IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBORAH E. BARRON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21-2181
	)	
UNITED STATES OF AMERICA,	)	Judge Edward Meyers
	)	
Defendant.	)	

SUPPLEMENTAL MEMORANDUM OF LAW REGARDING THE ISSUE OF THE PROPERTY INTEREST THE RAILROAD ACQUIRED IN THE STRIP OF LAND SUBJECT TO THE 1926 CONDEMNATION PROCEEDING

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QUESTION PRESENTED

This Court is called upon to determine whether the condemnation of a right-of-way for a railway line in 1926 vested Tampa Southern Railroad Company with ownership of *the fee simple absolute estate* in the strip of land used for the railway line or whether the condemnation granted Tampa Southern Railroad Company *an easement* across the strip of land limited to use of the land for construction and operation of a railway line. The answer to this question determines whether the government took private property in violation of the Fifth Amendment.

INTRODUCTION

On May 16 of this year, this Court held a status conference and directed the parties to file supplemental briefs addressing the question of what interest (title to the fee simple estate in the land or an easement to use the land for a railroad right-of-way) the railroad acquired by reason of a 1926 condemnation proceeding. ECF No. 50 and ECF No. 52.[1]

In this supplemental brief Plaintiffs demonstrate that, as a matter of Florida law, common law principles, and the text of the condemnation documents, the railroad's interest in that strip of land described in the 1926 condemnation proceedings to be an easement limited to use of the land for operation of a railroad. The owners whose property was condemned for this railroad right-of-way retained ownership of the fee estate in the land. The railroad did not acquire title to the fee simple estate in the strip of land condemned for a "right-of-way" for the operation of a railway line. And, when the strip of land the railroad condemned was no longer used for the operation of a railway line, the right-of-way easement terminated, and the owners of the fee estate would have

[1] This question was addressed in the prior summary judgment briefing. ECF No. 31-2, pp. 32-36, and ECF No. 39, pp. 18-19. This question is also common to *4023 Sawyer Road, LLC, et al., v. United States*, No. 19-757L. See ECF No. 111-1, pp. 20, 21, 56-59, and ECF No. 122, pp. 6-7 and 12-17.

held unencumbered title to the land but for the Surface Transportation Board's invocation of section 8(d) of the Trails Act.

Should this Court, however, find Florida law on this point to be unclear, this Court should certify this question to the Supreme Court of Florida as provided in Florida's Constitution, Art. V §3(b)(6), and Rule 9.150 of the Florida Rules of Appellate Procedure.[2]

BACKGROUND

1. The Trails Act.

This Trails Act taking case involves twenty properties in Sarasota County, Florida, owned by eighteen different owners. The federal government took these owners' property in May 2019 when the Surface Transportation Board issued an order invoking Section 8(d) of the National Trails System Act, as Amended in 1983, codified as 16 U.S.C. §1247(d). The Board's order established a public rail-trail corridor across the strip of land. These owners brought this lawsuit on November 18, 2021. See ECF No. 1. The Tucker Act, 28 U.S.C. §1491(a) provides this Court with jurisdiction of this case. The owners seek "just compensation" for that private property the United States took from them in violation of the Fifth Amendment of the United States Constitution. The government's invocation of the Trails Act frequently gives rise to a taking of private property for which the federal government must pay the owner "just compensation." See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*),

> This language [Section 8(d) of the Trails Act] 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. While the terms of these easements and applicable state law vary, frequently the easements

[2] See, *e.g.*, *Rogers v. United States*, No. 13-5098 (Fed. Cir. July 21, 2014).

> provide that the property reverts to abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests.[3]

This Court's recent decisions in *Nicholson v. United States*, 170 Fed. Cl. 399 (2024), and *Hyatt v. United States*, 170 Fed. Cl. 417 (2024), summarize the Federal Circuit's Trails Act jurisprudence. In *Nicholson* and *Hyatt*, Judge Tapp wrote,

> Whether a plaintiff is entitled to compensation in Trails Act litigation depends on meeting two prongs of a three-prong test—stated differently, a taking occurs if the railroad only held an easement in the taken land (prong 1) and if one of the other two prongs is met. The Federal Circuit set out these prongs in *Preseault II*:
>
> (1) who owned the strips of land involved, specifically did the Railroad ... acquire only easements, or did it obtain fee simple estates;
>
> (2) if the Railroad acquired only easements, if the terms of the easements were limited to use for railroad purposes, then the authorization for future use as public recreational trails constituted a taking [i.e., exceeds the scope of the easements]; or
>
> (3) even if the grants of the Railroad's easements were broad enough to encompass recreational trails, if the easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements then a taking occurred [*i.e.*, abandonment of the easement].[4]

The plaintiffs have established their ownership of the land adjoining and underlying the railroad corridor. ECF Nos. 18 (Second Amended Complaint), 23, 31, and 39 (motions for

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[3] See also *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (*en banc*) (*Preseault II*) ("When state-defined property rights are destroyed by the Federal Government's preemptive power...the owner of those rights is due just compensation."), *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) ("it 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, 1342 (Fed. Cir. 2023) ("It is now well-settled that the issuance of a NITU under the Trails Act may result in a taking of property owned by the original grantor of the easement.") (citing *Preseault I*, 494 U.S. at 8).

[4] *Hyatt*, 170 Fed. Cl. at 427 (citing *Preseault I*, 100 F.3d at 1550, and *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)).

summary judgment and reply). For some owners, however, the government argues the railroad actually acquired title to the fee simple estate in the strip of land the Tampa Southern Railroad and its successor railroads used for its railway line. See ECF No. 32 and transcript of June 29, 2023, pp. 57-63.

2. The Tankersley and Davis land.

This supplemental brief concerns that portion of the right-of-way the railroad acquired by condemnation across a strip of land in which Bonnie Tankersley had a life estate and Mattie Davis had a contingent life estate with Bonnie's and Mattie's children having a remainder interest in the fee simple estate upon Bonnie's and Mattie's death. As we detail below, in 1925 and 1926, the Tampa Southern Railroad Company condemned a "right-of-way" for a railway line across the Tankersley and Davis land. One plaintiff in this case, Jane Sue Shumway, is the successor-in-title to Bonnie Tankersley and Mattie Davis. In the related case, *4023 Sawyer Road I LLC v. United States*, No. 19-757L, the present-day owners of twelve properties are the successors-in-title to Bonnie Tankersley and Mattie Davis.[5]

Before this present litigation, this property was the subject of a condemnation lawsuit in federal district court brought by Tampa Southern Railroad Company and two separate state lawsuits between the heirs of Bonnie Tankersley and Mattie Davis resulting in separate decisions by the North Carolina Supreme Court and Florida Supreme Court. See *Tampa Southern Railroad*

[5] In *4023 Sawyer Road*, Dominic and Kathleen Booth, Sean and Darcy Byrnes, John Ermilio, Steven and Linda Finehout, Paul Hoerning and Courtney Joachim, Gary Hurst, Suzanne McDonald, David Sadler, David Stebbins, and Patricia, Richard and Jonathan Varley are the plaintiffs who own twelve properties that are successors in title to Bonnie Tankersley and Mattie Davis as well. See ECF No. 111-3 in *4023 Sawyer Road, LLC, et al., v. United States*, No. 19-757L.

