PRIVATE RIGHTS AND PUBLIC WAYS: PROPERTY DISPUTES AND RAILS-TO-TRAILS IN INDIANA

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INTRODUCTION

In 1983, Congress expanded the National Trails System Act[1] to promote the conversion of abandoned railroad corridors into hiking and biking trails. By early 1997, there were over 9000 miles of rail trails in the United States.[2] Some of these are well-groomed, paved, multi-use trails in urban and suburban neighborhoods; others are relatively undeveloped, dirt paths along railroad corridors through rural farmland, state parks, and industrial sites. Indiana currently has less than fifty miles of trails, only twenty of which are fully developed, paved trails.[3] In contrast, Minnesota has more than 1100 miles of trails, and Michigan has more than 1000 miles of trails.[4] There is "a big blank spot there in Indiana" as two proposed coast-to-coast trails stop at Indiana's border.[5]

The National Trails System Act "encourage[s] state and local agencies and private organizations to establish appropriate trails" by preserving "established railroad rights-of-way for future reactivation of rail service." Due to the rapid decline of rail service over the last fifty years, the mileage in our nation's rail system has shrunk from more than 270,000 miles at its peak to 141,000 in 1970, with a continuing loss of over 2000 miles of corridor yearly.[6] Realizing that once the corridor is broken up, it would be prohibitively expensive to regain it, Congress has used the Trails Act to promote "railbanking"—the preservation of these corridors for possible future use. But many landowners would like to reacquire the corridor lands that were carved out of their parcels over a century

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1. 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995).

2. *See* Rails to Trails Conservancy, *Current Statistics*, (visited July 13, 1997) <http://www.railtrails.org>.

3. *See* Kyle Niederpruem, *Officials Will Seek Input on Use of Recreational Trails in State*, INDIANAPOLIS STAR, July 23, 1993, at B04. To date, only four trails are finished (DeKalb County Trail—seven miles—finished in 1976; Hammond PTA Trail—four miles—finished in 1991; a portion of the Monon Trail—three miles—finished in 1996; and the Prairie Duneland Trail—six miles—finished in 1996). Currently a number of trails are in different stages of development, and this figure will change.

4. *See* Steve Farr, *Derailed: New Trails Movement Encounters Opposition,* FORT WAYNE J. GAZETTE, May 11, 1997, at 16A. *See also* 16 U.S.C. § 1247(d) (Supp. I 1995).

5. *Farr, supra* note 4, at 16A.

6. *See* Charles H. Montange, PRESERVING ABANDONED RAILROAD RIGHTS-OF-WAYS FOR PUBLIC USE: A LEGAL MANUAL RAILS-TO-TRAILS CONSERVANCY 1 (1989).

ago on the theory that termination of rail service extinguished the railroads' property rights in the corridors. As a result, Indiana has become a hotbed of litigation over property rights to discontinued corridors. And although most of the states that have dealt in depth with the legal issues surrounding corridor conversions have ruled in ways that promote the federal railbanking policies, Indiana courts have stubbornly relied on and misapplied thirty- and forty-year-old precedents that do not adequately address the complex legal issues at stake in these cases.

This Article attempts to clarify the muddied legal issues that have, heretofore, stalled trail development, spurred a significant amount of acrimonious litigation, and resulted in a ruling by the supreme court that is not only contrary to basic rules of property law and Indiana legislation, but goes against the general rationale in every other state that has taken the time to consider the issue on the merits.[7] Current lawsuits, including a series of class-action suits by property owners adjacent to these abandoned railroad corridors, are challenging the sale of railroad rights as illegal, unconstitutional takings, and slanders of title. They claim that upon abandonment of railroad services, title to these corridors reverts to the adjoining landowners who, fearing crime and an influx of urban users, want to fence off, shut down, and otherwise halt trail conversions occurring literally in their back yards. And Indiana property law is, unfortunately, not particularly clear or well-developed, leaving attorneys for the trails, the railroads, and adjoining landowners to argue from rules laid down in thirty-year-old cases that did not anticipate the needs and developments of the twenty-first century. Furthermore, as with any area of law governed by federal regulations, Federal and State statutes, common law property doctrines, and arcane rules of property construction, most lawyers have sense enough to stay far away.

