IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

LANDOWNERS' RESPONSE TO THE GOVERNMENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND REPLY IN SUPPORT OF THE LANDOWNERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MARK F. (THOR) HEARNE, II
Stephen S. Davis
True North Law LLC
112 S. Hanley Road, Suite 200
St. Louis, MO 62105
(314) 296-4000
thor@truenorthlawgroup.com

Counsel for the Landowners

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INTRODUCTION

This is a Fifth Amendment Trails Act taking case. The federal government took private property from 214 landowners in Sarasota County, Florida for a public rail-trail corridor when the Surface Transportation Board (the Board) issued an order on May 14, 2019, invoking section 8(d) of the National Trails System Act Amendments of 1983, codified as 16 U.S.C. §1247(d). The Board's order imposed an easement for a public recreational trail and a possible future railroad line across Plaintiffs' land, that is mostly Plaintiffs' homes and small businesses.

The federal government's imposition of an easement for a public rail-trail corridor across an owner's land is a *per se* taking of private property for which the government has a categorical duty to justly compensate the owner. See U.S. CONST. AMEND. V, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 6 (1990) (*Preseault I*);[1] *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015).[2] See also *Preseault v. United States*, 100 F.3d 1525, 1533, 1552 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004);[3]

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[1] Holding the government's invocation of §1247(d) "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."

[2] Explaining that when the government "depriv[es] the owner of the right to possess, use and dispose of the property," and denies the owner's right to exclude others from his or her property, the government has a "categorical" duty to compensate the owner.

[3] "[I]t appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains."

Behrens v. United States, 59 F.4th 1339, 1344-45 (Fed. Cir. 2023);[4] *Barlow v. United States*, __ F.4th __, 2023 WL 8102421, at *3 (Fed. Cir. Nov. 22, 2023). [5]

As explained by this Court in *Mills v. United States*, 147 Fed. Cl. 339, 344 (2020) (quoting *Preseault II*, 100 F.3d at 1533), the federal government's liability for a Trails Act taking turns upon the answer to three inquiries:

> (1) who owned the strips of land involved, specifically did the [r]ailroad...acquire only easements, or did it obtain fee simple estates;
>
> (2) if the [r]ailroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and
>
> (3) even if the grants of the [r]ailroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.[6]

The owners of all 214 properties filed a motion under Rule 56 for summary judgment asking this Court to find the government liable for taking these owners' private property and obligated to "just compensation." See ECF Nos. 111, 111-1, 111-2. Each plaintiff owned title to the fee-simple estate in the land adjacent to and underneath the abandoned railway line when the Board invoked the Trails Act.

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[4] "[I]t is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." Quoting *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), and citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009).

[5] In *Behrens*, the government argued the scope of a railroad right-of-way easement under Missouri law included pubic recreational use of the strip of land. Judge Campbell-Smith agreed with the government, and the landowners appealed. The Federal Circuit, in an opinion by Judge Dyk agreed with the landowners and reversed Judge Campbell-Smith's decision.

[6] Paragraph breaks added. The third point in this inquiry (whether the easement was abandoned) only arises if the right-of-way easement originally granted the railroad included a right for a non-railroad to use the land for a public recreational trail. .

The railroad's interest in forty-seven of these 214 landowners' claims was established in 1910 by a conveyance from Adrian Honoré. The Honoré conveyance included an explicit termination clause. See Landowners' Memorandum in Support, ECF No. 111-1, p. 61 (quoting **Exhibit 8** (Honoré conveyance). For those plaintiffs who are the present-day successors-in-title to Adrian Honoré, this Court has already held that the original conveyance Adrian Honoré granted Seaboard Air Line Railway was only an easement for a railway line. *Rogers v. United States*, 90 Fed. Cl. 418, 430-31 (2009); *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608, 613 (2013); *Childers v. United States*, 116 Fed. Cl. 486, 496-97 (2014). The government does not dispute this holding. See **Exhibit 9** (joint title stipulations). See also Gov. cross-motion and response, ECF No. 115, n.1 ("The parties have stipulated that the Honore Conveyance, which relates to 49 parcels and 47 named plaintiffs, conveyed an easement for railroad purposes.").

The government does not oppose summary judgment for the forty-seven owners of the "Honoré Properties," and the government has not filed a cross-motion for summary judgment concerning the government's obligation to pay the owners of the Honoré Properties. See ECF No. 115, p. 1 ("The United States moves for summary judgment with respect to 164 [out of 214] Plaintiffs...."). Accordingly, this Court should grant the landowners' motion for partial summary judgment and direct that the compensation due each of these forty-seven owners of the Honoré properties be determined and paid.

The government, however, filed a cross-motion for partial summary judgment asking this Court to find the government is not obligated to pay the owners of the other 164 properties and asked that the Court to deny these plaintiffs' motion for partial summary judgment. See ECF No. 115, p. 1. The government's cross-motion is premised upon the contention that the railroad

originally acquired fee simple absolute title to the strip of land across which the railroad built a railway line.

The government and the owners agree upon the means by which the railroad obtained an interest in the strip of land across which the railway line was operated. See **Exhibit 1** (list of claims grouped by conveyance instrument); **Exhibit 5** (joint title stipulations regarding source conveyances). The government does not dispute the plaintiffs' ownership of the land described in the deeds and conveyances provided as exhibits to the amended complaint and landowners' motion for partial summary judgment, nor does the government dispute the legitimacy of the documents by which each plaintiff obtained title to their respective property.

The government and owners differ, however, on the legal interest the railroad acquired. The landowners contend the railroad's interest in the strip of land across which the railroad built and operated the railway line was an *easement* for a railroad right-of-way and, when the strip of land was no longer used for a railway line, the right-of-way easement terminated, and the owners of the underlying fee estate held unencumbered title to the fee estate in the land. The government contends the railroad acquired (by voluntary grant, adverse possession, or condemnation) title to the fee simple estate in the strip of land. And, for eight properties, the government claims that the property the plaintiff owns does not include the land adjoining or underlying the former railroad right-of-way because some other entity holds title to the fee simple estate in an intervening strip of land between the plaintiffs' properties and the abandoned railroad corridor.

The cross-motions for partial summary judgment ask this Court to determine what interest these plaintiffs' predecessors-in-title gave or granted the railroad. More specifically, did the railroad acquire an *easement* to use the strip of land for a railway line, or did the railroad acquire title to the *fee estate* in the strip of land?

These 214 plaintiffs demonstrate that: (a) on May 14, 2019, they owned fee simple title in the land adjoining and underlying the former railway right-of-way that is now subject to the federal government's new rail-trail corridor easement; and (b) the interest the railroad held in the land was only an easement for operation of a railway line, and this easement terminated when the railroad no longer used the strip of land for a railway line. Thus, but for the Board's order invoking section 8(d) of the Trails Act, these plaintiffs would have held unencumbered title to the fee estate in their land and could exclude the public and others from their land.