Company v. Bonnie Tankersley, et al., Southern District of Florida, No. 1225-T (1926), *Tankersley v. Davis*, 142 S.E. 765 (N.C. 1928), *Tankersley v. Davis*, 128 So. 507 (Fla. 1937).[6]

John C. Bishop (referred to as "J.C. Bishop") was, like Bertha Palmer and the Lord and Palmer families, one of the founding families of Sarasota. In the early 1900s, J.C. Bishop owned large tracts of land in Manatee County. This part of Manatee County became Sarasota County in 1921. J.C. Bishop had two daughters, Bonnie Bishop born in 1884, and Mattie Bishop who was born eight years later on March 25, 1892. See **Exhibit 1-A** and **1-B** (death certificates of Bonnie Tankersley and Mattie Davis). Both daughters were born in Virginia and moved to Greensboro, North Carolina. Bonnie Bishop married Dr. James W. Tankersley of Greensboro, North Carolina. Bonnie and Dr. Tankersley had no biological children but adopted a son, William Edward Tankersley. Bonnie and Dr. Tankersley's adopted son was the minor child of Dr. Tankersley's deceased brother. J.C. Bishop's younger daughter, Mattie, married A.C. Davis. Mattie and A.C. Davis had a daughter, Virginia Bishop Davis.

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[6] In *Stern v. Marshall*, Chief Justice Roberts observed the litigation "has, in course of time, become so complicated, that ... no two ... lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A long procession of [judges] has come in and gone out during that time, and still the suit drags its weary length before the Court. Those words were not written about this case, see C. Dickens, *Bleak House*, in 1 WORKS OF CHARLES DICKENS 4-5 (1891), but they could have been." *Stern v. Marshall*, 564 U.S. 462, 468, (2011). Though the litigation involving this property is not as storied as *Jarndyce v. Jarndyce* in *Bleak House* or as salacious as *Stern v. Marshall*, the tract of land J.C. Bishop gave his daughter Bonnie Tankersley and Mattie Davis and across which the railroad right-of-way was condemned has occupied the attention of many attorneys and judges over the past century.

On March 14, 1924, J.C. Bishop, then a widower, gave a life estate in a tract of his Sarasota land to his eldest daughter Bonnie and gave his younger daughter, Mattie, a contingent life estate should Bonnie die without surviving children. See **Exhibit 2** (Deed Book 17, Page 87).

After J.C. Bishop executed the 1924 deed giving Bonnie a life estate with a contingent life estate to Mattie, J.C. Bishop died. In September 1925, Tampa Southern Railroad Company sued to condemn a right-of-way for a railroad line across the land. See **Exhibit 3, Tab 2**.[7] The condemnation petition named both Bonnie and Mattie as defendants with an interest in the strip of land Tampa Southern Railroad sought to condemn. The condemnation petition and verdict stated that, at that time, no individuals or entities other than Bonnie and Mattie had any interest in the land subject to the condemnation. See **Exhibit 3, Tab 2**. ("Petitioner [Tampa Southern Railroad Company] … shows unto the Court that it has made a diligent search to ascertain the name or names of the owners, mortgagees or occupants of the said property hereinbefore described, their places of residence … [and] shows that the owners of the above described property are Bonnie K. Tankersley and Mattie V. Davies [*sic*.].…").[8]

Following a jury trial with a number of witnesses called by both the railroad and Tankersley and Davis, the federal district court issued the condemnation verdict on March 18, 1926. See

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[7] The condemnation pleadings, assembled as **Exhibit 3**, are pleadings and documents from the federal district court and Sarasota County archives. The pleadings are in chronological order with a separate tab for each document. These same documents are also filed as Exhibit 7 to ECF No. 111-14 in *4023 Sawyer Road*. These are the only copies of the district court pleadings and filings Plaintiffs could locate.

[8] The condemnation pleadings refer to "Mattie V. Davies" when, in fact, her last name was "*Davis*," not "*Davies*." The pleadings correctly describe her residence as "Greensboro" North Carolina but the return of service states it was sent to "Goldboro," North Carolina. In any event, Mattie Davis and Bonnie Tankersley did receive notice of the condemnation action and their counsel answered the petition. In this memorandum we refer to Mattie Davis by her proper surname "Davis." But, when quoting from the condemnation pleadings, we quote the document as written with "Davies" as Mattie's surname.

Exhibit 3, Tab 17. The verdict included the handwritten interlineation to paragraph three, ordering "the amount of said compensation shall be paid to Bonnie K. Tankersley and Mattie V. Davies [*sic*.], in equal portions." (The underlined language was the handwritten interlineation.) Tampa Southern Railroad Company paid these funds to the district court's registry. **Exhibit 3, Tab 18**.

"On the 6th day of April, 1927, on about three and one half years after the registration of the deed [from J.C. Bishop to Bonnie Tankersley], Bonnie Tankersley and her husband, [Dr.] J.W. Tankersley duly adopted a son of a deceased brother of J.W. Tankersley, the husband of Bonnie B. Tankersley and said adopted child was not related by blood to [J.C.] Bishop, or to Bonnie B. Tankersley, the grantee. The minor plaintiff had been living in the home of J.W. Tankersley and Bonnie B. Tankersley for several months prior to the date of the deed [from J.C. Bishop to Bonnie Tankersley.]" *Tankersley v. Davis*, 142 S.E. 765 (N.C. 1928). "Bonnie B. Tankersley had no [biological] children and died on the 14th day of April, 1927." *Id*. Bonnie died eight days after she and her husband adopted Dr. Tankersley's minor nephew, William Edward Tankersley. Bonnie was only 43 years old. See **Exhibit 1-A** (death certificate of Bonnie Tankersley). The events surrounding the Bishop, Tankersley, and Davis property and condemnation of the railroad "right-of-way" are summarized in **Exhibit 4**.

The *Strum und Drang* concerning the litigation over the land through which the Tampa Southern Railroad Company condemned a right-of-way demonstrates several points. *First*, this tract of land near downtown Sarasota and was very valuable, even in 1926. If the land was not valuable the various parties, the railroad and the daughters and heirs of J.C. Bishop, would not have devoted significant resources to litigation over ownership of the land. *Second*, the condemnation lawsuit confirms that the Tampa Southern Railroad *really* wanted this strip of land

for a right-of-way. Similarly, the opposition by Tankersley and Davis demonstrates that they *really* did not want the railroad building a railway line through their land. *Finally*, the decisions of the federal district court as well as the North Carolina and Florida supreme courts demonstrate that Bonnie Tankersley and Mattie Davis held life estates in the land and that Mattie Davis's daughter, Virginia Bishop Davis, owned title to the fee simple estate in the land upon Bonnie's and Mattie's death and that Virginia's parents and guardians could convey title to the fee simple estate in the land. See, *Tankersley v. Davis,* 128 So. 507 (1937).

3. Tampa Southern Railroad Company's condemnation of a right-of-way across the Tankersley and Davis land.

A railway line is like a turtle on a fence post. It didn't get there by itself. The Tampa Southern Railroad right-of-way was established by condemnation. The Tampa Southern Railroad Company wanted to extend its railway line from Tampa to Sarasota across land in which Bonnie Tankersley and Mattie Davis owned. On April 9, 1925 (apparently after entering and surveying the land), the Atlantic Coast Line Railroad's real estate agent prepared a metes and bounds legal description of an 8.98-acre strip of land.[9] This metes and bounds description was used and repeated in the condemnation pleadings to describe the land subject to the condemnation action. The legal description of the property condemned for the right-of-way states the property "FOR CONDEMNATION OF RIGHT OF WAY FOR TAMPA SOUTHERN RAILROAD THRU

[9] Tampa Southern Railroad Company was a subsidiary of the Atlantic Coast Line Railroad. Atlantic Coast Line and Seaboard Air Line were rival railroads competing for the Florida market. This competition was frequently manifested in litigation between the two railroads including disputes over rights-of-way. See *Sarasota Herald* article of October 3, 1926. **Exhibit 6** (and transcription). (The headline of the October 1926 *Sarasota Herald* article notes that the New York Yankees won the first game of the 1926 World Series. The St. Louis Cardinals went on to win the series.)

LANDS OF J.C. BISHOP."[10] **Exhibit 3, Tab 1**. Tankersley and Davis did not want to sell their land to the Tampa Southern Railroad Company and did not want a railway line across their land. See **Exhibit 3, Tab 2** ("[Tampa Southern Railroad Company] has made all reasonable efforts to purchase a right of way through the said property from the owners thereof, but that all negotiations for such purchase have failed.").