It is unfortunate that in a case of tremendous public interest, the Indiana Supreme Court thought fit to bestow a scant four paragraphs of legal analysis on the issue of interpreting railroad deeds.[8] In doing so, the supreme court adopted the misguided and illogical reasoning of the court of appeals.[9] In a case of this importance, the subject properly deserved a thorough analysis of the law and policy reasons that, under the guise of protecting private property, were completely ignored. I urge the court to reconsider this case in the hope that a more careful attention to the precedent being set and the application of well-settled, basic property-law principles will result in a decision that protects the property rights of

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7. *See, e.g.*, Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545 (1997); City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996); McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985); Brown v. State, 924 P.2d 908 (Wash. 1996).

8. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV368, 1997 WL 335018, at *2-3 (Ind. June 19, 1997). *Compare Chevy Chase Land Co.*, 37 Fed. Cl. at 564-75 (devoting twelve pages to analyzing the legal issues of deed construction); *City of Manhattan Beach*, 914 P.2d at 164-79 (devoting over fifteen pages to interpreting ambiguous railroad deed).

9. Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

all parties, including the railroads, not just the questionable claims of a noisy few. The property law issues are relatively straightforward once we are able to move beyond the confusing legacy of nineteenth-century railroad practices and title documents.

I. HISTORY OF RAILROAD DEVELOPMENT

In the nineteenth century, many states passed laws giving the railroads plenary powers to condemn private land for railroad use. Railroad use included laying tracks and operating stations, turnabouts, and switches.[10] Unfortunately, the railroads did not always act as conscientious partners in land and economic development. Some, armed with the power to condemn, mapped out the most convenient line from point A to point B without regard for preexisting property boundaries, drew up form deeds which had blanks for the price and property description, and began knocking on doors. Landowners were given a choice, either to sell the land or to have it taken under eminent domain. As a result, many landowners accepted whatever sums were offered and executed form deeds that the railroad representatives pulled out of their briefcases. Many of these deeds are ambiguous by today's standards, using language of purchase appropriate to fee simple deeds ("warrant and convey"), but sometimes mentioning rights-of-way, easements, reversions, or other words of limitation ("for railroad purposes only"). Worse, whether this really occurred has become irrelevant in light of our current legacy of anti-railroad animus that has cast a dark cloud over what are otherwise straightforward issues of property rights and deed construction.

The railroads could not take title to the land for free, however. They had to purchase whatever property rights they acquired and would pay more for fee simple title to the land than for access or drainage rights, though these were often included in the sales price.[11] If a landowner objected to the price offered by the railroad, he or she could request an independent appraisal by three "disinterested freeholders of such county to appraise the damages which the owner of the land

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10. In 1852, Indiana enacted a statute giving railroads the right to condemn land for railroad uses. 1 REV. STAT. ch. 83, §§ 14-15 (1852) (codified as amended at IND. CODE §§ 8-4-1-15 to -16 (1993)). They were explicitly given the power to acquire rights-of-way to access and maintain their tracks and to construct drainage culverts. *Id.* § 15. These lesser rights are included in the statute as incidental to their property rights. Before 1852, railroads sought individual charters to enable them to acquire the necessary property.

11. Many people seem appalled by the sight of railroad deeds that paid a landowner anywhere from $50 to $200 for the land across their farms. But to put these values into perspective, the average value of an acre of farmland in 1870 was $28, in 1880 was $31, in 1890 was $37, in 1900 was $39, and in 1910 was $75. And when we consider that it takes a little over twelve acres to comprise a one-mile stretch of corridor at the average width of 100 feet, payments to landowners in excess of the fair market value of the land actually taken indicate that the railroads believed they were purchasing significant property rights. *See* INDIANA CROP & LIVESTOCK REPORTING SERVICE, HISTORIC CROP SUMMARY, 1866-1969, at 142 (1974) (citing ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., FARM REAL ESTATE DEVELOPMENTS).

may sustain by such appropriation."[12] If the parties still could not come to an agreement, the railroad could effectively force a conveyance by paying the appraiser's price and obtaining from the circuit court an instrument of appropriation. In any event, the landowners were free to negotiate for any limitations on the railroad's property interests by, for instance, granting only an easement or a defeasible fee that would revert back to the grantor upon discontinuation of railway service. In many cases the landowners were delighted when the railroads came through as they now had ready access to the large urban markets of Chicago, Boston, and New York.