STANDARD OF REVIEW FOR RULE 56 CROSS-MOTIONS FOR SUMMARY JUDGMENT

As an initial and important matter, the factual issues asserted by the plaintiffs should be deemed admitted. In the words of RCFC 56(e), the government "fails to properly address [the landowners'] assertion[s] of fact as required by RCFC 56(c)." The government does not refute or dispute any factual assertion in the landowners' Statement of Uncontroverted Material Facts. See *Clearmeadow Invs., LLC v. United States*, 87 Fed. Cl. 509, 530 (2009) (Supreme Court has held that "when a plaintiff neither opposed the factual claims made in a defendant's motion for summary judgment nor specifically challenged the defendant's statement of undisputed facts, but instead filed a cross-motion for summary judgment claiming that the undisputed facts entitled him to summary judgment, summary judgment in the defendant's favor was appropriate") (citing *Beard v. Banks*, 548 U.S. 521, 527-28 (2006)). See also *Servant Health, LLC v. United States*, 161 Fed. Cl. 210, 230 (2022) ("Once the moving party has satisfied its initial burden, the opposing party must establish a genuine issue of material fact and cannot rest on mere allegations, but must present actual evidence.") (quoting *Crown Operations Int'l, Ltd. v. Solutia Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002)).

The plaintiffs have asserted, with supporting evidence, that all 214 plaintiffs' properties are adjacent to and underlie the railroad right-of-way, were owned by the plaintiffs on the date of taking, and that the railroad only held an easement for railroad purposes in its right-of-way. Accordingly, the landowners are entitled to judgment as a matter of law in their favor, and this Court should order the government to pay these owners "just compensation."

I. A strip of land condemned for a railway line grants the railroad only an easement to use the land, not title to the fee estate in the land.

The easiest group of properties to resolve are those where the railroad's interest was acquired by condemnation.

But even though it was possible for a railroad to condemn a fee simple interest, a railroad's eminent domain authority is still limited by its charter and the purposes for which the railroad was created and operates. See *Mills*, 147 Fed. Cl. at 349-50; *Green Bay & M.R. Co. v. Union Steamboat Co.*, 107 U.S. 98, 100 (1883) ("The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation."). Indeed, during oral argument in *Barron v. United States*, No. 21-2181, when counsel for the government asserted that "this Court confirmed that in *Mills* just three years ago when it found that, just as with deeds, a railroad could acquire and hold fee simple title and property by condemnation," the Court responded, "but it would be somewhat weird for the railroad to go in and say, we want to get a right-of-way and come out with fee simple." Transcript of June 29, 2023, argument, pp. 57 (lines 20-23), 58 (lines 3-5). The colloquy continued,

> GOV. COUNSEL: Well, you'll see the term "right-of-way" in deeds as well. I mean, it's not exclusive to condemnations. And the difference that I think the distinction made is that right-of-way isn't being referred to in terms of a particular purpose,

> as opposed to like limiting the railroad to using it for a railroad purpose.
>
> THE COURT: Well, but what could they condemn it for? Isn't the whole point of the condemnation authority to say you can get the lands to make your railroad? I mean, I don't think the railroad could condemn the property to turn it into a baseball stadium.
>
> GOV. COUNSEL: Correct.

Id. at 58 (lines 10-22).

Accordingly, under Florida law, a railroad exercising its eminent domain authority pursuant to state statute is limited by its charter to acquiring only the property interest it needs for its public purpose. See *Silver Springs, O&G R. Co. v. Van Ness*, 34 So. 884, 885-86 (Fla. 1903); *Van Ness v. Royal Phosphate Co*., 53 So. 381, 381 (Fla. 1910); *Brandt Rev. Trust v. United States*, 572 U.S. 93, 102 (2014) (citing *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942)).

II. Building and operating a railway line across a strip of an owner's land without any valid conveyance from the owner grants the railroad, at most, a prescriptive easement limited to operation of a railway line.

For three plaintiffs, the government and landowners agree (and the government's own valuation maps state) there was no recorded conveyance of any interest from any owner of the fee estate to the railroad. See Exhibit 5 (joint title stipulations), p. 1 ("For three claims...the parties stipulate that I.C.C. Valuation Schedules state the railroad obtained the relevant parcel 'By Possession' from these plaintiffs' predecessors-in-interest." We also include in this group the owners of that property Oscar Pendley and his wife owned (the *Pendley Properties*). We include the Pendley Properties because there is no valid conveyance of any interest from Oscar Pendley and his wife to the railroad. See Landowners' brief, ECF No. 111-1, pp. 70-72.

The government contends that, for the prescriptive easement properties, despite the lack of any valid recorded conveyance, the railroad nonetheless acquired title to the fee simple estate in these strips of land because Florida law acknowledges that railroads "can acquire fee simple title to a right-of-way through adverse possession," which *Rogers* does not refute, and plaintiffs have not met their burden to show that the plaintiffs "owned their respective parcels in fee simple on the date of taking." Gov. brief, ECF No. 115, pp. 30-31.

Last week, the Federal Circuit issued its decision in *Barlow*. *Barlow* is a Trails Act taking case involving three categories of property. All three categories of property are similar to the categories of property at issue in this case. In *Barlow*, the Federal Circuit considered one category of properties involving this same question – what interest did a railroad have in a strip of land across which the railroad built a railway line without the benefit of any conveyance from the landowner? *Barlow*, 2023 WL 8102421, at *7-8. In *Barlow* the landowners argued, "[w]here there are no valid conveyance instruments, [the railroad] could have at most obtained prescriptive easements." *Id.* at *8. The Federal Circuit held that, on the basis of a provision of the Illinois Constitution, "the greatest interests [the railroad] could have obtained were easements." *Id.*

Florida law is the same as Illinois law on this point. See our discussion of the "Group Three – Prescriptive Easement Properties" in our opening brief, ECF No. 111-1, pp. 73-75. See also *Rogers*, 90 Fed. Cl. at 499 (citing *Downing v. Bird*, 100 So2d 57, 64 (Fla. 1958)). In *Mills* Judge Bruggink cited *Florida Southern R. Co. v. Hill*, 23 So. 566 (Fla. 1898), and *Pensacola & Atl. R.R. v. Jackson*, 21 Fla. 146, 152 (Fla. 1884), for the proposition that,

> The best distillation of the law in Florida is that, when a railroad company takes land under color of its statutory charter but without an agreement and without a condemnation proceeding, it does not divest the landowners of the title and that the railroad merely obtains perpetual use of the land for the purposes of its incorporation, *i.e.* an easement for railroad purposes.

Mills, 147 Fed. Cl. at 349-50.