Because Bonnie and Mattie would not agree to sell Tampa Southern Railroad a right-of-way across the land their father gave them, Tampa Southern Railroad filed a condemnation lawsuit in federal district court on September 14, 1925, to acquire a "right of way" across an 8.98-acre strip of land then owned by "Bonnie K. Tankersley and Mattie Davies." Tampa Southern Railroad told the district court that this strip of land was "for the purpose of its use as a right-of-way for the construction of its railroad." **Exhibit 3, Tab 2**.

The federal district court's jurisdiction was invoked under diversity of citizenship. See **Exhibit 3, Tab 2**. In its sworn petition Tampa Southern Railroad stated that "it has duly located its line of railroad and intends in good faith to construct *the same over and through* the property hereinafter described. That it desires to condemn [the strip of land] *for use as a right of way the* [described strip of land]." *Id*. (emphasis added). Tampa Southern Railroad further affirmed that, "Petitioner further shows unto the Court that the taking of the said property by your petitioner is for the purpose of its use as a right of way for the construction of its railroad, and that the said property is necessary for that purpose."

In response to Tampa Southern Railroad's condemnation petition, federal district Judge Lake Jones ordered Tankersley and Davis to "show cause why said property should not be taken

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[10] *Id.* (capitalization in original).

for the uses and purposes set forth in the petition filed by the Tampa Southern Railroad Company…and more particularly, why the said lands should not be taken *for use as a right-of-way* by the Tampa Southern Railroad Company...." **Exhibit 3**, **Tabs 4 and 5** (emphasis added).

Tankersley and Davis opposed Tampa Southern Railroad Company's condemnation of their land. Tankersley and Davis argued, *inter alia*, the Tampa Southern Railroad Company's charter, which allowed Tampa Southern to extend its existing railway line from Tampa to Sarasota, did not authorize the railroad to condemn property south of downtown Sarasota. See **Exhibit 3, Tab 7 (**Tankersley and Davis answer). Tankersley and Davis argued that, because the Tampa Southern Railroad Company is a "corporation duly incorporated under the laws of the State of Florida as a public carrier for the operation of a commercial railroad and is authorized to construct, maintain and operate a railroad," the railroad is not authorized to condemn property for the "construction or for its right-of-way...beyon[d] its terminus in the City of Sarasota." **Exhibit 3, Tab 7**. Tankersley and Davis argued that a right-of-way across their land (which was south of the railroad terminal in Sarasota) was "not essential for the construction of its line of railroad from the City of Tampa to the City of Sarasota but [is] beyond the destiny and termination of its purposes and authority and its power to extend and *proceed with its said road and with condemnation for its construction or for its right-of-way*." *Id.* (emphasis added).

Judge Jones denied Tankersley's and Davis's motion and granted the railroad's petition to condemn a "right-of-way" "through and across" Tankersley's and Davis's land "for use as a right of way for said Railroad Company." See **Exhibit 3, Tab 17**. The district court's verdict provided, "It is considered by the Court that the property therein described be appropriated by the Tampa Southern Railroad Company for *use as a right of way* for said Railroad Company...." *Id.* (emphasis added). The amount of compensation Tampa Southern Railway was required to pay Tankersley

and Davis for the railroad right-of-way was tried to a jury. *Id.* A number of witnesses testified including representatives of the Palmer and Ringling families. The jury determined Tampa Southern Railway must pay Tankersley and Davis $61,500 for the 8.98-acre "piece, parcel or strip of land" taken for the right-of-way and pay $5,000 in attorney fees. *Id*.

4. The present controversy.

Jane Sue Shumway, a plaintiff-landowner in this case, and the owners of twelve properties in *4023 Sawyer Road*, are the present-day successors-in-title to J.C. Bishop and his daughters, Bonnie Tankersley and Mattie Davis. Under Florida law, established principles of common law and the explicit terms of the district court's condemnation verdict and the related condemnation pleadings, the Tampa Southern Railroad Company acquired only a right-of-way easement for the construction and operation of a railway line across a strip of land. See ECF Nos. 23 and 31 in this case and ECF Nos. 111 and 122 in *4023 Sawyer Road*. The right-of-way easement Tampa Southern Railroad and its successor-railroads acquired by condemnation terminated when the railroad no longer used the strip of land for the operation of a railroad. See *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014).[11]

The government, on the other hand, contends Tampa Southern Railroad actually acquired fee simple absolute title to the strip of land including all incidents of fee simple ownership such as mineral interests in the land under the railroad line and the right to sell this strip of land to a non-

[11] "Unlike most possessory estates, easements...may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *Brandt*, 572 U.S. at 105 (internal quotation and citation omitted; quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.2, Comment d, §7.4, Comments a, f). See also those authorities cited in our earlier briefing, ECF Nos. 23 and 31. See also *4023 Sawyer Road*, ECF Nos. 111 and 122. For these reasons the plaintiffs' motion for summary judgment should be granted.

railroad for any purpose including a public recreational trail. See ECF No. 32. See also oral argument transcript (June 29, 2023), pp. 57-61. The government's argument is contrary to all authority and is a novel interpretation of Florida law.

ARGUMENT

I. Tampa Southern Railroad Company acquired only a right-of-way easement for a railway line across Bonnie Tankersley's and Mattie Davis's land.

A. Background principles of property law.

To answer the question presented in this supplemental briefing it is necessary to first recall the relevant principles of property law and taxonomy of interests in land. The answer to the question presented turns upon the fundamental distinction between ownership of an *estate* in land and an *easement* to use land owned by another.

The inquiry into what interest a railroad or other condemning authority obtained by condemnation or by a voluntary conveyance can be loosely described as "fee versus easement." This dichotomy ("fee versus easement") is a convenient shorthand to refer to the binary option of characterizing an interest in land as a fee simple *estate* in the land or an *easement* granting a right to use land owned by another for a specific purpose. But, when considering the conveyances, condemnation documents, and caselaw, using just the terms "fee" or "easement" can be misleading. It is necessary to be precise in how the terms *easement* and *fee* are used to describe the respective interests in land.

This Court is asked to determine the intention of the parties original to the transaction and whether (by condemnation or voluntary conveyance) the railroad was intended to acquire title to the fee simple estate in the strip of land or the grant of an easement across this strip of land for a railway line. The words the parties used to describe the interest the railroad acquired should be given their ordinary meaning within the context of the transaction and considering the law at the

time the documents were written. There are no "magic words" and documents should be considered in their entirety and construed to effect the intent and purpose for which the transaction was undertaken.

> A fee interest is "a heritable estate in land…to say of a tenant that he holds in fee (*tenet in feodo*) means no more than that his rights are inheritable…at the common law, an estate of inheritance in land. A fee simple: that is the absolute fee is: a fee without limitation to any particular class of heirs or restrictions upon alienation."
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> WEBSTERS NEW INTERNATIONAL DICTIONARY (2nd ed.) (italics in original).

BLACK'S LAW DICTIONARY (11th ed.) defines the word *fee* to mean "A heritable interest in land; esp., a fee simple absolute. – Also termed *fee estate; feod; feodum; feud; feudum; fief*." BLACK'S defines *fee simple absolute* as: "An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute. – Often shortened to *fee*. – Also termed *estate in fee simple; tenancy in fee; fee-simple title; exclusive ownership; feudum simplex; estate in fee*…fee simple absolute. An estate of indefinite or potentially infinite duration (e.g., "to Albert and his heirs"). – Often shortened to *fee simple* or *fee*. – Also termed *fee simple absolute in possession*.[12] BLACK'S LAW DICTIONARY quotes Thomas F. Bergin & Paul G. Haskell, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 24 (2nd ed. 1984):

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[12] BLACK'S goes on to explain:

> "The estate in fee simple is the largest estate known to the law, ownership of such an estate being the nearest approach to ownership of the land itself which is consonant with the feudal principle of tenure. It is 'the most comprehensive estate in land which the law recognises'; it is the 'most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law.' Traditionally, the fee simple has two distinguishing features: first, the owner ('tenant' in fee simple) has the power to dispose of the fee simple, either inter vivos or by will; second, on intestacy the fee simple descends, in the absence of lineal heirs, to collateral heirs – to a brother, for example, if there is no issue." Peter Butt, *LAND LAW* 35 (2d ed. 1988).