In an effort to stem the railroads' power, and possibly in response to a particularly strident railroad campaign in 1902 and 1903, the Indiana Legislature passed the 1905 Condemnation Act, which provided that where a railroad acquires a right of way by condemnation, it may not acquire fee simple title.[13] This Act only affected the railroad's eminent domain powers; it did not alter property rights actually negotiated by the railroads and landowners that resulted in a conveyance.[14] The 1905 Act was a turning point in the railroads' expansive powers, and was an attempt to increase the bargaining power of local property owners.[15]

After World War I, the railroad industry was facing a crisis; weak links in the array of smaller lines prevented the coordination and support necessary to serve the needs of a national market. Consequently, Congress passed the Transportation Act of 1920[16] which granted the Interstate Commerce Commission (ICC)[17] the authority to regulate construction, operation, and abandonment of railroad lines. By thinking nationally rather than locally, the industry consolidated and abandoned lines in an effort to survive the stiff competition from trucking that began in the early 1930s.[18] Ironically, many landowners who now rely on

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12. IND. CODE § 8-4-1-16(e) (1993).

13. Act of Feb. 27, 1905, ch. 48, § 1, 1905 Ind. Acts 59, 59-60, (codified as amended at IND. CODE § 32-11-1-1 (1993)). It is interesting to note that use of the term, right-of-way, by the legislature in this Act refers to the strip of land and not to a legal easement. *See infra* notes 76-79 and accompanying text.

14. *See* McKinley v. Waterloo R.R., 368 N.W.2d 131, 135 (Iowa 1985) (distinguishing interests created by condemnation and those created by deed).

15. It can be argued, however, that post-1905 deeds should be strictly construed against the adjoining landowners because local property owners had the power to limit the railroad's interests to easements. Thus, where a deed arguably conveys a fee simple, the courts should protect the railroad's interests because it negotiated for more than the standard claim. In many cases, they paid the same amount for an easement in 1906 that they would have paid for fee simple title in 1904.

16. ch. 91, § 402, 41 Stat. 474, 477-78 (1920) (current version at 49 U.S.C. § 10903 (Supp. I 1995)).

17. In 1996, the ICC ceased to exist, and its duties were transferred to the Surface Transportation Board which is part of the Department of Transportation. ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 101-102, 109 Stat. 803, 804-852 (1995) (codified at 49 U.S.C. §§ 10101-11908 (Supp. I 1995)). For ease of reference, however, I will continue to refer to the ICC as the governing body.

18. *See generally* Dennis McKinney, *A Railroad Ran Through It*, *in* INDIANA CONTINUING

arguments that the railbeds have been abandoned, opposed abandonment of the local lines that ran through their land when the railroads tried to discontinue certain lines in order to maximize profits.

By the 1970s, the nation faced extensive losses in its rail system from abandonment and reversion of the corridors back to prior landowners. To help preserve these railroad corridors for possible future reactivation, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, which explicitly prescribed the preservation of "abandoned" railroad corridors for public uses.[19] This Act also authorized the ICC to delay finalizing abandonment proceedings unless the property had first been offered for sale for public purposes, including trail use.[20] However, because this Act provided little incentive to the railroads to work with public groups trying to save the corridors, and because the administrative procedures proved cumbersome to local trail advocates and governmental entities like parks departments and natural resources boards, Congress gave the ICC the power to enforce a sale under reasonable terms.[21] The National Trails System Act (NTSA) Amendments of 1983[22] further allowed the ICC to deny abandonment authorization to railroads and issue certificates of interim trail use that would forestall the application of state law property rights. In particular, the NTSA provides that "in the case of interim use of any established railroad rights-of-way . . . if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[23] The effect of the NTSA is to preempt application of state property laws that would otherwise determine property interests in railroad corridors upon abandonment of rail services.

In most states, including Indiana, abandonment triggers a state law analysis wherein corridors owned as easements, rights-of-way, or reversionary future interests determine, and the land reverts to the original grantor's successors in interest or the adjoining property owners, and corridors owned by the railroads in fee simple are deemed fully transferable by the railroads.[24] This leads to a messy and often difficult analysis of the language of nineteenth-century deeds, grantors' intent, and state legislation regarding trail conversions and rail abandonment.

LEGAL EDUCATION FORUM, STAYING ON THE CUTTING EDGE: THIRD ANNUAL REAL ESTATE SYMPOSIUM, (1995); Samuel H. Morgan, *Rails to Trails: On the Right Track*, 8 PROB. & PROP. 10, (1994); Steven R. Wild, *A History of Railroad Abandonments,* 23 TRANSP. L. J. 1 (1995).