The railroad gained only an easement by prescription over land owned by the plaintiffs whose predecessor-in-interest is Oscar Pendley because the Pendley document is as meaningful and relevant as scribblings on a cocktail napkin. As the government admits, the document is not signed – *by anyone*. ECF No. 115, p. 27 ("the instrument is not signed...."). The pre-printed form deed is also not notarized or attested to *by anyone* and the attached letter from the railroad's land agent states, "[t]his deed was not signed by the wife of O.H. Pendley, and was sent out for her signature but has never been returned." **Exhibit 4**, p. 4. The signature line is unsigned, no witnesses attested to Oscar Pendley's execution of the document, and the document fails to satisfy any of the requirements Florida requires for a conveyance of an interest in real estate. See Fla. Stat. §689.01 (quoted and discussed in our opening brief, p. 71).

As Judge Bruggink observed in *Andrews v. United States*, 147 Fed. Cl. 519, 523, 527 (2020), Florida land records involving railroads in the late 1880s and early 1900s could be a "mare's nest of inconsistent documentation" that was "probably a reflection of what plaintiffs document in their initial brief of the wild west conditions in Florida in the 1880's when land speculators and competing railroads were buying land and laying track with abandon and no doubt little concern about a foolish consistency." Nonetheless, the government's claim that this unsigned piece of paper somehow granted the railroad title to the fee estate in a strip of land is specious.

The government cites *Griem v. Zabala*, 744 So.2d 1139, 1140 (Fla. Ct. App. 1999), for the proposition that "Florida law allows that 'the original writing be offered when proving the contents of the writing absent a sufficient explanation for its unavailability.'" ECF No. 115, p. 28. In fact, *Griem* establishes precisely the opposite point. To wit: the Pendley document is not a valid conveyance of an interest in property. See *Griem*, 744 So.2d at 1140 ("To transfer a property

interest, a deed must be in writing and signed by the person conveying such interest.") (citing Fla. Stat. §689.01).

Griem is a seven-paragraph Florida court of appeals decision involving two real estate agents who managed condominium units for an Ecuadorian citizen. After Hurricane Andrew, the Ecuadorian owner suffered a mental breakdown, and, in the owner's absence, the real estate agents claimed to have a valid deed to the condominium unit. The deed contained the required notary acknowledgement, but "the notary testified at trial that she had never met the Griems prior to trial nor were they in her presence when she notarized the deed." The court of appeals held the deed the notary attested to, but which the notary had not witnessed the execution of, "did not conform to the statutory requirements for a valid deed." *Griem*, 744 So.2d at 1140. *Griem* is the only Florida decision the government cites in support of its claim that the Pendley document conveyed the railroad title to the fee simple estate in the strip of land. See ECF No. 115, pp. 25-28.

We fail to see how *Griem* supports the government's argument. And, as noted, *Griem* holds the exact opposite of what the government claims. Specifically, a document lacking the required notary attestation "do[es] not conform to the statutory requirements for a valid deed" in Florida. *Griem*, 744 So.2d at 1140. Thus, while the Pendley document, such as it is, maybe an interesting historical relic from what Judge Bruggink described as the "wild west days" of Florida land speculation and railroad construction, the Pendley document is not a valid conveyance of title to the fee estate and cannot be the basis for a legitimate contention that the railroad acquired title to the fee simple estate in a strip of the Oscar and his wife owned.[7]

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[7] See *Andrews*, 147 Fed. Cl. at 523, 527. "They [the different conflicting deeds and condemnation decree] are probably a reflection of what plaintiffs document in their initial brief of the wild west conditions in Florida in the 1880s when land spectators and competing railroads were buying land an laying rack with abandon and no doubt little concern about a foolish consistency." *Id.* at 519.

Finally, the government misconstrues the stipulations concerning the Pendley property. The government states, "Plaintiffs and Defendants by stipulation have already *agreed* that the relevant conveyance documents [for those owners whose predecessor-in-title was Oscar Pendley and his wife] are the unexecuted deed and supporting affidavit, and thus, any other versions are unavailable." ECF No. 115, p. 28 (emphasis by the government). The stipulation provides, in relevant part, that the "parties also stipulate that the relevant source conveyances to the railroad identified in the above chart [listing each plaintiff's property and its "Relevant Source Conveyance to the Railroad"] are associated with the following Bates Stamp ranges: ... O.H. Pendley US_0008576-81...." **Exhibit 5** (joint title stipulations). This is *not* a stipulation that the Pendley document conveyed any interest in the property to the railroad. Rather, the stipulation provides that the Pendley document is the only document either party could find that related to the railroad's interest in the land owned by Oscar Pendley and his wife. Again, the Pendley document is of no greater significance than scribbles on a cocktail napkin.

Thus, the greatest interest the railroad could claim to the property once owned by Oscar Pendley and his wife is, like the other land across which the railroad built a railway line without any conveyance, a *prescriptive easement*. This Court should grant summary judgment in favor of the five plaintiffs across whose land the railroad built a railway line without a valid conveyance.

Judge Bruggink was explaining what was "a mare's next of inconsistent documentation" in the *Andrews* case. *Id.* at 523.

III. The Voluntary Conveyances granted the railroad only an easement.

A. The government wrongly claims "right-of-way" does not describe an easement.

The government argues, "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." ECF No. 115, p. 18. And, "the mere inclusion of the term 'right-of-way' in the condemnation judgment does not indicate an easement was granted." *Id.* at 30.

The government is wrong. A description of an interest in property as a "right-of-way" describes an easement. The term "right-of-way" means exactly what it says – a "right" to use another's land for "a way." "Right-of-way" does not describe a conveyance of title to the fee simple estate in a strip of land. See Landowners' memorandum, ECF No. 111-1, pp. 20-22.[8]

In *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1844-45 (2020), a case arising under the Trails Act, the Supreme Court unanimously held that a "right-of-way" is an easement. To build a 604-mile-long natural gas pipeline from West Virginia to North Carolina, the pipeline company needed a permit to construct a one-tenth-mile segment of the pipeline 600 feet below the Appalachian Trail. These federal lands are under the United States Forest Service's jurisdiction. The Forest Service granted the pipeline company a permit. A group of conservancy organizations challenged the Forest Service's jurisdiction to grant the permit, arguing the land under the Appalachian Trail was not land subject to the Forest Service's jurisdiction under the Mineral Leasing Act. The Fourth Circuit vacated the permit because the

[8] Citing *Brandt*, 572 U.S. at 110; *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1845 (2020); *Mills*, 147 Fed. Cl. at 347; Jon W. Bruce & James W. Ely, Jr., THE LAW OF EASEMENTS & LICENSES IN LAND (2021-22) §1:22; THOMPSON ON REAL ESTATE (2nd ed.) §60.03(a)(7)(ii); BLACK'S LAW DICTIONARY (11th ed.) (Bryan A. Garner, ed.), p. 1587.

Appalachian Trail had become part of the National Park System under the Trails Act and the land under the Appalachian Trail right-of-way was not subject to the Forest Service's jurisdiction under the Mineral Leasing Act. The Supreme Court reversed.