> "Although it is probably good practice to use the word 'absolute' whenever one is referring to an estate in fee simple that is fee of special limitation, condition subsequent, or executory limitation, lawyers frequently refer to such an estate as a 'fee simple' or even as a 'fee.'"

An easement, in contrast to a fee simple estate, is a nonpossessory interest in the land of another. See Jon W. Bruce and James W. Ely, Jr., THE LAW OF EASEMENTS AND LICENSES IN LAND (2013) §1:1. An easement is "an interest in land, but it is not an estate." *Id*. §1.21 (citing, among other authorities, 4 POWELL ON REAL PROPERTY §34.02[1]).[13]

The Montana Supreme Court explained, "[t]he important distinction between an easement and a fee simple is that the former describes the right to a use of the land which is specific or restrictive in nature, while the latter is the grant of title to the land itself." *Park Cnty. Rod & Gun Club v. Dept. of Highways*, 517 P.2d 352, 355 (Mont. 1973). The Florida Court of Appeals similarly held, "An easement, or right to use land not owned, is more in the nature of a claim or encumbrance against the title to the land than it is in the nature of title to, or an estate in, the land itself." *Dean v. MOD Props., Ltd.,* 528 S.2d 432, 433 (Fla. Ct. App. 1988). Bruce and Ely observe, "This difference is significant because fee owners receive substantive and procedural rights unavailable to easement holders." THE LAW OF EASEMENTS §1:21 (citing 2 AMERICAN LAW OF PROPERTY §8.21, and Cunningham, Stoebuck and Whitman, THE LAW OF PROPERTY §8.1 (2d ed.)).

As noted above, the word "*fee*" refers to the *heritability* of the interest in the land. The word "fee" is occasionally used by courts and drafters to describe the *duration* of an easement as perpetual. This engenders confusion especially when distinguishing between a fee estate and an easement. THE LAW OF EASEMENTS §§1:21, 10.1. "Cases occasionally contain the assertion that

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[13] See also THOMPSON ON REAL PROPERTY § 60.02(a) (citing the RESTATEMENT OF PROPERTY) ("an easement is 'an interest in the land in the possession of another' that entitles the easement owner to 'limited use or enjoyment' of that land").

easements may be held in fee or as a defeasible fee…Such statements are unnecessarily confusing. One need not refer to the hierarchy of estates in land to identify the longevity of an easement." *Id*. An easement can be described as "an easement in fee" or a "limited fee" interest. The use of the word "fee" in relation to an easement means the easement is inheritable not that the interest is an estate in the land.

B. Florida law provides that the interest in land a railroad acquires by condemnation is limited to an easement to use the land for the purpose of operating a railroad.

In the late 1800s and early 1900s railroads used their eminent domain power and their economic monopoly to take advantage of landowners and farmers. See James W. Ely, Jr., RAILROADS AND AMERICAN LAW (2001), pp. 81-93. In response, state legislatures (including Florida's legislature) adopted laws to protect landowners from abuse by railroad corporations. In 1887 Florida passed a law to curb abuses by the largely unregulated railroad industry.[14] The legislation balances the interests of landowners with the need for railroads to acquire rights of ways for railway lines. Florida provided that railroads may "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 that "the real estate received by voluntary grant shall be held and used for purposes of such grant only." *Id*.

[14] Chapter 1987, s. 10, Laws of Florida and recodified several times, including in 1892 as section 2241, Florida Statutes, and in 1941 as section 360.01, Florida Statutes. Although the statute was repealed in 1982, the text of the provision at issue here did not change between 1887 and 1982.

The Florida legislature granted railroads the power of eminent domain to enter upon and take private property "necessary to [their] business." Fla. Stat. §2683 (1914). See also *State v. Baker*, 20 Fla. 616, 650 (1884) (holding that a railroad's occupation of private land, without the owner's consent, to survey and locate its railway line "is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain") (citation and internal quotation marks omitted).

The railroad's power of eminent domain, however, was subject to limitations – for example, a railroad corporation can only take private property "upon making due compensation according to law to private owners." Fla. Stat. §2683 (1914). See *Pensacola & Atlantic R.R. Co. v. Jackson*, 21 Fla. 146 (1884), 1884 WL 2143, ("The taking possession and building the track by [the railroad] does not divest the [landowner] of his title to the land."). In *Florida Southern R. Co. v. Hill*, 23 So. 566 (1898), the Florida Supreme Court held that when a railroad company enters an owners' land and builds a railway line across the land

> The owner may elect to regard the act of the [railroad] company as done under the right of eminent domain and demand and recover compensation… for the transaction is nothing more nor less than an implied sale of *an easement* in the land, induced, it may be true, by the compulsory features of the power of eminent domain, the landowner knowing that he cannot prevent the taking of his property under such power, and the company knowing that is must pay for it if it does take or keep it. Even where the original taking is tortious, because against the consent of the owner, and without condemnation, it is nevertheless, necessarily referrable to the power of eminent domain whose express provisions, protected and permitted by organic law, require that compensation be made for the property taken.

Florida statute Section 2241 (1892) limited what interest a railroad acquired, providing that "the real estate received by voluntary grant shall be held and used for purposes of such grant only." *Id*. (emphasis added). A "voluntary grant" was a conveyance a landowner would convey to a railroad without having it go through a condemnation proceeding. Thus, under Section 2241, the nature of the railroad's interest in land taken by a railroad is limited to the railroad's public purpose.

A railroad did not need to acquire title to the *fee estate* to operate a railway line across a strip of land, *a right-of-way easement* was sufficient.[15] It is also well-established that conveyances of an interest in land must be construed to give effect to the parties' intent. *McNair & Wade Land Co. v. Adams*, 45 So. 492, 493 (Fla. 1907). The record demonstrates that Bonnie Tankersley and Mattie Davis did not intend the railroad to have any greater interest than the railroad could take by eminent domain. See **Exhibit 3, Tab 2** (Condemnation Petition) ("[Tampa Southern Railroad Company]

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[15] Florida is not unique in directing that conveyances of strips of land to a railroad be construed as granting only a right-of-way easement. See *Ogg v. Mediacom, LLC*, 142 S.W.3d 801, 812 (Mo. Ct. App. 2004) (considering a deed as a whole and construing it to convey only an easement, because "there are no clear, overriding indicia of an intent to convey full fee ownership of the land…the recited consideration was nominal ($1.00), which is 'not a sum that would suggest purchase of a fee simple interest' in the strip") (citation omitted); *Hash v. United States*, 403 F.3d 1308, 1321 (Fed. Cir. 2005) (citing *Neider v. Shaw*, 65 P.3d 525, 530 (Idaho 2003)) (noting that "use of 'right-of-way' in the substantive part of the deed creates an easement"). See also *Preseault II*, 100 F.3d at 1537 ("the proceeding retained its eminent domain flavor, and the railroad acquired only that which it needed, an easement for its roadway").