19. Pub. L. No. 94-210, § 802, 90 Stat. 31, 127-30 (current version at 49 U.S.C. § 10905 (Supp. I 1995)).

20. *Id.*

21. *See* 49 U.S.C. § 10907(b)(1) (Supp. I 1995). The ICC could only force a sale to an entity that planned to continue offering rail services. It could not force a sale for a trail conversion.

22. Pub. L. No. 98-11, §§ 201-207, 97 Stat. 42, 42-50 (codified as amended at 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995)).

23. 16 U.S.C. § 1247(d) (Supp. I 1995).

24. Under certain circumstances the reversionary interest holder may be someone other than the adjoining property owner.

Hence, it is important for trail organizers to negotiate with the railroads before an ICC abandonment certificate has been granted; otherwise, the federal preemptive powers of the NTSA may be inapplicable, and title will become purely a question of state law. That appears to be the situation in a number of Indiana cases.[25] But even if a line has been abandoned and the deeds are ambiguous, Indiana law supports the premise that the ambiguities should be interpreted in favor of the railroads and the trail conversions for a variety of legal and policy reasons.

II. ABANDONMENT OF RAIL SERVICE

The first determination to be made is whether or not a railroad has abandoned its line. After 1920 the clearest evidence of abandonment is a certificate of abandonment issued by the ICC. This certificate authorizes discontinuation of services and the removal of track. Prior to 1983, a certificate of abandonment was construed under most states' laws to divest the railroad of any easements or rights-of-way that were not fee simple interests.[26] Under the NTSA, an abandonment certificate could include an interim trail use provision which would allow discontinuation of railroad services but would not constitute abandonment for state reversionary purposes. This Notice of Interim Trail Use (NITU) provides for a 180-day stay during which trail advocates can negotiate sales of the corridor directly with the railroad. If no negotiation has occurred by the end of the 180 days and no extension has been requested, the interim trail use certificate automatically converts into a certificate of abandonment. But if a sale has occurred, under the NTSA, such interim use will not be considered abandonment and state property laws will not be triggered.[27]

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25. *See* Fritsch v. ICC, 59 F.3d 248, 313 (D.C. Cir. 1995); Victor Oolitic Stone Co., Inc. v. CSX Transp., Inc., 852 F. Supp. 721 (S.D. Ind. 1994); Tazian v. Cline, 673 N.E.2d 485 (Ind. Ct. App. 1996); Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997); CSX Transp., Inc. v. Clark, 646 N.E.2d 1003 (Ind. Ct. App. 1995); Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment).

26. For example, in Pennsylvania, there can be no abandonment of property rights until the ICC (or now the STB) formally authorizes abandonment. Palm Corp. v. Pennsylvania Dep't of Transp., 688 A.2d 251, 253 n.7 (Pa. Commw. Ct. 1997); Quarry Office Park Assocs. v. Philadelphia Elec. Co., 576 A.2d 358, 363 (Pa. Super. 1990) (issuance of ICC certificate only evidence of abandonment). *See also* Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543, 548 (Minn. 1983) (issuance of ICC certificate does not necessarily indicate an intention to abandon). *See also infra* notes 39-45 and accompanying text for a discussion concerning whether ICC power to regulate abandonment pertains to railroad services only, or to those services *and* underlying property rights.

27. Although the ICC has formulated a nice procedure for authorizing railroad conversions to trails, few of us know when railroads are about to seek abandonment certificates, can locate adequate money and legal resources on short notice in order to purchase many miles of corridor land and do not have a governmental infrastructure capable of developing a rails-to-trails plan

A number of important cases have dealt with the NTSA and the ICC's plenary powers over abandonment. In the most important, *Preseault v. ICC*,[28] the Supreme Court ruled that Congress did have adequate powers under the Commerce Clause to deem "interim trail use to be like discontinuance rather than abandonment."[29] The Court noted that Congress intended "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."[30] This intent passed the rational basis test for activities that affect interstate commerce. Hence, the preemption of state law reversionary rights, in the context of railbanking and interim trail use, was deemed a valid exercise of Congressional power and therefore superior to any state law. The Preseaults also claimed that the federal preemption of their reversionary interests constituted a taking, but the Supreme Court noted that a takings claim was premature and referred the Preseaults to a Tucker Act remedy in the Court of Claims.[31]