The Supreme Court needed to determine the distinction between the *lands* across which the Appalachian Trail crossed and the *right-of-way* for the Appalachian Trail that crossed these lands. The Court noted, "The Trails Act refers to the granted interests as 'rights-of-way,' both when describing agreements with the Federal Government and with private and state property owners." *Cowpasture*, 140 S.Ct. at 1845. The Court continued, "When applied to a private or state property owner, "right-of-way" would carry its ordinary meaning of a limited right to enjoy another's land. … Accordingly, as would be the case with private or state property owners, a right-of-way between two agencies grants only an easement across the land, not jurisdiction over the land itself." *Id.*

The Court explained the term "'right-of-way' means an easement,"

> A right-of-way is a type of easement. In 1968, as now, principles of property law defined a right-of-way easement as granting a nonowner a limited privilege to "use the lands of another." Specifically, a right-of-way grants the limited "right to pass...through the estate of another." Courts at the time of the Trails Act's enactment acknowledged that easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement. And because an easement does not dispossess the original owner, "a possessor and an easement holder can simultaneously utilize the same parcel of land." Thus, it was, and is, elementary that the grantor of the easement retains ownership over "*the land itself*." Stated more plainly, easements are not land, they merely burden land that continues to be owned by another.
>
> If analyzed as a right-of-way between two private landowners, determining whether any land had been transferred would be simple. If a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land. Nor would anyone think that the rancher had ceded his own right to use his land in other ways, including by running a water line underneath the trail that connects to his house. He could, however, make the easement grantee responsible for administering the easement apart from the land. Likewise, when a company obtains a right-of-way to lay a segment of pipeline

> through a private owner's land, no one would think that the company had obtained ownership over the land through which the pipeline passes.

Id. at 1844-45.[9]

We cited *Cowpasture* repeatedly in our opening brief. See ECF No. 111-1, pp. 12, 21, 50, 68. We also explained that in *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942), and *Brandt*, 572 U.S. at 102, the Supreme Court held that the interest granted railroads in federal land grants for a "right-of-way" was an easement not title to the fee estate in the land and a right-of-way easement terminated when the land was no longer used for the purpose for which the easement was granted.

In the Florida Trails Act case, *Mills*, Judge Bruggink similarly held, "[w]e think the better view is that the 'right-of-way' for railroad purposes should be construed according to its natural meaning, *i.e.* '[t]he right to pass through property owned by another.'" Judge Bruggink's holding in *Mills* is consistent with, and prescient of, the Supreme Court's decision in *Cowpasture* and the Federal Circuit's recent opinion in *Barlow*.

In *Barlow*, the Federal Circuit considered three categories of property. One category of property that *Barlow* considered involved property in which the railroad acquired its interest in the strip of land by conveyances that included to term "right-of-way" stating the grantor

> do[es] hereby *grant and convey* unto the said [railroad] *the RIGHT OF WAY* for said railway,…over or across the [description of land]. And I Promise and Agree To make all proper and necessary deeds *to convey in fee simple* to said [railroad],

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[9] Internal citations omitted; emphasis in original; citing and quoting, *inter alia*, *Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606, 613 (W.V. 1951); *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 192 S.E.2d 449, 453 (N.C. 1972); R. Powell & P. Rohan, REAL PROPERTY (1968) §405; RESTATEMENT (FIRST) OF PROPERTY (1944) §450; *Bunn v. Offutt*, 222 S.E.2d 522, 525 (Va. 1976); *Barnard v. Gaumer*, 361 P.2d 778, 780 (Colo. 1961), Bruce & Ely, THE LAW OF EASEMENTS & LICENSES IN LAND (2015) §1:1, pp. 1-5; *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970); BLACK'S LAW DICTIONARY (4th ed. 1968), p. 1489.

> *said RIGHT OF WAY*, as soon as said Railway is located *on or across* said above-described premises[.]
>
> *Barlow*, 2023 WL 8102421, at *2 (emphasis in original).

The landowners in *Barlow* argued "'the Right of Way for said Railway' language in the ROW Agreements and the placement of this language in the granting clause show the parties' intent to convey easements rather than fee simple estates." 2023 WL 8102421, at *4. The government countered by claiming the words "grant and convey" meant this instrument conveyed the fee simple estate in the land to the railroad notwithstanding the term "right-of-way." *Id.* Judge Grigsby agreed with the government. The landowners appealed. The Federal Circuit reversed Judge Grigsby.

Looking to Illinois law, the Federal Circuit held the term "right-of-way" is synonymous with an easement and demonstrates the grantor's intention to grant an easement, not title to the fee simple estate. The Federal Circuit wrote:

> Such a reference to a right of way, specifically in the granting clause, conveys an easement rather than a fee simple. Outside the granting clause, other express words in the ROW Agreements also rebut the presumption. First, the ROW Agreements' "RIGHT OF WAY" title demonstrates an intention to convey easements. Second, the "over or across" and "on or across" language in the ROW Agreements is consistent with the description of the right of way and shows an intent to convey an easement.
>
> 2023 WL 8102421, at *4-5 (internal citations omitted).

The Federal Circuit held, "we are not persuaded by the government's argument that the use of the term 'right-of-way' in the [Right-of-Way] Agreements refers to the land conveyed, not a limitation on the interest conveyed." *Barlow*, 2023 WL 8102421, at *5. The Federal Circuit found those Illinois cases the government sought to rely upon for this point to be distinguishable. *Id*.

The second category of property at issue in *Barlow* concerned similar "instruments that included the words 'for railroad purposes.'" *Barlow*, 2023 WL 8102421, at *5-6. The Federal

Circuit agreed with the landowners that this "language in the granting clause of the deed that restricts the right of the conveyance to a lesser estate, *i.e.*, 'for railroad purposes.'" *Id*. at *6. The Federal Circuit looked to a Seventh Circuit decision, *Carter Oil v. Meyers*, 105 F.2d 259, 260-61 (7th Cir. 1939), where "the Seventh Circuit found a deed conveyed an easement under Illinois law despite the 'grant, convey and dedicate' language in part because of the limiting language 'for the purpose of a public highway' in the granting clause.'" *Id*. The third category of properties in *Barlow* were the "non-instrument parcels," which are equivalent to the "prescriptive easement properties" in this case. See *Barlow*, 2023 WL 8102421, at *7. See our discussion of the prescriptive easement properties.

Curiously, the government never addresses, distinguishes, or even considers the Supreme Court's holding in *Cowpasture* that "right-of-way" means an easement. To the extent the government addresses Judge Bruggink's decision in *Mills*, the government simply labels Judge Bruggink's decision "dicta." See ECF No. 115, p. 18.[10] The government further fails to reconcile the government's contention that "right-of-way" describes a conveyance of title to the fee estate in land with all those authorities, including Bruce and Ely and the Restatement, explaining that "right-of-way" describes, or is synonymous with, an *easement*, not title to the fee simple estate. See Landowners' brief, ECF No. 111-1, pp. 20-22.[11]

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[10] The government explained, "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...."

