests conveyed to certain uses or purposes, nor does it reference an easement. *See Rogers II*, 93 Fed. Cl. at 618. This is in stark contrast to the habendum clause in the Honore Deed at issue in *Rogers I* in which the grantor conveyed property for its "own proper use, benefit and behoof forever *for railroad purposes*." *See id.* at 620 ("The Honore conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes."). No such language is found in the FMIC 53 Conveyance. Instead, the deed's unambiguous language clearly shows that the Florida Mortgage & Investment Co. granted fee simple title to Seaboard's predecessor-in-interest.

[4] At the time of the Joint Title Stipulation (ECF No. 70), Plaintiffs only agreed that fourteen of the parcels were subject to the FMIC 536 Conveyance and maintained that the seven remaining parcels were controlled by the Palmer Conveyance, Book 11, Page 524. Defendant's objected, and now, Plaintiffs agree that the twenty-one parcels are controlled by the FMIC 536 Conveyance. *See* Pls.' Ex. 1, ECF 111-3 at pp. 10-11.

The source deed's reference to the "blueprint" is immaterial and does not support Plaintiffs' position that Florida Mortgage & Investment Co. conveyed an easement to the railroad. The source deed describes the right-of-way as a "parcel of land [that] is more clearly shown in red on the attached blueprint dated March 7, 1905, and made in the office of the assistant engineer, Savannah, Ga." In their motion, Plaintiffs contend that this language indicates that the railroad surveyed and located the railroad right-way prior to conveyance and that the railroad drafted the conveyance simply to memorialize its pre-existing easement. *See* ECF. No. 111-1 at p. 84. Plaintiffs' argument is immaterial to this Court's interpretation of the deed. The Federal Circuit determined in *Rogers IV* that, under Florida law, "the act of survey and location before the conveyance" is not the operative determinant of the type of transfer effected by a deed. 814 F.3d at 1307. Here, it is clear that in referencing the blueprint, the grantor and railroad sought to clarify the geographic scope of right of way. This language does not, however, limit the interest conveyed. The deed is clear—Florida Mortgage & Investment Co. granted fee simple title to Seaboard's predecessor-in-interest.

iv. Florida Mortgage & Investment Co. 532 Conveyance

The parties agree that the claims concerning eleven parcels and ten named Plaintiffs[5] turn on a proper reading of the railroad source deed recorded at Book 10, Page 532 ("FMIC 532 Conveyance"), Def.'s Ex. 13. *See* Joint Title Stipulations, ECF No. 70. One of the 11 parcels also suffers from a lack of adjacency with the rail corridor and therefore, summary judgment should be granted in the United States' favor on this claim for this independent reason.

a. <u>The FMIC 532 Conveyance Transferred Title in Fee Simple</u>

[5] Plaintiff Lewma Enterprise, Inc. owns parcels 2034-02-0001 and 2034-02-0003. *See* Fourth Am. Compl. ¶ 310, ECF No. 34; Pls.' Ex. 1, ECF No. 111-3 at p. 10.

The FMIC 532 Conveyance was one of two nearly identical instruments executed between the Florida Mortgage and Investment Company and the Florida West Shore Railway in March 1905. *See* FMIC 536 Conveyance, Def.'s Ex. 12.

The FMIC 532 Conveyance granted fee simple title to Florida West Shore Railway for at least three reasons. First, the granting clause does not contain any language limiting the interests conveyed to certain railroad uses or railroad purposes, nor does it reference an easement or any other intent to transfer a mere right of use. Def.'s Ex. 13 at 532 (stating that Florida Mortgage & Investment Co. "has granted, bargained and sold" its interests). This Court has previously held that similar language demonstrates an intent to convey fee simple title. *Rogers II*, 93 Fed Cl. at 621 (recognizing that granting clause whereby the grantor "granted, bargained, sold and conveyed" real estate "does not restrict the transfer of such lands for use as a railroad or for railroad purposes" and resulted in the transfer of title in fee simple).

Second, the description of the property conveyed refers not to an interest, but rather to the "following described *land*." Def.'s Ex. 13 at 532 (emphasis added)]. In particular, the deed refers to the "land" conveyed as "[b]eing *all* that tract or parcel of land lying and situate in Manatee County, Fla., near the town of Sarasota, Fla., and containing fourteen and five hundred and forty-five thousandth (14.545) acres more or less." *Id.* at 533. The inclusive description of "*all* . . . land" indicates an intent to transfer title in fee simple and not merely an interest in the land.