But despite well-laid plans, the 180-day negotiation period can prove too short given the needs of trail organizers to locate funds, contact railroad authorities, and perhaps engage in public meetings and referendums.[32] In a blow to Indiana trail organizers, negotiations between CSX and the Monroe County Parks and Recreation Department (MCPRD) were frustrated by a strict interpretation of the ICC's abandonment powers. In *Fritsch v. ICC*,[33] CSX filed a Notice of Exemption seeking authorization in late January, 1993, to abandon a rail line that it had operated between Bloomington and Bedford. The rail line had been out of service since 1987, but the railroad did not request an abandonment certificate until 1993.[34] Seven days later the MCPRD filed a request with the ICC for a

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within the time limit of 180 days set by the ICC. As a result, many lines have been abandoned for years that are only now being considered for possible trail conversion. In such a case, trail organizers must rely on state law doctrines to determine the property rights of the different parties. Fortunately, in 1995 the Indiana General Assembly established a Transportation Corridor Planning Board. One of its duties is to keep track of these potential corridors and notify interested parties when abandonment proceedings have been filed. *See* IND. CODE §§ 8-4.5-2-1 to -10 (Supp. 1996).

28. 494 U.S. 1 (1990).

29. *Id.* at 8.

30. *Id.* at 18 (citing H.R. REP. NO. 98-28, at 8 (1983) *reprinted in* 1983 U.S.C.C.A.N. 112, 119. S. REP. NO. 98-1, at 9 (1983)).

31. *See* Preseault v. United States, 27 Fed. Cl. 69 (1992), *rev'd en banc,* 100 F.3d 1525 (Fed. Cir. 1996).

32. In a case that took two years of negotiations between railroad authorities and trail advocates to reach an agreement, the Ninth Circuit apparently did not question the delays in negotiation or in the conversion of the interim trail use certificate into one for abandonment when it dismissed the reversionary property claimants' suit in *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940 (9th Cir. 1996). *See also* Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997) (discussing legality of ICC extensions on the 180-day negotiations period).

33. 59 F.3d 248 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996).

34. This seems to be a common protocol for many of these railroads. They may have

public use condition. Fourteen days after that the ICC issued a notice of exemption authorizing abandonment that would be effective thirty days later, noting that "[e]nvironmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision."[35] Seventeen days later, CSX requested additional time to negotiate a trails-use agreement, but on March 16 it changed its mind and informed the ICC that it had decided not to agree to a conversion. The thirty days were now up, and two days later, on March 18, the Commission issued a decision permitting the abandonment, but imposing a public use condition under 49 U.S.C. § 10905. The next day CSX notified the ICC by letter that it had "abandoned" the line. Nearly six months later the MCPRD wrote to the ICC that it had reached an agreement with CSX to acquire a portion of the rail corridor for trail use. CSX confirmed MCPRD's position on the day the public use condition expired and asked the ICC to issue a Notice of Interim Trail Use (NITU). The ICC issued an NITU imposing the interim trail use condition. One month later the petitioners, adjacent landowners, filed suit claiming that CSX had abandoned on March 19, 1993, that the ICC therefore had no jurisdiction to impose trail use conditions, and that the corridor easements were extinguished.[36]

The D.C. Circuit ruled that once full abandonment had occurred, the ICC could not later impose a trail use condition. Abandonment, it ruled, "is a question of the carrier's intent."[37] Because the ICC had issued an abandonment certificate on March 18 and CSX manifested its intent to abandon by letter on March 19, the court ruled that the 180-day stay was inconsistent with official abandonment which terminated the ICC's jurisdiction to impose the trail use condition. What makes this case problematic is the court's narrow distinction between a 180-day condition imposed on abandonment (meaning abandonment would occur after the 180 days) which was fully within the powers contemplated by 49 U.S.C. § 10905, and a 180-day stay as part of abandonment or post abandonment. For at that magical moment of abandonment, the ICC's power to enforce the 180-day stay and the NITU had ceased.

This distinction is particularly troubling in light of the court's reliance on intent as the crux of abandonment. CSX's letter on March 19, 1993, stating it had abandoned the line became the focal point for the court. The other indicia of

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discontinued services many years before applying for an ICC certificate. Such behavior raises questions about which factors the courts should consider in determining abandonment. *See infra* notes 133-45 and accompanying text.