[11] Judge Williams' opinion in *Rogers v. United States*, 93 Fed. Cl. 607 (2010), upon which the government relies, was decided in 2010. At the time of her decision Judge Williams, for whom we have tremendous respect, did not have the benefit of the Supreme Court's decision in *Cowpasture*, nor this Court's decision in *Mills*, nor the Federal Circuit's recent decision in *Barlow*, nor was Judge Williams presented the other authorities cited in our opening memorandum.

Those voluntary conveyances explicitly describing the railroad's interest as a "right-of-way" include seventy-nine properties whose predecessors-in-interest were Adrian Honoré, Bertha Palmer, and the Florida Mortgage & Investment Company; and all of the voluntary conveyances contain language that rebut any presumption that the railroad obtained fee simple title. See *Barlow*, 2023 WL 8102421, at *4-5. The railroad's interest in all these strips of land is an easement, not title to the fee estate. This Court should grant the plaintiffs' motion for partial summary judgment as to these plaintiffs.

B. The government fails to consider the railroad entered the land and surveyed a right-of-way across the land before the owners executed any conveyance, the railroad was acting pursuant to its eminent domain power, such that any interest the railroad obtained is limited to that interest the railroad could obtain under its condemnation authority – an *easement*.

The text of voluntary conveyances and the context in which they were created demonstrate the grantor intended to convey an easement. For example, the Burton conveyance described the property as a "strip of land" on "each side of the center line of the Seaboard Air Line Railway *as located across the lands owned by*" the Burtons. **Exhibit 13**, p. 1 (emphasis added). See *Barlow*, 2023 WL 8102421, at *5 ("the 'over or across' and 'on or across' language in the ROW Agreements is consistent with the description of the right of way and shows an intent to convey an easement").

Under Florida law, a railroad corporation is granted authority to enter an owner's land without the owner's consent to survey and locate a right-of-way for a railway line across the owner's land. In doing so, the railroad corporation is acting under its eminent domain authority granted railroads under Florida law. Were it not for Florida's grant of limited eminent domain authority, the railroad would be a trespasser. Thus, the railroad corporation's entry upon the landowner's private property is the railroad acting under the power of eminent domain the state

has granted the railroad in the railroad's charter. See Landowners' brief, ECF No. 111-1, pp. 35-39.[12]

It is only after entering the owner's land, surveying and locating the railway line across the owner's land that the railroad corporation obtains a written conveyance from the owner. In such a situation, the conveyance to the railroad is a grant of an easement for the operation of a railway line, not title to the fee estate in the land. Such "voluntary conveyances" are executed by the landowner in light of, and subject to, the railroad's eminent domain power and the railroad's interest is limited to an easement. See James W. Ely, Jr., RAILROADS & AMERICAN LAW (2001), pp. 197-98; Landowners' brief, pp. 36-37. See also *Preseault II*, 100 F.3d at 1536 ("a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes, and that the act of survey and location is the operative determinant, and not the particular form of transfer, if any").

C. Florida statute §689.10 applies to future interests not easements.

The government says, "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." Gov. brief, ECF No. 115, p. 8 (citing Fla. Stat. §689.10 and *Rogers v. United States*, 184 So.3d 1087, 1095 n.5 (Fla. 2015)). In our opening brief we explained that the "purpose of Fla. Stat. §689.10 was to abrogate the strict common-law requirement" that "certain *magic words* (such as 'and his heirs') [are] necessary to convey *inheritable* title[, and that t]he statute is irrelevant to the issue of

[12] Florida allowed railroads to "cause such examinations and surveys for the proposed railroad…and for such purposes…to enter upon the lands…of any person for that purpose [and] to take and hold such voluntary grants of real estate…as shall be made to it to aid in the construction, maintenance and accommodation of its road." Fla. Stat. §2241 (1892). But the statute also provided "the real estate received by voluntary grant shall be held and used for purposes of such grant only." *Id.*).

determining whether an *estate* in land or a *servitude* was conveyed because the statute only applies to estates in land (not servitudes, such as easements)." ECF No. 111-1, p. 28. Simply put, Fla. Stat. §689.10 does not apply to *servitudes* such as easements. Florida adopted §689.10 to address fee conveyances of future interests in the fee estate, such as rights of reversion, possibility of reverter, right of entry, vested remainder, contingent remainder, and an executory interest.

As we noted in our opening brief, if the government's view of §689.10 were correct, then every utility, road, drainage, and driveway easement would be a conveyance of fee simple title to the land described in the conveyance. The government fails to provide any authority holding that §689.10 applies to grants of easements.

D. The government fails to consider the text of the entire instrument and the context in which, and the purpose for which, the grantor executed the document.

The polestar guiding a Court in the interpretation of a conveyance of an interest in property is to achieve the interest the grantor sought to accomplish. *Rogers*, 90 Fed. Cl. at 429 (citing *Reid v. Barry*, 112 So. 846, 852 (Fla. 1927), and *Thrasher v. Arida*, 858 So.2d 1173, 1175 (Fla. Ct. App. 2003)). The Federal Circuit in *Barlow* recognized a similar governing principle under Illinois law. 2023 WL 8102421, at *3 ("Under Illinois law, the cardinal and all-important rule is to ascertain the intention of the parties, as gathered from the entire instrument, considering the facts the parties had in mind, including their situation, the state of the property, and the objects to be attained.") (internal quotations omitted).

Rather than consider the text of the entire document, the government focuses on magic words in the granting and habendum clauses of the conveyances. See, *e.g.*, Gov. brief, ECF No. 115, p. 15 (comparing the habendum clauses of the Florida Mortgage & Investment Co. conveyance with that of the Honoré deed, arguing that the "granting clause [of the Florida Mortgage instrument] does not contain language limiting the interests conveyed to certain uses or

purposes, nor does it reference an easement" in "stark contrast to the habendum clause in the Honore Deed...."). The government's reliance upon magic phrases or talismanic provisions extracted from the document as a whole finds no support in Florida law.

Many of the conveyances were filled-in by hand on preprinted forms. See discussion in Landowners' brief, ECF No. 111-1, pp. 24-26. Especially in the case of preprinted form documents, that portion of the document which most precisely describes the property interest the grantor intended to grant the railroad is the boilerplate language on preprinted forms. See *id.* at 24-25 (citing *Preseault II*, 100 F.3d at 1535, regarding railroad agents using preprinted forms). The government overlooks this fact and instead focuses on the boilerplate phrases in the preprinted form. Moreover, any ambiguity between the handwritten or typed description of the property by reference to an existing railway line directs the court to go beyond just the four corners of text and consider the context in which the conveyance was created, the purpose for which the grantor executed the document, and the law at the time the document was drafted. See ECF No. 111-1, pp. 26-26 (quoting *Enterprise Leasing Co. v Demartino*, 15 So.3d 711, 716 (Fla. Ct. App. 2009)), 29 (quoting the RESTATEMENT (THIRD): SERVITUDES §2.2, Comment g). When the entire text, the context and purpose for which these instruments were created is considered, it is apparent that the interest the grantor intended was understood to be granted the railroad was an easement.