Based on statutes similar, or even identical to, section 2241, courts of several other states have reached the same conclusion. For example, the Kansas Supreme Court, applying a statute identical to section 2241, stated "[t]his Court has uniformly held that railroads do no own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed. The rule…gives full effect to the intent of the parties who execute right-of-way deeds rather than going through lengthy and expensive condemnation proceedings." *Harvest Queen Mill & Elevator Co. v. Sanders*, 370 P.2d 419, 423 (Kan. 1962) (internal citations omitted); *see also Brown v. Weare*, 152 S.W.2d 649, 652 (Mo. 1941) (the "law is settled in this state that where a railroad acquires a right of way whether by condemnation, by voluntary grant or by a conveyance in fee upon a valuable consideration the railroad takes but a mere easement over the land and not the fee") (internal citations omitted); *Illinois Cent. R.R. Co. v. Roberts*, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996) (where "land is purportedly conveyed to a railroad company for the laying of a rail line, the presence of language referring in some manner to a 'right of way' operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee"); *Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964) ("[p]ublic policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation"); *Mich. Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc*., 699 N.W.2d 272, 280 (Mich. 2005) ("a deed granting a right-of-way typically conveys an easement"); *Pollnow v. State Dep't of Naural Res.,* 276 N.W.2d 738, 744 (Wis. 1979) ("normally a right of way condemned by a railway would only constitute an easement"); *Neider*, 65 P.3d at 530 ("use of the term right-of-way in the substantive portions of a conveyance instrument creates an easement").

has made all reasonable efforts to purchase a right of way through the said property from the owners thereof, but that all negotiations for such purchase have failed.").

Florida protects the rights of owners whose private property is taken by eminent domain. Florida requires the condemning authority to pay the landowners legal fees and litigation expenses because Florida recognizes that a landowner confronted with a condemnation of the owner's land is at an unfair advantage. See Fla. Const. Art. X §6(a); *Dade County v. Brigham*, 47 So.2d 602, 604-05 (Fla. 1950), ("[A]n owner forced into court by one to whom he owes no obligation cannot be said to have received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair market value of the property, the expenses of which could conceivable exceed such value"); *Jacksonville Expressway Auth. V. DuPree Co.,* 108 So.2d 289, 290-92 (Fla. 1959) (same); *Doerr v. Cent. Fla. Expressway Auth.*, 177 So.3d 1209, 1215 (Fla. 2015) (same). See also, *Sabal Trail Transmission LLC v. 3.921 Acres of Land in Lake County, Florida*, 74 F.4th 1346 (11th Cir. 2023).

The Florida Supreme Court adopted and quoted a New York court's explanation of why this is so:

> He [the owner] does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses in fixing that value.
>
> 47 So.2d at 605 (quoting *In re Water Supply in City of New York*, 109 N.Y.S. 652, 654 (1908)).

This right-of-way through the land Tankersley and Davis owned was taken without their consent and against their will. So, the limitation upon the interest the railroad acquired is even more compelling than the limit upon the interest a railroad acquires by voluntary grant from an owner executed under threat of condemnation. In Florida, as in most states, when a railroad

acquires its right-of-way by condemnation, the railroad only obtains an easement for railroad purposes. As discussed above, by statute, Florida granted railroads a limited power of eminent domain but restricted that interest the railroad could acquire to only that necessary for the "construction, maintenance and accommodation" of a railroad.

> Every railroad…shall be empowered 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…*but the real estate received by voluntary grant shall be held and used for purposes of such grant only*.
>
> Rev. Gen. Fla. Stat. §4354 (1920) (emphasis added).

In *Wilton v. St. John's County*, 123 So. 527, 532 (Fla. 1929), the Florida Supreme Court held,

> This court, in harmony with the weight of authority, has held that proceedings for the condemnation of property under the power of eminent domain are governed and controlled by the statutes authorizing them, and these statutes must be strictly construed and substantially complied with in all proceedings instituted thereunder. *Florida, O. & P. R. Co. v. Bear*, 43 Fla. 310, 31 So. 257."

The Supreme Court of Florida further explained,

> Again, where the statue conferring the authority, or the statute on the subject of eminent domain, limit the taking to such property as my be *necessary for the purpose* in question, whether any necessity exists for taking particular property for a particular purpose is ultimately a judicial question, upon which the owner is entitled to be heard…But Lewis (section 600) says that, though the statute be silent on the subject of necessity, the Constitution impliedly forbids the taking for public use of what is not necessary for such use, and that "the power to take is, in every case, limited to such and so much property as is necessary for the public use in question, and that the owner is entitled, either in the proceedings to condemn or otherwise, to be heard upon this question." Citing Lewis, Em. Dom. §§599, 600; and *Spafford v. Brevard Cty*, 92 Fla 617 (Fla. 1926).
>
> *Id.* at 535.

The Florida Supreme Court explained that this limitation upon the interest a condemning authority may acquire by eminent domain arises from the United States Constitution.

> The Legislature cannot, under the guise of the exercise of the vast public and sovereign power of eminent domain which can *only* be exerted for public purpose, take without his consent one citizen's property and give to another for his mere private use even though compensation be paid. To do so would also come in conflict with the Fourteenth Amendment to the Federal Constitution, as a deprivation of property without due process of law.
>
> *Id.* at 533 (internal citations omitted; citing *Cooley's Cons. Lim*. (8th ed.) 1124; *O'Neill v. Leamer*, 239 U.S. 244 (1915); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896)).

In *Robertson v. Brooksville & T. Ry*., 129 So. 582, 586 (Fla. 1930), the Florida Supreme Court reiterated its holding in *Wilton* and wrote:

> [T]he court is asked to allow the exercise of the vast power of eminent domain to give the railway company access to water with it has no present or prospective right to use, and which it cannot use without committing an unlawful trespass. As we understand them, the authorities do not countenance anu such exercise of power. It is admitted that condemnation proceedings can be brought to acquire property necessary to the construction or operation of a railroad which it as previously taken possession of without right, but such proceedings cannot be used to enable the petitioner to accompany an unlawful act or to continue the perpetration of a legal wrong.

The only interest in land a railroad corporation required to accomplish its public purpose of operating a railroad was an easement to build and operate a railway line across the strip of land. An easement was sufficient for the railroad to accomplish its chartered public purpose of operating a railroad. See *Davis v. MCI Telecomms. Corp*., 606 So.2d 734, 738 (Fla. Ct. App. 1992) ("Except to site a station house or similar land use here and there, the railroads had no need or desire for any interest except a 'right-of-way.'"); *Dean v. MOD Props., Ltd.,* 528 So.2d 432, 434 (Fla. Ct. App. 1988) ("only an easement is needed to lawfully construct and maintain a road right-of-way").

In *Seaboard All-Florida Ry. v. Leavitt*, 141 So. 886, 890 (Fla. 1932), the Supreme Court of Florida explained that "the tremendous power of eminent domain, while frequently necessary to be resorted to for the promotion of needful public purposes, is a power which can be abused unless properly safeguarded." As one of the "safeguards," Florida adopted was the principle that, "[a] condemning authority exercising the power of eminent domain is not permitted to acquire a

greater quantity of property or interest therein than is necessary to serve the public purpose for which the property is acquired." *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So.2d 503, 507 (Fla. 1986). See also *Canal Authority v. Miller*, 243 So.2d 131, 133 (Fla. 1970) ("It is equally well recognized, however, that an acquiring authority will not be permitted to take a greater quantity of property, or greater interest or estate therein, than is necessary to serve the particular public use for which the property is being acquired.") (citing *Wilton*, 123 So. at 527, and *Staplin v. Canal Authority*, 208 So.2d 853 (Fla. Ct. App. 1968)).

In *Robertson v. Brooksville & I. Ry,* the Florida Supreme Court further explained, "[o]f course, a railroad corporation may not exercise the power of eminent domain to take any land or material it may desire for the economical conduct of its business…. It can only condemn land in its public capacity *for purposes essential to the proper exercise of its franchise*." 129 So. 582, 584-85 (Fla. 1930) (emphasis added).

A railroad's eminent domain authority is limited and defined by its charter and the purposes for which the railroad corporation was created and operates. See *Mills v. United States,* 147 Fed. Cl. 339, 349-50 (2020); *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."). See also *East Alabama Ry. Co. v. Doe*, 114 U.S. 340, 354 (1885) ("The grant to the 'assigns' of the [railroad] corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad.").