35. *Fritsch*, 59 F.3d at 250.

36. The adjacent landowners had sued CSX to quiet title to the corridor in themselves, slander of title, and injunctive relief based on a taking of private property. The court dismissed the suit on the grounds that the ICC abandonment certificate and notice of interim trail use precluded counts one and two, and that under *Preseault*, their property interest was too speculative for consideration of their constitutional claim. Victor Oolitic Stone Co. v. CSX Transp., Inc., 852 F. Supp. 721 (S.D. Ind. 1994).

37. *Fritsch*, 59 F.3d at 253. *See also* Birt v. Surface Transp. Bd., 98 F.3d 644 (D.C. Cir. 1996) (ruling, under nearly identical facts, against a finding of abandonment).

abandonment, stopping service and removal of track and signal lines and poles, occurred both before and after that date. Thus, to fix March 19 as the irrevocable date of abandonment for a process that can take months and even years, will ultimately frustrate the congressional goals of railbanking and trail use, and create a rule that draws a questionable distinction between the power to impose conditions before abandonment and the power to impose conditions as a part of the abandonment. The latter, according to the court, is inconsistent with the termination of jurisdiction implicated by abandonment proceedings.

The reasoning in *Fritsch* was questioned in two later cases dealing with the dual nature of abandonment: receipt of an abandonment certificate and what has come to be called "consummation" of abandonment. The latter is seen as an independent analysis of the railroad's intent to abandon, which is gleaned from such independent evidence as: "cessation of operations, cancellation of tariffs, salvage of the track and track materials, and *relinquishment of control over the right-of-way.*"[38] The *Birt* court reasoned that on-going negotiations with a trail-use group evinced a clear intent not to abandon, despite written letters referring to the railroad's actions as "abandonment."[39]

Although state property laws often refer to ICC abandonment for reversionary property interests, there are really two distinct processes going on.[40] Arguably, the ICC's interest in abandonment is purely a question of discontinuing railroad services.[41] This is evidenced by the ICC's determination being premised on a balancing of the public convenience and necessity with the needs of interstate commerce. Thus, it is essentially a "public interest evaluation."[42] Under common law easement and property doctrines, non-use of an easement will only extinguish the easement if there is an additional showing of "intent to abandon" the property interest.[43] One of my arguments later in this Article draws on the distinction between abandonment of service through ICC procedures and abandonment of the underlying property interest. I would suggest that courts be more sensitive to this distinction by recognizing that an ICC certificate of abandonment should be only one factor to consider in determining whether the railroad's underlying property rights have also been abandoned.[44]

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38. *Birt*, 90 F.3d at 585. (emphasis added). There is, arguably, a potential Catch-22 if abandonment per federal law is premised on termination of state property rights, and state property rights are premised on federal abandonment. One thing seems relatively clear: without ICC abandonment there can be no state law abandonment, but ICC abandonment does not necessarily constitute state law abandonment.

39. *See also* Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996).

40. *See* Barney v. Burlington N. R.R., 490 N.W.2d 726, 731 (S.D. 1992) (distinguishing abandonment for ICC purposes and abandonment in general).

41. *See id.*

42. Wild, *supra* note 18, at 8.

43. *See* CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 8.12, at 465 (2d ed. 1993).

44. On December 24, 1996, the Surface Transportation Board (STB) issued amendments to the Rules and Regulations governing abandonment and discontinuance of rail lines, effective January 23, 1997. 49 C.F.R. §§ 1152.1-1152.60 (1997). These new rules do not materially alter

After *Fritsch*, it is important that railroads and trail advocates distinguish between three separate legal acts: an intent to discontinue service or relieve itself of liability for taxes or other duties, official abandonment as granted by the ICC, and intent to abandon the property interests under state law. The *Fritsch* court did acknowledge the power of the ICC to condition an abandonment certificate on a 180-day negotiations period so long as the railroad is participating in the negotiations. Unfortunately, the courts, the railroads, and the ICC have not made a clear distinction between a railroad discontinuing service and selling its corridor, which constitutes abandonment by the railroad and relief of its liabilities and duties, and the NTSA's preemption and redefinition of that action as discontinuance so as not to trigger state reversionary laws.[45] Both are a discontinuance of railroad service, but one is labeled abandonment and the other a discontinuance for preempting state property laws.[46] It is not entirely clear that the ICC's abandonment procedure, which principally governs railroad services, should be a determinant under state law for termination of property rights.