Third, the habendum clause provides that Florida Mortgage & Investment Co. granted the land to the Florida West Shore Railway, including "its successors and assigns *forever*." *Id.* at 532 (emphasis added). Like all other parts of the FMIC 532 Conveyance, nowhere are there any limitations restricting the conveyance of land for railroad uses or railroad purposes, nor is there

any right of reverter if the land is no longer used for those purposes. *Compare Rogers I*, 90 Fed. Cl. at 422 (recognizing that deed which was "forever quit claim[ed]" was limited in its use as "a right of way for railroad purposes" and contained a right of reverter if grantee "abandon[ed] said land for railroad purposes").

Plaintiffs' argument that the FMIC 532 Conveyance transferred only an easement is without merit. Plaintiffs rely heavily on the fact that the deed contains the phrase "right-of-way," and on related dicta in this Court's decision in *Mills v. United States*, 147 Fed. Cl. 339, 347 (Ct. Fed. Cl. 2020).[6] In *Rogers IV* the Federal Circuit, after certifying the question to the Florida Supreme Court, held that "under Florida state law, a railroad can acquire either an easement *or* fee simple title to a railroad right-of-way and that no statute, state policy, or factual considerations prevails over the language of the deeds when the language is clear." 814 F.3d at 1309. In other words, the mere presence of the term "right-of-way" in an instrument does not put a thumb on the scales of construing the instrument as conveying either an easement or fee simple title. Rather, both meanings are permissible and the intent of the parties must be drawn from the instrument as a whole. *See Rogers II*, 93 Fed. Cl. at 618 ("Under Florida law, a court should 'consider the language of the entire instrument in order to discover the intent of the grantor, both as to the character of the estate and the property attempted to be conveyed . . . .'") (quoting *Reid v. Barry*, 93 Fla. 849, 112 S. 846, 852 (1927)). Moreover, the very thing the *Mills* Court noted that *would* indicate a "right-of-way" was intended to convey a title in fee simple—

[6] The court's holding in *Mills* ultimately turned not on the interpretation of deed language under Florida law, but rather on the interpretation of the Florida railroad charter statute where no present property interest in a deed exists. 147 Fed. Cl. at 347 ("*If plaintiff was correct* . . . that a present property interest was granted by the . . . instrument, it would have been an easement—the same result reached by our analysis below concerning the effect of the Florida railroad charter statute.") (emphasis added).

the use of the term "land"—is repeatedly present here. 147 Fed. Cl. at 347 ("In addition, there was no reference in the bond to a fee estate or anything that might look like a fee estate, 'land,' for instance.").

Finally, Plaintiffs argue that a blueprint and an office referenced in the instrument must indicate that the railroad had already surveyed the area and it was only seeking an easement after-the-fact. As noted with respect to FMIC 536 above, the Florida Supreme Court has soundly rejected this argument: "We therefore conclude that the fact that the railroad company surveyed property that it did not own and located a route for its railroad before acquiring title to it did not affect the nature or quality of the property interest the railroad received under the deeds that were executed later." *Rogers III*, 184 So.3d at 1100; *see also Rogers II*, 93 Fed. Cl. at 624 ("Under Florida law, a court may not look beyond the four corners of a deed if the deed is 'clear and certain in meaning and the grantor's intention is reflected by the language employed.'") (quoting *Saltzman v. Ahern*, 306 So.2d 537, 539 (Fla. Dist. Ct. App. 1975). For this same reason, the location where the blueprint was purportedly made is likewise irrelevant.

In sum, like the FMIC 536 Conveyance, there is no limiting language in the FMIC 532 Conveyance indicating that it was made for any limited use or purpose, such as for railroad purposes. The mere inclusion of the term "right-of-way" in the instrument is inconclusive under Florida law. The granting language, description of the "land" being conveyed, and the estate conveyed, however, all indicate the parties intended to convey the land in fee simple. The ten Plaintiffs whose land is adjacent to the FMIC 532 Conveyance therefore have no property interest in the conveyed land and summary judgment should be granted on their eleven claims in the United States' favor.

b. <u>The Booth Property is Not Adjacent to the Rail Corridor</u>

As a "preliminary hurdle," plaintiffs pursuing a Trails Act takings claim must establish that "they owned land adjacent to the railway when the taking allegedly occurred." *Rogers I*, 90 Fed. Cl. 418, 428.