Under Florida law, a railroad acquiring a "right-of-way" is limited to only that property necessary for the construction of a railway line and does not include ownership of the mineral interests in the land under the railway line. In two cases the Florida Supreme Court held that a

conveyance of a "right-of-way" to a railroad allowed the railroad the right to maintain tracks and ties across the land but did not grant the railroad ownership of the mineral interests in the land under the right-of-way. See *Silver Springs, O&G R. Co. v. Van Ness*, 34 So. 884, 885-86, 888 (Fla. 1903) (the landowners "notwithstanding the right of way deed, still remained the owners of all the phosphate in the land covered by such right-of-way…. As the deed granted defendants a perpetual easement over the land, with the right to operate its cars on its track laid on the right of way…"); *Van Ness v. Royal Phosphate Co*., 53 So. 381, 381 (Fla. 1910) (*Silver Springs* "certainly determines that the deed which is before us only conveyed an easement to the railroad company").

During oral argument 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," this 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 between this Court and government counsel 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).

This Court's question is precisely on point. As the Supreme Court of Florida explained in *Wilton* and *Robertson*, the extent of the interest in land that can be acquired by condemnation is

limited to that necessary to accomplish the public purpose for which the power of eminent domain was granted to the condemning authority.

Mills is a Florida Trails Act decision by Judge Bruggink of this Court. *Mills* considered what interest a railroad acquired in a strip of land for an almost twelve-mile-long railway line in Alachua County, Florida. The railroad line was established in the 1880s. "The sources of the railroad interests at issue here can be classified into three groups." 147 Fed.Cl. at 342. The first group involved what the owners and the government agreed to be an easement. The second group of *Mills* conveyances involved a "bond for deed" about which "the parties disagree as to whether the instrument from the [grantor] was a present conveyance of any interest in land, and, if it was, whether it was a fee or only an easement for a right-of-way for railroad purposes." The landowners "argue[d] that the 'land for deed' operated as a present conveyance, but only of an easement." The government "argue[d] that the instrument was not a present conveyance of any kind and ineffective to transfer any interest in land." *Id* at 343. And, for "the third category of claims…the parties have not been able to locate any instrument of transfer." For this category the government "urges that in the absence of direct proof by plaintiffs that only an easement was obtained, the Court should assume that the railroad obtained a fee. [The owners] of course, urge the contrary." *Id.* And, the landowners argued in the alternative that the interest the railroad "obtained [in] the land [was] by prescriptive use" and, as such, was an easement. *Id.*

Mills did not involve a question of what interest a railroad obtains in land condemned for a railroad right-of-way. But Judge Bruggink's analysis of the applicable principles of Florida law provides helpful guidance. *Mills* does not support the government's contention that the Tampa Southern Railroad acquired title to the fee simple estate in the strip of land. Judge Bruggink's opinion in *Mills* supports the opposite conclusion. It is also important to note that *Mills* was

decided after the *Rogers* decisions by Judge Williams and after, and in light of, the Florida Supreme Court's answer to the Federal Circuit's certified question in *Rogers v. United States*, 184 So.3d 1087 (Fla. 2015).

C. Common law principles direct this Court to find the railroad only acquired an easement.

In the previous section we discuss Florida's constitution, statutes, and case law that hold a railroad condemning a right-of-way for railway line acquires only an easement not title to the fee estate. Florida law closely follows the general principles of common law and property law applicable to land condemned by a railroad corporation for a railway line.

As discussed in the cases noted above, Florida adopts the common law principle that the interest a condemning authority acquires by eminent domain is limited to only that interest necessary to achieve the public purpose for which the condemning authority was granted the power of eminent domain. This Court, in *Rogers v. United States*, 93 Fed. Cl. 607, 623 (2010), *aff'd*, 814 F.3d 1299 (Fed. Cir. 2015), held that "Florida adheres to the unremarkable principle of eminent domain law that the condemnor only acquires interests sufficient to satisfy the purpose of the taking."[16] See also Ely, RAILROADS & AMERICAN LAW, pp. 197-98 ("Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use.") (citing, *inter alia*, Simeon F. Baldwin, AMERICAN RAILROAD LAW (1904), p. 77; Isaac F. Redfield, 1 THE LAW OF RAILROADS 270 (6th ed. 1888)). This is a principle of Florida law and common law applicable to land a railroad condemns for a right-of-way upon which to construct and operate a railway line.

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[16] Citing *Robertson v. Brooksville & Inverness Ry.*, 129 So. 582, 584 (Fla. 1930), and *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So.2d 503, 507 (Fla. 1986)).

Florida recognizes that when the government or a condemning authority exercises eminent domain power to take an owner's private property against the owner's will the property owner is not on a level playing field with the condemning authority. The public policy underlying this rule is the recognition that a condemning authority exercising the extraordinary power of eminent domain is confiscating an owner's private property against the owner's will. While states have granted private corporations, such as railroads, this extraordinary power to take private property, the law limits that interest the condemning authority can acquire to only the least property interest (an easement not title to the fee estate) necessary to accomplish the public purpose for which the condemning authority is granted eminent domain power.

Florida and other states adopted voluntary conveyance statutes and constitutional provisions limiting a railroad's ability to condemn or acquire an interest in private property greater than that necessary for the railroad to accomplish its public purpose Florida provides that voluntary conveyances to railroads are construed as the grant of an easement not the conveyance of title to the fee estate in the strip of land. See, *supra*, note 13. The Federal Circuit discussed this principle in *Behrens v. United States*, 59 F.4th 1339 (Fed. Cir. 2023). *Behrens* involved Missouri law. But Missouri law on this point is identical to Florida law. The Federal Circuit reversed Judge Campbell-Smith because she failed to follow this principle.

Florida has also adopted the common law "strips-and-gore" doctrine and the "centerline presumption" as public policy applicable to the strips of land acquired (whether by condemnation or voluntary grant) for public infrastructure such as roads, railroads, utility lines or pipelines. These common law doctrines and principles of public policy direct this Court to find the interest the Tampa Southern Railroad acquired by condemnation was an easement, not title to the fee estate in the strip of land. See landowners' motion for partial summary judgment, ECF No. 31-2, pp. 28-

31. See also *Castillo v. United States*, 952 F.3d 1311, 1320 (Fed. Cir. 2020) ("Long ago, the Supreme Court of the United States described the centerline presumption as a "familiar principle of law" to the effect that "a grant of land bordering on a road or river, carries the title to the centre of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines.") (citing *Banks v. Ogden*, 69 U.S. 57, 68 (1864)).[17]

In *Penn Central Corp. v. U.S.R.R. Vest. Corp.,* 955 F.2d 1158 (7th Cir. 1992), Judge Posner explained the fundamental presumption (recognized in almost every state) that a railroad's interest in land used for a railway line is only an easement granting the railroad use of the land, not a fee simple estate in the land itself.

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple… Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor – that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than right of way.[18]

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[17] In *Castillo*, the Federal Circuit reversed Judge Horn of this Court because the trial court failed to properly follow Florida's centerline presumption. See Castillo, 952 F.3d at 1324 ("The trial court's discussion of pre-platting issues in the reconsideration order may have been colored by an understanding of the presumption that we have determined to be incorrect in rejecting the trial court's original summary-judgment ruling.").

[18] *Id*. at 1160 (citing *Highland Realty Co. v. City of San Rafael*, 298 P.2d 15, 20 (Cal. 1956); *Johnson v. Ocean Shore R.R.*, 94 Cal. Rptr. 68 (Cal. Ct. App. 1971); *Brown v. Penn Cent. Corp*., 510 N.E.2d 641, 644 (Ind. 1987); *Ross, Inc. v. Legler*, 199 N.E.2d 346 (Ind. 1964); *Sherman v. Petroleum Exploration*, 132 S.W.2d 768 (Ky. Ct. App. 1939); *Henry v. Columbus Depot Co*., 20 N.E.2d 921 (Ohio 1939)).