E. The government ignores the significance of the fact that the railroad paid only nominal consideration.

The voluntary conveyances are all for nominal consideration. See Landowners' brief, ECF No. 111-1, table at p. 58, n.58. The government never reconciles this fact with the principle that conveyances for nominal consideration are interpreted as a grant of an easement not title to the fee estate. See Fla. Stat. §4354, *Behrens*, 59 F.4th at 1345, and discussion at ECF No. 111-1, p. 60. To be sure, in *Rogers*, 93 Fed. Cl. at 622, 625, the court held that the BLE and Venice deeds were

not voluntary conveyances for nominal consideration based upon the unique context involving the relocation of the southern two miles of the Sarasota to Venice rail line and the Brotherhood of Locomotive Engineers' development of Venice, Florida. The Florida Supreme Court's response to the Federal Circuit's certified question did not repudiate this principle applicable to the interpretation of voluntary conveyances to a railroad but, rather the Florida Court affirmed this principle.[13]

IV. The government incorrectly argues that some of the plaintiffs' properties do not abut the rail-trail corridor.

All 214 landowners' properties are adjacent to and underlie the Legacy Trail right-of-way. See Landowners' Statement of Facts, ECF No. 111-2, ¶¶28-30. The government has abandoned its non-adjacency objection to the landowners' claims in the Oakwood Manor and Oaks at Woodland Park subdivisions that it had raised in discovery.[14] But for the three Old Forest Lakes Association subdivision landowners (the Flaherty, Messick, and Herring families), and the Hagar Park subdivision landowners, William and Jill Booth, the government continues to incorrectly claim these plaintiffs' properties are not adjacent to the right-of-way. And the government now confusingly claims the properties owned by Crabapple, Lynn, Martell, and 3153 Novus Court are not adjacent to the railroad right-of-way. The government is wrong on all counts.

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[13] The BLE and Venice deeds that were the subject of the certified question in *Rogers v. United States*, 814 F.3d 1299, 1304 (Fed. Cir. 2015), were *not* subject to Florida's voluntary conveyance statute. Florida's Supreme Court explained that the "provision in subsection (2) of the Florida statute, to the effect that 'real estate received by voluntary grant shall be held and used for purposes of such grant only,' does *not* apply in this case because the deeds were grants by bargain and sale for valuable consideration and conveyed fee simple title." *Id.* at 1094, n.3. (emphasis supplied.)

[14] See **Exhibit 19** (Appendix B to government's interrogatory answers listing adjacency objections to twenty owners' claims). See also Gov. cross-motion and response, ECF No. 115, pp. 10-11, 19-23 (objecting to the adjacency of eight owners' claims but not the claims of those owners within the Oakwood Manor or Oaks at Woodland Park subdivisions).

First, the government does not contend the plaintiffs who own these supposed "nonadjacent" properties don't own their homes or businesses. Nor does the government claim the documents by which these plaintiffs establish their ownership of their land are void. Rather, the government's quarrel is with the *boundaries* of that property each of these plaintiffs owned. Specifically, the government contends some third-party owns a strip of land lies between that land the government does not dispute these plaintiffs' own and the centerline of the rail-trail corridor. The government premises its argument upon the proposition that (for example) an intervening five-foot-wide drainage easement running parallel to a plaintiff's home and the proximate edge of the abandoned railway right-of-way means these plaintiffs title does not extend to the land center of the adjoining railway right-of-way.

The government's "intervening parcel" theory is wrong for three principal reasons, any one of which is fatal to the government's argument. *First*, the government's argument is contrary to Florida law that follows the centerline presumption and strip-and-gore doctrine. See *Castillo v. United States*, 952 F.3d 1311, 1320-21 (Fed. Cir. 2020). The Federal Circuit in *Barlow* described its decision in *Castillo* as holding Florida's centerline presumption applicable to highways and streets applies to railroads and noting "[m]any other jurisdictions – very much the predominant number among those whose law has been cited to us – have applied the centerline prescription to railroad rights-of-way." 2023 WL 8102421, at *8.

Second, the "intervening" strips of land are not a separate tract of land owned by a third party in fee simple. Rather, the "intervening" strips upon which the government rests its argument are narrow easements for drainage runoff or canals. See our opening brief, ECF No. 111-1, pp. 76-80, and referenced exhibits. The government fails to explain or to provide any authority that holds a drainage right-of-way easement that runs parallel to another right-of-way easement

(whether a railroad, road, or utilities) somehow voids the owner of the fee estate's title to the underlying fee estate in the land across which the parallel easements are located.

Third, the government fails to offer any evidence that controverts these plaintiffs' title and the boundaries of these plaintiffs' land. In fact, the government's evidence, such as the Bellevue Terrace plat, supports the plaintiffs' position. The plaintiffs supported their claim to own the land extending to the centerline of the rail-trail corridor with recorded deeds, tax records, and, most importantly, a declaration and exhibits prepared by the Stantec civil engineering and survey firm. The government offers no credible contrary evidence.

A. Plaintiffs' title documents and expert mapping analysis demonstrate that these eight landowners' property does adjoin and underlay the rail-trail corridor.

1. The Flaherty, Messick, and Herring properties within the Old Forest Lakes subdivision are adjacent to the railroad right-of-way.

The government incorrectly claims that the properties owned by the Flaherty, Messick, and Herring families in the Old Forest Lakes subdivision are not adjacent to the railroad right-of-way "due to the intervening five-foot strip of land owned by Old Forest Lakes Association, Inc." ECF No. 115, p. 11. The government claims these plaintiffs do not own the land adjacent to or underlying the railroad corridor because "a five-foot wide strip of land separates their respective parcel's eastern boundary and the rail corridor." *Id.* at 10. The government says this is so because, "the legal description in their deeds, and intervening ownership interest, and GIS imaging demonstrate [these plaintiffs' property] does not extend to the centerline of the abandoned right-of-way." *Id.* The government points to the Herrings' property deed (Gov. Ex. 8) that provides that the Herrings' property consists of "that part of tract 7, lying west of [Seaboard Coast Line] Railroad...as per plat thereof...less the easterly 5 feet thereof...." The government is wrong that this language means these owners' properties are not adjacent to the Legacy Trail right-of-way.