The property owned by William and Jill Booth (parcel 2034-01-0042) ("Booth Property") lies in the northwestern corner of a cul-de-sac at the western terminus of Novus Street in Sarasota, Florida. *See* Map containing Sarasota Co. Property Appraiser Tax Parcel No. 2034-01-0042, generated from Source Data from Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community, Def.'s Ex. 14. To the north and running parallel to Novus Street lies the Legacy Trail. But importantly, in between the Booth Property and the Legacy Trail is another property: a drainage canal (parcel 2022-05-0010) owned by Sarasota County. Tax Parcel Map for Acct. No. 2034010042, Sarasota Co. Prop. Appraiser, Def. Ex. 15.[7] Sarasota County acquired the drainage canal prior to the date the NITU in this case. *Id*.; *see also* Unit No. 2, Hager Park Subdivision recorded at Plat Book 10, Page 68, Def.'s Ex. 16. The existence of the intervening drainage district canal cannot be disputed and yet, Plaintiffs have not presented any evidence that they have reserved any right in the drainage district canal such that they could maintain adjacency with the Legacy Trail.[8]

In short, on the date of the taking in this case, William and Jill Booth owned parcel 2034-01-0042, but a strip of land owned by Sarasota County clearly separated the parcel from the rail

[7] A second property—a small triangular-shaped property identified as a drainage easement according to the Sarasota County Property Appraiser's website—lies north of the drainage canal and is directly adjacent to the Legacy Trail in some places. Plaintiffs, however, have not alleged that they own this parcel.

[8] This same drainage district separates the parcel (20131021337) associated with plaintiffs Thomas M. and Joyce R Fay's claim and the rail corridor. *See* Def.'s Ex. 17. Similarly, summary judgment should be granted in the United States' favor on this claim because the parcel does not abut the corridor.

corridor, such that the Booth Property was not adjacent to the Legacy Trail. Because William and Jill Booth have not presented evidence that they own land adjacent to the Legacy Trail on the date of the taking in this case, they cannot establish that there was any taking involving the Booth Property. Accordingly, summary judgment should be granted in the United States' favor on this particular claim for this independent reason.

v. Neihardt Conveyance

The parties agree that claims concerning seven parcels and seven named plaintiffs turn on a proper reading of the railroad source deed recorded at Book 10, Page 529 ("the Neihardt Conveyance"), Def.'s Ex. 18. *See* Joint Title Stipulations, ECF No. 70. Not only did the Neihardt Conveyance transfer fee simple title to the railroad, but four of the seven parcels also suffer from a lack of adjacency with the rail corridor. Therefore, summary judgment should be granted in the United States' favor on these claims.

a. The Neihardt Conveyance Transferred Title in Fee Simple.

The Neihardt Conveyance clearly grants fee simple title to SGR's predecessor-in-interest, West Shore Railway. M. Neihardt "granted, bargained, and sold" to West Shore Railway his interest in the right-of-way. As in the Sarasota Land Company, Burton, and Clough Conveyances, the granting clause here does not contain language limiting the interests conveyed to certain uses or purposes, nor does it reference an easement. *See Rogers II*, 93 Fed. Cl. at 618. If there had been an intent to convey only an easement, the parties could have included limiting language as in the Honore conveyance. Yet that language is absent here. Thus, the plain reading of the conveyance is that Mr. Neihardt granted fee simple title to SGR's predecessor-in-interest.

Plaintiffs err in assuming that interpreting the deed requires the Court to consider why "Moses Neihardt, a Missouri widower," would "convey the railroad title to the fee estate" for

"one dollar of consideration" or why the railroad would "desire any greater interest than an easement." ECF No. 111-1 at 69. First, under Florida law, a conveyance may not be challenged based on the recited consideration. *Whispell Foreign Cars*, 97 Fed. Cl. at 335. Second, "[w]hen the language of a deed is clear and certain in meaning and the grantor's intention is reflected by the language employed," as it is here, "there is no room for judicial construction of the language nor interpretation of the words used." *Mills*, 147 Fed. Cl. at 344-45.

b. The Crabapple, Lynn, Martell, and 3153 Novus Court Properties Are Not Adjacent to the Rail Corridor.