But after a clear finding of abandonment, as in the CSX corridor, is the trail

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abandonment and discontinuance procedures and power except in the following ways: The department now requires that a railroad submit a "Notice of Consummation" within one year of receipt of their certificate of abandonment, or the certificate expires, and the authority to abandon ceases. *Id.* § 1152.29 (e)(2). This new requirement is an attempt to reconcile *Fritsch* with the cases that have distinguished it. The Board wishes to prevent the confusion that arose in *Fritsch* where the issue of consummation of abandonment turned on a variety of factors and actions evidencing intent to abandon. As the Board noted: "The courts . . . have expressly declined to read *Fritsch* as holding that abandonment is necessarily triggered upon a showing of any single piece of evidence indicative of an intent to abandon." 61 Fed. Reg. 67879-80 (1996). *See Grantwood Village*, 95 F.3d at 659 (8th Cir. 1996); Consolidated Rail Corp. v. Surface Transp. Bd., 93 F.3d 793, 799 (D.C. Cir. 1996); *Birt*, 90 F.3d at 588 (D.C. Cir. 1996). "Moreover, the court in *Fritsch* essentially viewed the railroad's letters to the ICC . . . as conclusive evidence that abandonment had been consummated . . . . Thus, our adoption of a notice of consummation requirement here will codify that portion of the court's ruling in *Fritsch* and prevent similar disputes from arising in the future." 61 Fed. Reg. 67879-80 (1996). The effect of this change is to condition abandonment on two events: issuance of a certificate and consummation within one year. If consummation does not occur, the certificate expires, and the STB's authority to regulate is reinstated. The Rules also extend the time for filing public use requests from 30 days to 45 days. 49 C.F.R. § 1152.26(a).

45. Whether the corridor reverts or is converted to a trail, the railroad's actions and intent are the same—to discontinue service and give up all interests in the corridor. But whether that action is deemed a discontinuance or an abandonment is a function of federal law. Thus, it makes no sense in light of the NTSA and the ICC's plenary powers to use the railroad's intent as the criterion for invoking federal preemptive powers.

46. It is especially problematic that the *Fritsch* court focused on the timing of the ICC's abandonment/discontinuance determinations rather than the substantive power to label the same activity either one or the other. Because the railroad's underlying activity is the same, and the ICC clearly has the power to label that activity as an abandonment or a discontinuance, the ICC should arguably have the power to change the label within a reasonable time period, i.e., the statutory 180-day period.

dead? No. As mentioned above, if the ICC grants an interim trail use certificate in place of a certificate of abandonment, the railroad may sell whatever property rights it had in the rail corridor to a trail group, governmental entity, or parks department with no reference to state law.[47] However, if ICC abandonment has already occurred, either through prior ICC action or delays and errors in ICC application procedures, one must turn to analysis under state property law to determine what legal significance will be given to the federal abandonment certificate. Some states provide legislative definitions of abandonment for property rights purposes that might include removal of track, discontinuance of services, failure to pay real estate taxes, sale of property rights, or a combination of the above. Or, in the absence of legislation, the common law definition of abandonment will be applied, generally the railroad's "intent to abandon."[48]

In 1995, the Indiana Legislature passed a comprehensive statute to regulate the property rights associated with railroad abandonments.[49] The legislation defines abandonment (after 1920) as: 1) an ICC certificate of abandonment *and*, 2) either the removal of rails, switches, ties, and other facilities, *or* ten years since issuance of the ICC certificate of abandonment.[50] The statute also provides that a railroad right-of-way will not be considered abandoned if the ICC imposes on it a trail use condition.[51] In the *Fritsch* case, therefore, CSX and the trail advocates could argue that despite the ICC's issuance of a certificate of abandonment, the railroad corridor was not abandoned under Indiana state law until removal of the tracks, rails, switches, and other facilities because CSX had not fully manifested its intent to abandon. Until abandonment under Indiana law, CSX could transfer its rights and interests in the corridor without triggering any state property rights.[52]

In sum, if there has been no abandonment by a railroad under state property law, the railroad can lease or sell whatever rights it has in the corridor regardless of the interests of adjoining landowners. Because the reversionary rights are triggered only upon abandonment, and an official definition of abandonment exists, only those actions that meet the definition of abandonment will suffice to trigger the state property law. One principal consideration in whether or not a railroad has abandoned is whether it has continued to pay property taxes for the

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47. *See* 49 C.F.R. § 1152.29; Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543 (Minn. 1983).