We address the government's "nonadjacency" claim for this group of landowners in our opening brief. See Landowners' brief, ECF No. 111-1, pp. 75-80. To demonstrate that these plaintiffs own title to the fee estate in the land extending to the centerline of the rail-trail corridor, we also provide a declaration by experts with the Stantec surveying and civil engineering firm demonstrating the boundaries of these owners' properties extend to the centerline of the rail-trail corridor. See **Exhibit 20** (Stantec decl.); Landowners' brief, Section III(D)(3), pp. 79-80 (citing **Exhibit 20** with declaration-exhibits H and I).[15] As explained in the Stantec declaration, the Forest Lakes Association deed described a five-foot-wide drainage easement dedicated to the Old Forest Lakes Association. See **Exhibit 20** ¶9 and accompanying Exhibit H (plat and warranty deed conveying a five-foot strip "as per plat thereof...lying West of S.C.L. R.R. right-of-way."), pp. 2, 4, and Exhibit I (Stantec mapping, including aerial photograph of these properties with the subdivision plat overlain to show the five-foot easement). The Flaherty, Messick, and Herring plaintiffs own the land under the drainage easement and the rail-trail. See *id.* ¶9 ("As depicted on Exhibit I, the five-foot-wide drainage easement runs adjacent to and abuts the plaintiffs' properties and the right-of-way."). The landowners have correctly asserted, with proper and sufficient evidence, that the owners' properties within the Old Forest Lakes subdivision, including the Flaherty, Messick, and Herring families, "are adjacent to and underlie the Legacy Trail rail-trail corridor," and that these owners "owned their property abutting and underlying the railroad right-of-way on May 14, 2019, the date the Board issued the NITU." Statement of Facts ¶¶29(d), 30 (citing **Exhibit 20** (Stantec decl.) 5, 9; **Exhibit 5** (joint title stipulations); **Exhibit 6** (valuation

[15] It appears that, due to a filing error, only exhibits A-1, A-2, and A-3 to the Stantec declaration were filed with the landowners' memorandum in support of their motion for partial summary judgment. The landowners are, accordingly, re-filing Exhibit 20 with all of its exhibits, including exhibits H and I.

maps); and the landowners' title documents attached as exhibits 5 through 452 of Plaintiffs' Fourth Amended Compl. (which are attached to the landowners' motion as **Exhibit 2**).

2. The Booth property includes the land adjacent to and under the former railroad right-of-way.

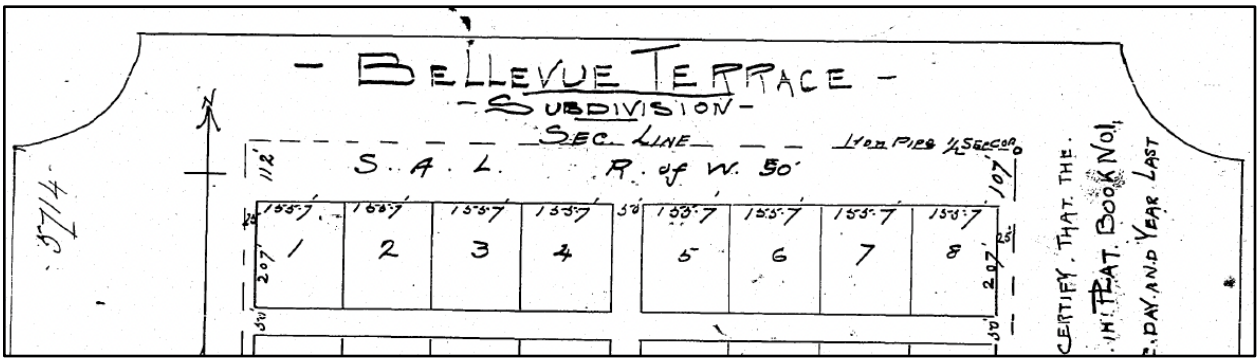
The government wrongly argues that the Booth property in the Hagar Park subdivision is not adjacent to the Legacy Trail right-of-way. The government incorrectly contends that "an intervening drainage district canal," which is "owned by Sarasota County," separates the Booth property from the Legacy Trail right-of-way. Gov. brief, ECF No. 115, p. 20. The government is wrong because the drainage canal is an easement that does not separate the Booth property from the Legacy Trail right-of-way. See **Exhibit 20** (Stantec decl.) ¶7. As described by Stantec and depicted in Exhibit E to the Stantec declaration, "the Sarasota drainage canal easement runs adjacent to and abutting the Booth property on the southern side of the Legacy Trail." *Id.* The drainage canal is *an easement*, and thus, its presence does not cut-off the Booth family's ownership of the fee title to the land extending to the center of the adjoining right-of-way. See Landowners' brief, ECF No. 111-1, pp. 76-78, and n.75 (citing, quoting, and explaining the drainage canal title documents, the subdivision plat describing the canal as an easement, and the Stantec mapping and analysis of the drainage easement). The government has failed to address or contradict any of the landowners' evidence supporting the their assertion that the drainage canal is an easement. Thus, the government's adjacency objection should be denied and disregarded.

3. The Crabapple, Lynn, Martell, and 3153 Novus Court properties are adjacent to the railroad right-of-way.

The government also argues, incorrectly, that the Crabapple, Lynn, Martell, and 3153 Novus Court properties are not adjacent to the rail-trail corridor. The government produces two aerial photographs (Gov. exhibits 19 and 20), and a subdivision plat (Gov. exhibit 21). The

government states that these owners' properties comprise lots 1, 3, 5, 6, and 7 of Bock A of the Bellevue Terrace plat. Gov. cross-motion, ECF No. 115, p. 22, n.9 (citing Gov. exhibit 21).

But the government's evidence contradicts and defeats its own argument. The figure below is a close-up detail-image of Gov. exhibit 21 (plat) showing lots 1-8 of Block A. The plat shows



that all of these owners' properties *directly adjoin* the Seaboard Air Line Right-of-Way.

B. Florida's centerline presumption and related strips-and-gores doctrine hold that these landowners' property extends to the centerline of the former railroad corridor.

The Federal Circuit's decision in the recent Florida Trails Act case, *Castillo*, explains that Florida follows the strips-and-gore doctrine and the related centerline presumption. See Landowners' brief, ECF No. 111-1, pp. 30-35. *Castillo* involved owners of platted lots along an abandoned railroad right-of-way in Miami. The federal government invoked the Trails Act to take this abandoned railway corridor for a new public recreational trail and possible future railroad corridor. The owners of these platted lots sued for compensation. The government said the owners did not own the land under the rail-trail corridor because the recorded plats for the subdivision depicted the boundary of the lots adjoining the railroad right-of-way as extending only to the proximate edge of the railroad right-of-way, not to the centerline of the right-of-way. *Castillo*, 952 F.3d at 1319.

The owners countered by arguing that their title to the fee estate in the platted lots adjoining the railroad right-of-way extended to the center of the adjoining right-of-way under Florida's centerline presumption and the strip-and-gore doctrine. Judge Horn agreed with the government and granted the government's motion for summary judgment. The owners appealed. The Federal Circuit reversed Judge Horn and held that Florida follows the centerline presumption and the strip-and-gore doctrine and that under legal doctrines and prescriptions the owners of platted lots adjoining a railroad right-of-way hold title to the fee simple estate in the land extending to the centerline of the adjoining railroad right-of-way.