Plaintiffs pursuing a Trails Act takings claim must establish that "they owned land adjacent to the railway when the taking allegedly occurred." *Rogers I*, 90 Fed. Cl. 418, 428.

The properties owned by Crabapple Enterprise (parcel 0054-03-0018) ("Crabapple Property"), Tammy Lynn (0054-03-0016) ("Lynn Property"), William Martell III (0054-03-0003) ("Martell Property"), and 3153 Novus Court LLC (0054-03-0005) ("3153 Novus Court Property") were not adjacent to the rail corridor when the taking in this case allegedly occurred. See Def.'s Exs. 19, 20. All four of these properties are party of the Bellevue Terrace Subdivision[9] and are located on Novus Court in Sarasota, Florida.[10] To the north and running parallel to Novus Court lies the Legacy Trail. However, as noted in the northern borders of the Crabapple, Lynn, Martell, and 3153 Novus Court Properties are all located between 107 to 112 feet south of the 50-foot rail corridor. *See* Def.'s Ex. 21. Therefore, all these properties are at

[9] The Crabapple Property is located at Block A, Lot 1; the Lynn Property is located at Block A, Lot 3; the Martell Property is located at Block A, Lot 7; and the 3153 Novus Court Property is located at Block A, Lot 6 and the east 23.3 feet of Lot 5. *See* Maps containing Sarasota Co. Property Appraiser Tax Parcel No. 2034-01-0018, et al. and 0054-03-0003, et al., Def.'s Ex. 21.

[10] The Crabapple Property abuts Novus Court, but the residential address is located on the northeast corner of Novus Street and South Brink Ave. in Sarasota, Florida. This distinction is immaterial to Defendant's analysis.

least 57 to 62 feet from the edge of the railroad right-of-way. Plaintiffs have not presented any evidence that they have reserved any right in this 57-to-62-foot parcel such that they could maintain adjacency with the Legacy Trail. Plaintiffs cannot establish there was any taking involving the Crabapple, Lynn, Martell, and 3153 Novus Court Properties, in absence of such information. Accordingly, summary judgment should be granted in the United States' favor on these claims.

vi. Charles Ringling Co. Conveyance

The parties agree that the claims concerning six parcels and six named plaintiffs turn on a proper reading of the railroad source deed recorded at Book 42, Page 569 ("the Ringling Conveyance"), Def.'s Ex. 22. *See* Joint Title Stipulations, ECF No. 70.

The Ringling Conveyance clearly grants fee simple title to SGR's predecessor-in-interest, Tampa Southern Railroad Company. First, the granting clause plainly reads that Charles Ringling Company "has granted, bargained, sold and conveyed" to Tampa Southern Railroad Company the described land "in fee simple forever." Def.'s Ex. 22 at 570. Even absent the "fee simple" language, this Court has previously recognized that a nearly identical granting clause conveyed fee simple title. *Compare Rogers II*, 93 Fed. Cl. at 621 (recognizing that granting clause whereby the grantor "granted, bargained, sold and conveyed" real estate "does not restrict the transfer of such lands for use as a railroad or for railroad purposes" and resulted in the transfer of title in fee simple).

Second, the description of the property conveyed refers not to an interest, but rather to "[a] strip of *land* fifty (50) feet wide through Lots Numbered Fourteen (14) and Sixteen (16) of Lord's Second Addition to Sarasota, Florida." Def.'s Ex. 22 at 569 (emphasis added). Again, this Court has already held in *Rogers II* that nearly identical property descriptions support the

conveyance of fee simple title. 93 Fed. Cl. at 616, 621 (concluding that property described as "[*a*] *strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor*" was evidence of "the parties' intent to convey land, rather than a right to use the land for railroad purposes").

Third, the habendum clause provides that the Charles Ringling Company granted the property to Tampa Southern Railroad Company "to have and to hold in fee simple forever." Def.'s Ex. 22 at 570. This is in stark contrast to the habendum clause in the Honore Deed at issue in *Rogers I* in which the grantor conveyed property for its "own proper use, benefit and behoof forever *for railroad purposes*." *See Rogers II*, 93 Fed. Cl. at 620 ("The Honore conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes."). Here, the clause contains no such limitation.