The public policy disfavoring creation of "strips" or "gores" of land was explained by Chief Justice and President Taft when he was a circuit court judge in *Paine v. Consumers Freight Forwarding & Storage Co.*, 71 F. 626 (6th Cir. 1895):

> The existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are "strips or gores" of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexations in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation of the land underlying the water would be as strong in one case as in either of the others…
>
> The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases.[19]

The overwhelming weight of authority from jurists such as former President and Chief Justice Taft, current Chief Justice Roberts, Justices Thomas, Brennan, O'Conner, and Judge Posner, a series of decisions by the Florida Supreme Court going back to the 1800s, the Federal Circuit, and Judges Williams and Bruggink of this Court, all hold that principles of common law direct this Court to conclude the Tampa Southern Railroad obtained only a right-of-way easement to operate a railway line across the strip of land not title to the fee simple estate in the land itself.

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[19] *Id.* at 629-30, 632 (quoting *Lembeck v. Nye*, 24 N.E. 686, 689 (Ohio 1890)).

D. The text of the condemnation verdict and proceedings explicitly define Tampa Southern Railroad's interest to be an easement not title to the fee estate.

1. The text of the condemnation documents described the railroad's interest as a "right-of-way."

The federal district court's condemnation pleadings and related documents and proceedings are gathered in **Exhibit 3**. The most relevant provisions of the condemnation pleadings and documents specific to the question of whether the railroad obtained an easement or title to the fee simple estate in the strip of land through the Tankersley and Davis property are transcribed in **Exhibit 5**.

It is manifest in these condemnation pleadings that everyone concerned, the railroad, the owners and the court, all referred to the railroad's interest as a "right-of-way" for the specific "purpose" of constructing and operating a railway line.

2. A "right-of-way" is an *easement*.

The railroad's interest in the strip of land is described throughout the condemnation pleadings as a "right-of-way." The ordinary-meaning rule applies to the interpretation of documents (including condemnation documents) defining the railroad's interest in the strip of land used for the railway line. 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. A document describing a railroad's interest in land as a "right-of-way" is an *easement*.

The ordinary meaning of the term *right-of-way* is "a legal right of passage over another person's ground[;] the area over which a right-of-way exists[;] the strip of land over which is built

a public road[;] the land occupied by a railroad especially for its main line."[20] Professors Jon W. Bruce and James W. Ely, Jr., explain, in THE LAW OF EASEMENTS & LICENSES IN LAND (2021-22) §1:22, "[g]enerally, courts conclude that a conveyance of a "right-of-way" creates only an easement whether the grantee is an individual, a railroad, or another entity." The use of the term "right of way" generally suggests the creation of only an easement.[21] See also THOMPSON ON REAL PROPERTY (2nd ed.) §60.03(a)(7)(ii).

The U.S. Supreme Court holds the phrase "right-of-way" means an easement. See *Brandt*, 572 U.S. at 110 ("More than 70 years ago, the government argued before this Court that a right of way granted under the [General Railroad Right-of-Way Act of 1875] was a simple easement. The Court was persuaded, and so ruled. Now the government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given 'the special need for certainty and predictability where

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[20] BLACK'S LAW DICTIONARY (11th ed.) (Bryan A. Garner, ed.), p. 1587, provides, "right-of-way. (18[th] c[entury]) 1. The right to pass through property owned by another. ... 2. The right to build and operate a railway line or a highway on land belonging to another, or the land so used. ... 4. The strip of land subject to a nonowner's right to pass through." Under "right-of-way deed," BLACK'S simply directs the reader to the definition of "*easement deed*." *Id.* (italics in original). Similarly, WEBSTERS NEW INTERNATIONAL DICTIONARY defines "easement" as follows, "an acquired privilege or right of use or enjoyment, falling short of ownership, which an owner or possessor of land has, by virtue of his ownership or possession in the land of another, or, loosely, any of several rights which one person may have in the land of another…at common law easement are classified as positive or affirmative or those including active physical use of the land a sin the *right of way*…" (emphasis added).

[21] The Federal Circuit relied upon Professors Bruce and Ely's treatise in *Preseault II*, 100 F.3d at 1542 ("In a leading treatise on the subject, the authors state the general rule to be "[w]hen precise language is employed to create an easement, such terminology governs the extent of usage.") (quoting Bruce & Ely, THE LAW OF EASEMENTS & LICENSES IN LAND ¶8.02[1] (rev. ed. 1995)). The Supreme Court has cited Professor Ely's scholarship in *Brandt*, 572 U.S. at 96, *United States Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1844 (2020), and *Sveen v. Melin*, 138 S.Ct. 1815, 1828 (2018) (Gorsuch, J., dissenting).

land titles are concerned.'") (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979), and discussing *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942)).

More recently, in *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1845 (2020), a case arising under the Trails Act, the Supreme Court held, "[t]he 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. *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*." *Id.* at 1845 (emphasis added). All of these authorities direct us to the unsurprising, but important, conclusion that documents describing the interest a railroad holds in a strip of land as a *right-of-way* mean the railroad's interest in the strip of land is an *easement*, not title to the fee estate.

Cowpasture arose because, 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 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.* (emphasis added).

> The Supreme 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.
>
> *Cowpasture*, 140 S.Ct. at 1844-45.[22]

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[22] 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);

Florida law is in accord. See *Mills*, 147 Fed. Cl. at 347. Judge Bruggink wrote "a '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.'" (quoting "Right-of-Way," in BLACK'S LAW DICTIONARY (11th ed. 2019)). Judge Bruggink continued, "[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.'"

In *Rogers I*, 90 Fed. Cl. at 429-30, Judge Williams similarly held and quoted *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So.2d 503, 506 (Fla. 1986), for the proposition that Florida courts construe the words "across, over, and under" in a deed as indicative of an easement, not a fee simple estate; and this Court quoted *Nerbonne, N.V. v. Florida Power Corp.*, for the principle that "[t]he conveyance of a right-of-way is generally held to create only an easement." 692 So.2d 928, 928 n.1 (Fla. Ct. App. 1997) (citing Bruce & Ely §1.06[1] (rev. ed. 1995)).

Judge Bruggink's holding in *Mills* and Judge Williams's holding in *Rogers* are consistent with, and prescient of, the Supreme Court's decision in *Cowpasture* and the Federal Circuit's recent opinion in *Barlow*.

In *Barlow v. United States*, 86 F.4th 1347 (Fed. Cir. 2023), the Federal Circuit considered two categories of property. The first category of properties involved land across 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], *said RIGHT*

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.

> *OF WAY*, as soon as said Railway is located *on or across* said above-described premises[.]
>
> *Id.* at 1352 (emphasis in original).

The landowners in *Barlow* argued "'the Right of Way for said Railway' language in the [Right-of-Way] Agreements and the placement of this language in the granting clause show the parties' intent to convey easements rather than fee simple estates." *Barlow*, 86 F.4th at 1354. 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 Griggsby.

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.
>
> *Barlow*, 86 F.4th at 1354-55 (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*, 86 F.4th at 1355. 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 including the words 'for railroad purposes.'" *Barlow*, 86 F.4th at 1351. 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*. 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*.

In *4023 Sawyer Road* the government argued, "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 government said, "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's argument is contrary to all authority.

When the railroad, the federal district court and the owners use the words "right of way" for the "purpose" of constructing a railway line to describe Tampa Southern Railroad's interest in the strip of land that was, in fact, used for a century for a railway line and no other purpose, the railroad's interest in the strip of land is an *easement*. The government contention that the term "right-of-way" for the "purpose" of a railway line actually means "title to the fee simple estate in the land fails as a matter of basic English. The government's argument that "right-of-way" actually means "title to the fee simple estate recalls Humpty Dumpty's explanation in *Alice in Wonderland*.