The government has not produced any evidence rebutting the centerline presumption. The government can only point to the "*less* the *easterly* 5 feet thereof" language in some of these owners' deeds. See ECF No. 115, p. 10; Gov. exhibit 8 (emphasis added). This language does not rebut Florida's centerline presumption. *Castillo*, 952 F.3d at 1322 ("The trial court in the present matter relied on language of the...plats that is not sufficient to avoid the centerline presumption. It relied on "east of" and "less" language in the [one] plat and on "excepting" language in the [other] plat."). As in *Castillo*, the phrases the government relies upon refers to the two-dimensional corridor (not a one-dimensional edge) or even to the right-of-way itself (as an easement) in affirmatively stating the boundary of the subdivision land and identifying certain exclusions." *Id*. Furthermore, the government has produced no evidence that the drainage strips are anything other than easements. Under the centerline prescription and the strip-and-gore doctrine, the fee estate of the adjoining owner extends to the land underlying the right-of-way corridor. These landowners are, therefore, entitled to summary judgment in their favor.

CONCLUSION

This Court should grant the plaintiffs' motion for partial summary judgment and deny the government's cross-motion. All of these 214 plaintiffs have demonstrated that, on May 5, 2019, they owned the fee estate in land across which the federal government imposed an easement for a public rail-trail corridor under section 8(d) of the Trails Act. This is a *per se* taking of these owners' private property for which the government has a "categorical" constitutional obligation to justly compensate these owners.

The government does not dispute the owners of forty-seven properties claim to hold fee simple title to that land now subject to the government's rail-trail corridor easement. These are the present-day owners of the land across which Adrian Honoré granted the Seaboard Air Line Railroad a right-of-way easement for a railway line in 1910. For these plaintiffs there is no doubt they own the land now subject to the government's rail-trail corridor easement.

For the plaintiffs who own the other 167 properties, the government's claim that the government needn't pay these plaintiffs because the railroad (by adverse possession, condemnation, or voluntary conveyance) obtained title to the fee simple estate in the strip of land across which the railroad operated a railway line is contrary to all controlling authority and precedent. Hence, this Court should grant these plaintiffs' motion for partial summary judgment and direct the government and owners to determine the specific amount of "just compensation" due each plaintiff.

Rule 56(a) provides the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The government, in its response to these landowners' motion, fails to provide any countervailing factual dispute, and the question of law (fee versus easement) should be resolved

in the plaintiffs' favor on the basis of stipulated and uncontroverted facts. The government has either not addressed the authorities supporting finding the railroad's interest to be only an easement or, in the case of the voluntary conveyances, the government offers only an "argument by adverb" without any substantive authority.[16] Accordingly, the plaintiffs are entitled to summary judgment.

The government's response is also remarkable for those points the government does not address and those authorities the government ignores. Beginning with the government's table of authorities compared to those authorities the plaintiffs cite, it is notable that any mention of the Supreme Court's decisions in *Brandt*, *Cowpasture*, *Great Northern*, and *Leo Sheep* is missing. The government fails to consider the Federal Circuit's Trails Act leading decisions. The government does not mention *Behrens*, *Toews*, *Castillo*, *Hash*, *Memmer*, or *Barlow* (though the omission of *Barlow* is to be excused because the Federal Circuit issued *Barlow* after the government filed its response). And, to the extent the government considers the most important Trails Act decisions, the Supreme Court's opinion in *Preseault I* and the Federal Circuit's *en banc* decision in *Preseault II*, the government affords them only passing reference and fails to discuss the Federal Circuit's deed interpretation and analysis as explained by Judge Plager in *Preseault II* apart from reciting the *Preseault II* three-part test, ignoring the plaintiffs' *Preseault II* argument. See Landowners' brief, ECF No. 111-1, pp. 41-42, 48-50. Similarly, the government fails to

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[16] For example, the government says the "text of the relevant conveyance instruments *plainly* demonstrates that the grantors conveyed fee simple title to the railroad," that the "granting clause *plainly* reads," that the conveyance "*plainly* grants...fee simple title," that the conveyance "*clearly* grants fee simple title to" the railroad, that the "*mere* inclusion of the term 'right-of-way' in the instrument is inconclusive," that the "deed's unambiguous language *clearly* shows that the [grantor] granted fee simple title," that the conveyance "*plainly* grants...fee simple title," that "a strip of land owned by Sarasota County *clearly* separated the parcel from the rail corridor," and that the conveyance "*plainly* grants to [the railroad] fee simple title to the land at issue." Gov. brief, ECF No. 115, pp. 7, 9, 10, 15, 19, 24, 25 (emphasis added). Adverbs are not authority.

consider or discuss this Court's decisions in *Childers* and *McCann Holdings* (both involving this same Legacy Trail rail-trail corridor) or *Jackson v. United States*, 135 Fed. Cl. 436 (2017) (Trails Act analysis by Judge Williams). And while the government mentions *Mills*, the government simply labels Judge Bruggink's opinion "dicta" and affords it no serious weight even though *Mills* is a recent Trails Act case turning upon the same questions of Florida law at issue here.

So too, with Florida authorities. The government never considers *Florida Southern R. Co. v. Hill*, 23 So. 566 (Fla. 1898), *Florida Southern Railway Co. v. Brown*, 1 So. 512 (Fla. 1887), *Davis v. MCI Telecomms. Corp.,*606 So.2d 734 (Fla. 1992), *Dean v. MOD Properties*, 528 So.2d 432 (Fla. 1988), *Downing v. Bird*, 100 So.2d 57 (Fla. 1958), *Smith v. Horn*, 70 So. 435 (Fla. 1915), *Servando Building Co. v. Zimmerman,* 91 So.2d 289 (Fla. 1956), *Rawls v. Tallahassee Hotel,* 81 So. 237 (Fla. 1901), *Trailer Ranch Inc. v. City of Pompano Beach,* 500 So.2d 503 (Fla. 1986), *Thrasher v. Arida,* 858 So.2d 1173 (Fla. Ct. App. 2003), *Van Ness v. Royal Phosphate Co.*, 53 So. 381 (Fla. 1910), and other Florida decisions.

In short, the government's response (the government's memorandum of law without a statement of uncontroverted facts, which fails to event attempt to controvert any of plaintiffs' factual positions) fails to contravene the plaintiffs' motion for summary judgment and fails to support the government's motion for summary judgment. Thus, this Court should grant the plaintiff's motion for summary judgment and deny the government's cross-motion for summary judgment.

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
MARK F. (THOR) HEARNE, II
Stephen S. Davis
True North Law, LLC
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 296-4000
thor@truenorthlawgroup.com

Counsel for the Landowners