In sum, the Ringling Conveyance plainly grants to Tampa Southern Railroad Company fee simple title to the land at issue. The six plaintiffs whose land is adjacent to the Ringling Conveyance therefore have no property interest in the conveyed land and summary judgment should be granted on their six claims in the United States' favor.

vii. Clough Conveyance

The parties agree that claims concerning three parcels and three named plaintiffs turn on a proper reading of the railroad source deed recorded at Book 19, Page 481 ("the Clough Conveyance"), Def.'s Ex. 23. *See* Joint Title Stipulations, ECF No. 70.

The Clough Conveyance clearly grants fee simple title to SGR's predecessor-in-interest, Seaboard Air Line Railway. First, the granting clause plainly reads that C. Clough and Flora D. Clough transferred to Seaboard Air Line Railway "all their right, title and interest, of any nature

whatsoever" in the property. Def.'s Ex. 23 at 48. Thus, whatever interest the Cloughs possessed in the property at that time was conveyed to the railroad.

Second, the description of the property conveyed refers not to an interest, but rather to "[a]ll those certain pieces or parcels of land, lying and being in the County of Manatee and State of Florida[.]" *Id.* Again, this Court has already held in *Rogers II* that similar property descriptions support the conveyance of fee simple title. 93 Fed. Cl. at 616, 621 (concluding that property described as "[*a*] *strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor*" was evidence of "the parties' intent to convey land, rather than a right to use the land for railroad purposes").

Third, the habendum clause provides that the Cloughs granted the property to the railroad with "the tenements, hereditaments and appurtenances thereunto belonging or appertaining, and every right, title or interest, legal or equitable, of the said party of the first part in and to the same." Def.'s Ex. 23 at 1. This is in stark contrast to the habendum clause in the Honore Deed at issue in *Rogers I* in which the grantor conveyed property for its "own proper use, benefit and behoof forever *for railroad purposes*." *See Rogers II*, 93 Fed. Cl. at 620 ("The Honore conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes."). Here, the clause contains no such limitation.

In sum, the Clough Conveyance plainly grants to Seaboard Air Line Railway fee simple title to the land at issue. The three plaintiffs whose land is adjacent to the Clough Conveyance therefore have no property interest in the conveyed land and summary judgment should be granted on their three claims in the United States' favor.

viii. Pendley Conveyance

Two of Plaintiffs' claims—the Trustee of the Wallace David Brunton Testamentary Trust (2031-02-1366) ("Brunton Property") and Gary L. Cathey and Victoria L. Goodrich (2031-02-1370) ("Goodrich Property")—fail for two independent reasons. First, the Brunton Property and Goodrich Property were not adjacent to the rail corridor on the date of the NITU. Therefore, no taking of their property occurred and summary judgment should be granted in favor of Defendant for this reason alone. Second, the parties agree the relevant source deed for the Brunton and Goodrich properties is an instrument in which Oscar H. Pendley conveyed his interest in certain lands to the Tampa Southern Railroad Company ("the Pendley Conveyance"), Def.'s Ex. 24. *See* Joint Title Stipulations, ECF No. 70. The Pendley Conveyance, however makes clear that the railroad acquired title in fee simple to the rail corridor.

a. The Pendley Conveyance Transferred Title in Fee Simple

The Brunton and Goodrich Plaintiffs did not own property adjacent to the rail corridor on the date of the taking and summary judgment may be granted in the United States' favor on this basis alone. Even if, however, Plaintiffs could establish adjacency, the operative source instrument demonstrates an intent by Mr. Pendley to convey a fee simple interest in the property described to the Tampa Southern Railroad Company.

The operative documents for the Pendley Conveyance include a partially completed conveyance document for the subject property and a sworn affidavit from a real estate agent for the Tampa Southern Railroad Company that he received an executed deed from Mr. Pendley for the subject property. *See* Def.'s Ex. 24. The granting clause provides that Mr. Pendley broadly "grant, bargain, sell, alien, remise, release, convey, and confirm" his interest in the property. *Id.* at 1. There is also no language limiting the grant of the property to any railroad uses or purposes. This Court has previously held that similar language demonstrates an intent to convey

fee simple title. *Rogers II*, 93 Fed Cl. at 621 (recognizing that granting clause whereby the grantor "granted, bargained, sold and conveyed" real estate "does not restrict the transfer of such lands for use and a railroad or for railroad purposes" and resulted in the transfer of title in fee simple).