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."[23]

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[23] LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE (Selwyn H. Goodcare ed. 1983 (1871)).

Under Florida law, common law principles and the explicit terms of the condemnation pleadings, the Tampa Southern Railroad Company obtained only an easement allowing the railroad to construct and operate a railway line across the strip of land the Tampa Southern Railroad condemned. Tankersley and Davis, and their present-day successors-in-title, retained ownership of the fee estate. And, when the strip of land was no longer used for the operation of a railway line, the easement terminated, and the present-day owners held unencumbered title to the land. See *Brandt*, 572 U.S. at 105. No Florida court presented with language similar to the condemnation pleadings in *Tampa Southern Railroad Company v. Tankersley, et al.*, has concluded a railroad acquired title to the fee estate in a strip of land. In other words, no court has done what the government is asking this Court to do.

II. This Court should not make an *Erie*-guess about Florida law.

The authorities are overwhelming and compelling. That interest Tampa Southern Railroad and its successor railroads acquired and held in the strip of land condemned for a "right-of-way" across Bonnie Tankersley's and Mattie Davis's land was an easement not title to the fee estate. We believe this point is established beyond cavil. Thus, certification of this question to the Supreme Court of Florida is unnecessary. But, should this Court believe Florida law is ambiguous or unsettled as to whether the 1926 condemnation verdict actually granted title to the fee simple estate in the strip of land used for a railway line, this Court should certify this question to the Supreme Court of Florida. To hold, as the government argues, that the 1925-1926 condemnation lawsuit granted the Tampa Southern Railroad title to the fee simple estate in the strip of land would be a novel and unique interpretation of Florida law that is contrary to established Florida precedent and all authorities.

Basic principles of federalism direct federal courts to not declare (or guess about) novel applications of state law. Confronted with an unsettled question of state law, a federal court must

abstain or refer the question to the State's highest court for a definitive answer. This is because "[f]ederal courts lack competence to rule definitely on the meaning of state legislation." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997). When a federal court elects to decide "a novel state [law question] not yet reviewed by the State's highest court," it risks friction-generating error." *Id.* at 78-79. A federal court should not define an owner's state-law property interest by forecasting how the federal court believes a state's highest court may decide disputed questions of state law and public policy. A federal court should not make an *Erie*-guess about state law

Justice O'Connor (sitting by designation on the Second Circuit) reiterated the Supreme Court's direction that interpretation of state law is a "job surely best left to the state courts, especially when they 'stand willing to address questions of state law on certification from a federal court.'" *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2nd Cir. 2013).[24] Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court cannot presume to independently declare state law; federal courts must defer to the interpretation of the highest state court. See 304 U.S. at 78-79. Particularly when state law is unsettled, federalism concerns strongly favor certifying questions to a state's highest court instead of a federal court presuming to independently decide them.

Long before certification became widely available, the Supreme Court held that principles of judicial federalism and constitutional avoidance sometime require federal courts to abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal courts to avoid adjudicating a federal constitutional issue. See *Railroad Commission of Texas, et al., v. Pullman Co., et al.*, 312 U.S. 496, 501 (1941); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209-10 (1960). With the development of certification procedures, the "*Pullman*

[24] Citing *Arizonans*, 520 U.S. at 79, and quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 510 (1985) (O'Connor, J., concurring).

abstention doctrine" has become a "*Pullman* certification doctrine," because certification is substantially less time consuming and disruptive than traditional abstention. See *Arizonans*, 520 U.S. at 75-76, 79.

In *Pullman,* this Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court." 312 U.S. at 500. As the Court explained, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499. Accordingly, the Supreme Court directed the district court to stay proceedings while the parties sought an authoritative determination of state law in state court. Such a procedure was lengthy and costly because the parties had to litigate the unsettled state law issue up through the state court systems.

In the decades since *Pullman* was decided, virtually all states, including Florida, have adopted procedures allowing federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. PA. L. REV. 1459, 1548 (1997). Perhaps for this reason, the Supreme Court has urged federal courts to use certification to resolve unsettled questions of state law. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (reversing a lower federal court's failure to certify an unsettled question of state law). The Supreme Court's unanimous opinion in *Arizonans* provides essential guidance.

To be clear, Plaintiffs do not believe Florida law is ambiguous on what interest the railroad obtained in the strip of land the Tampa Southern Railroad Company condemned – it was an easement. But the government is asking this Court to accept a novel view of Florida law and hold the condemnation of a right-of-way actually granted the railroad title to the fee estate in the strip

of land. As discussed in Section I, these owners' constitutional right to "just compensation" turns upon fundamental principles of Florida law defining title to land and upon Florida's public policy such as the strip-and-gore doctrine and the centerline presumption. See *Castillo*, 952 F.3d at 1320, and *Behrens*, 59 F.4th at 1339.

To the extent this Court entertains the government's novel view of Florida law or should this Court believe Florida law is ambiguous or unsettled on the question of what interest Tampa Southern Railroad Company acquired in the strip of land that was the subject of the 1926 condemnation, this Court should certify this novel view of Florida law to the Supreme Court of Florida. Happily, Florida welcomes federal courts certifying questions of Indiana law.

In other Trails Act cases, this Court and the Federal Circuit have certified unsettled questions of state property law. See *Rogers*, 814 F.3d at 1304.[25] In three recent Indiana Trails Act cases, the government requested a question of state law be certified to Indiana's Supreme Court. In *Howard v. United States*, 100 Fed. Cl. 230, 232, 236-37 (2011), this Court explained:

> The United States also has requested certification of questions to the Indiana Supreme Court in two other Rails to Trails takings cases filed in the United States Court of Federal Claims, *Macy Elevator, Inc. v. United States*...and *Hunneshagen Family Trust v. United States*....

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[25] In *Rogers* the Federal Circuit certified a question concerning the interpretation of Florida statute applied to a unique situation involving deeds describing a strip of land Bird Bay Golf Course's predecessor had granted Seaboard Air Line Railway when the railroad line and depot were relocated to accommodate a redevelopment of the property. Judge Moore observed "given what an awful job we obviously do of interpreting state law, why don't we just send this [case] to [the state court], so that we don't make another mistake?" Oral argument in *Rogers v. United States*, No. 2013-5098 (Fed. Cir. July 10, 2014), available at: https://cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments. For a discussion of the *Rogers* certified question see the landowners' memorandum of law in *4023 Sawyer Road v. United States*, Case No. 19-757L, and the landowners' reply. ECF Nos. 111 and 122.

> ... In *Macy Elevator*...the [United States] had requested that the court certify to the Indiana Supreme Court, among other questions, the question of whether recreational trail use with railbanking is within the scope of a railroad easement under Indiana law.

Thus, should this Court believe Florida law and policy ambiguous or unclear this Court should not venture an *Erie*-guess as to Florida law but should instead of certifying the question to the Supreme Court of Florida.

CONCLUSION

This Court should hold that, under unambiguous and settled Florida law, principles of common law and the explicit text of the condemnation pleadings, the Tampa Southern Railroad Company and its successor railroads obtained a right-of-way easement of the operation of a railway line across the strip of land and when the strip of land was no longer used for the operation of a railway line, the easement terminated. No Florida court confronted with a similar record involving the condemnation of a railroad right-of-way has ever held the railroad acquired title to the fee simple estate in a strip of land. To so hold would be a novel view of Florida law.

Should this Court find Florida law on this point to be ambiguous or unsettled and entertain the government's invitation to adopt a novel application of Florida law concluding the railroad acquired by condemnation actual title to the fee simple estate in the strip of land used for a railway line, this Court should certify this question to the Supreme Court of Florida as provided by Florida Const., Art. V §3(b)(6), and Rule 9.150 of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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