Second, the description of the property found in both the instrument and the affidavit refers to a "strip of *land*" and the former also refers to "all of a certain tract or parcel of *land*." Def.'s Ex. 24. at 1, 4 (emphasis added). The description does not limit the property for railroad uses or purposes. Rather, at most, it foresees that the property will be used as a railroad "to be constructed," but in no way conditions or provides a right of reverter should the railroad not be constructed. This unconditional grant of *land* and not a limited interest for railroad purposes further supports a finding that this property was conveyed in fee simple.

Third, the instrument provides that the property will be transferred to the railroad "and its successors and assigns forever." *Id.* at 1. It also expressly provides all rights and title, including rights of reversion, are conveyed "in fee simple forever." *Id.* The express inclusion of language granting all rights "in fee simple forever" and absence of any language indicating the parties intended to provide less than title to the land in fee simple is precisely the sort of language this Court has recognized grants title in fee simple and does not grant an easement. *Rogers II*, 93 Fed. Cl. at 621.

Though, as Plaintiffs note, the instrument is not signed, it is the best evidence of the interest Mr. Pendley conveyed to the railroad and, because the language here is unambiguous, applying the sort of historical context Plaintiffs proffer here would contravene Florida law. *See* ECF No. 111 at 70. Moreover, a signed letter from the railroad's real estate agent confirms that he "received a deed executed by O.H. Pendley, dated July 17th, 1923, conveying" the property to

the railroad, so there is evidence of Mr. Pendley's intention to be bound by the deed's terms. Florida law allows that "the original writing be offered when proving the contents of the writing absent a sufficient explanation for its unavailability." *Griem v. Zabala*, 744 So.2d 1139, 1140 (Fla. Dist. Ct. App. 1999). Here, aside from the missing executed version of the deed being over 100 years old and likely lost to time, both Plaintiffs and Defendants by stipulation have already *agreed* that the relevant conveyance documents are the unexecuted deed and supporting affidavit, and thus, any other versions are unavailable. Accordingly, Plaintiffs' criticism of the operative documents is misplaced.

b. The Brunton and Goodrich Properties are Not Adjacent to the Rail Corridor

As a "preliminary hurdle," plaintiffs pursuing a Trails Act takings claim must establish that "they owned land adjacent to the railway when the taking allegedly occurred." *Rogers I*, 90 Fed. Cl. 418, 428.

The Brunton and Goodrich Properties lie along the southern edge of Oakwood Boulevard South as it runs West to East in Sarasota, Florida. *See* Def.'s Ex 25.[11] To the south and running parallel to Oakwood Boulevard South lies the Legacy Trail. But importantly, in between the Brunton and Goodrich's Properties and the Legacy Trail is another property: a drainage canal (parcel 2022-05-0010) owned by Sarasota County. Def.'s Ex. 26. The drainage canal is adjacent to and runs parallel to the Legacy Trail. Sarasota County acquired the property at lease by 2017—two years prior to the date of the NITU in this case. *Id*. A map overlaying the railroad parcel in purple and the Brunton and Goodrich parcels in blue indicates that the latter are separated from the rail corridor by a significant distance. *See* Def.'s Ex. 27. The existence of the

[11] The Court may take judicial notice of Defendant's Map Exhibits, as they are publicly available documents created through the Sarasota County Property Appraiser's office, available at https://ags3.scgov.net/scpa/.

intervening drainage district canal cannot be disputed and yet, Plaintiffs have not presented any evidence that they have reserved any right in the drainage district canal such that they could maintain adjacency with the Legacy Trail.

In short, on the date of the taking in this case, Plaintiffs owned the Brunton and Goodrich Properties, but Sarasota County owned the strip of land lying between the Legacy Trail and the Brunton and Goodrich Properties. Without owning land adjacent to the Legacy Trail, Plaintiffs cannot establish that there was any taking involving the Brunton and Goodrich Properties. Accordingly, summary judgment should be granted in the United States' favor for this independent reason.

ix. 1926 Condemnation

The parties agree that claims concerning ten parcels and ten named plaintiffs turn on a proper reading of a U.S. District Court condemnation judgment from 1926 ("the 1926 Condemnation"), Def.'s Ex. 28, granting a right-of-way to Tampa Southern Railroad. *See* Joint Title Stipulations, ECF No. 70. Under Florida law at the time, railroads could acquire and hold fee simple title in property by condemnation. *See*, e.*g.*, *Mills v. United States*, 147 Fed. Cl. 339, 347 (2020).

The 1926 Condemnation grants fee simple title to SGR's predecessor-in-interest, Tampa Southern Railroad Company. First, as was true of the previously discussed source deeds, the description of the property here refers not to an interest, but rather to "certain piece, parcel or strip of *land*." Def.'s Ex. 28 at 6 (emphasis added). This is consistent with language evidencing the acquisition of a fee simple interest in the described property. *See Rogers II*, 93 Fed. Cl. at 616, 621.

Also consistent with the *Rogers II* decision, the granting clause here does not contain language limiting the railroad's interests to certain uses or purposes, nor does it reference an easement. *See* 93 Fed. Cl. at 618. Instead, the condemnation reads that "the property . . . be appropriated by the Tampa Southern Railroad Company for use as a right of way for said Railroad Company[.]" Def.'s Ex. 28 at 2. If it had been intended that SGR's predecessor-in-interest use the right-of-way for "railroad purposes" only, as in the Honore Conveyance, that limiting language would have been included. Yet such limiting language is absent. Moreover, the mere inclusion of the term "right of way" in the condemnation judgment does not indicate an easement was granted. *See Rogers IV*, 814 F.3d at 1309. "Consider[ing] the language of the entire instrument," a plain reading of the condemnation judgment is that on March 18, 1926, Tampa Southern Railroad Company paid a large sum of $61,500.00 for a fee simple interest in the subject property. *Mills*, 147 Fed. Cl. at 345.

x. Adverse Possession

With respect to claims by John W. and Christine L. Fordham, Bradley Blum Morrison, and Shirley P. Ramsey, the parties stipulated that I.C.C. Valuation Schedules state the railroad obtained the relevant parcel "By Possession" from these plaintiffs' predecessors-in-interest. *See* ECF No. 70 at 1. Without support, Plaintiffs argue that the Court must presume the railroad acquired a prescriptive easement with respect to these parcels. The Court should deny Plaintiffs' motion for summary judgment with respect to these claims.

First, this Court has acknowledged that "under Florida law a railroad can acquire fee simple title to a right-of-way through adverse possession." *Rogers*, 107 Fed. Cl. at 401 (citing *Seaboard Air Line Ry. Co. v. Atl. Coast Line R.R. Co.*, 117 Fla. 810 (1935) and *Tassapoulous v. Seaboard Coastline R.R. Co.*, 353 So. 2d 867 (Fla. Dist. Ct. App. 1977)). Further support for

this reading of Florida law can be found in the Fifth Circuit's decision in *Dunscombe v. Loftin*, 154 F.2d 963, 967 (5th Cir. 1946) ("Under Florida law, a railroad, having the power of eminent domain, can also acquire title by adverse possession."). Contrary to Plaintiffs' proposed reading of *Rogers* (ECF No. 111-1 at 74), which seems to suggest that the lack of a recorded deed limits the railroad to an easement interest, "the critical difference between adverse possession and prescriptive easement is whether the railroad actually possessed the property for the requisite period, indicating adverse possession, or merely used it, giving rise to a prescriptive easement for the purpose of railroad use." *Rogers*, 107 Fed. Cl. at 402.

Second, Plaintiffs are not absolved of the burden of showing that they owned their respective parcels in fee simple on the date of the taking. Yet Plaintiffs here have done nothing to meet that burden. Instead, Plaintiffs attempt to shift this burden to the United States. Plaintiffs cite to a secondary source, but do not sufficiently support their burden-shifting proposition with authority from this Court or the Federal Circuit. *See* ECF No. 111-1 at 75. Not unlike the plaintiffs in *McClurg Family Farm, LLC v. United States*, 115 Fed. Cl. 1, 17 (2014), Plaintiffs here argue that because there are no documents that speak to the circumstances by which the railroad acquired use of these parcels, the Court must presume that the railroad possessed only an easement for railroad purposes. This, however, would "turn the burden of proof in this case on its head." *Id.* "The Federal Circuit has made amply clear that '[i]t is plaintiffs' burden to establish cognizable property interests for purposes of their takings … claims.'" *Id.* (citing *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 519 n. 12 (Fed. Cir. 2011)). These plaintiffs have not made that showing here.

CONCLUSION

For the reasons set forth above, the United States' Motion for Partial Summary Judgment should be granted.

Respectfully submitted this 16th day of October, 2023,

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