48. New York, for example, has created statutory rules for determining abandonment. *See* N.Y. TRANSP. LAW § 18(2) (McKinney 1993).

49. IND. CODE § 32-5-12-1 to -15 (Supp. 1996) (replacing IND. CODE § 8-4-35-4 (1993) (repealed 1995)).

50. *Id.* § 32-5-12-6 (a)(2). The statute does not explain what happens if a railroad has an ICC certificate of abandonment but has left its tracks in place. Its status during those 10 years would presumably preclude a finding of abandonment and hence stay any reversionary property interests.

51. *Id.* § 32-5-12-7.

52. To date, there has been no judicial interpretation of this state railbanking statute or the abandonment definition, but it appears to provide a stricter definition of abandonment than mere intent to abandon or an ICC certificate.

corridors in question. In many cases, the railroads continue to pay taxes even after discontinuing rail services so as to retain whatever property interests they may have to the underlying land.[53] But if abandonment has occurred, then federal preemptive power to postpone state property law provisions ends, and we must then undertake an analysis of the respective property rights pursuant to state law.

III. Title Under State Property Law

The second issue to be resolved is the nature of the railroad's title to the land under its tracks, which, in Indiana, is purely a matter of state law. The law in Indiana is quite clear that where the railroad owns fee simple title to the land, abandonment of rail services has no effect on its property rights, which it may convey to trail groups or governmental entities without consideration for the wishes of adjoining property owners property owners. If, however, the railroad only owns an easement or right-of-way to the land, then abandonment of rail service *may* extinguish the easement.[54] Unfortunately, many of the parties involved in these railroad conversion cases have occluded the relatively simple property analysis because of a general dislike for the often arcane and seemingly complex rules of future interests. So let me explain the three-step process that must be undertaken to determine who has title to the corridor property following a discontinuation of service by the railroad.

We must first determine what kind of property interest the railroad originally acquired either by deed or by an instrument of appropriation. To do so, we look first to the intentions of the grantors, who had three possible types of interest they could convey to the railroads. The first is a fee simple absolute; the second is a defeasible fee (with a reversion or right of reentry to the grantor upon the happening of an enumerated condition), and the third is an easement. If the deed is ambiguous, we must interpret the deed by applying certain straightforward rules of construction, which entails a judicial determination that the railroad's interest falls into one of these three categories. If the deed is clear and unambiguous, we can easily identify the nature of the railroad's interest and move on to the second step. Thus, we must first determine the railroad's interest, which will, ipso facto, fall into one of these three categories.

The second step, once we know the railroad's property right, is to determine who *now* holds that right. Presumably, a successor railroad or a trail group will have acquired the railroad's interests through a series of easily traced quitclaim deeds. Additionally, we must determine at this stage who *now* holds the property interests of the original grantor. As I discuss below, however, it is not always clear

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53. It is often difficult to tell exactly who is paying the property taxes because the railroads are taxed on the basis of their statewide services and their assessments are not divided up according to each separate piece of property. Payment of taxes by a railroad should militate strongly against a finding of abandonment as far as state law is concerned.

54. For a thorough analysis of the different states' approaches to interpreting ambiguous railroad deeds, see Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3D 973 (1966 & Supp. 1996) and cases cited *supra* note 8.

who owns all the different interests originally held by the grantor.

And the third step, once we have determined the interests of all parties to the corridor land, is to determine what effect, if any, occurs from the railroad's discontinuation of services, abandonment certificate, or consummation of abandonment under state law. We reach this third analysis *only* if the first analysis tells us that the railroad's interest was a mere easement. If it was a fee simple or a defeasible fee, we can stop with step two, and the trail conversion may continue unimpeded by claims of adjacent landowners.

1. Step One: What Is the Railroad's Original Interest?—In determining the railroad's interest, there are four types of deeds we might encounter: clear grants of a fee simple absolute, a defeasible fee, an easement, or an ambiguous deed that will be determined to fall into one of these three categories. I will discuss all four and the kinds of language we are likely to encounter, along with the relevant rules of construction to aid us in interpreting which kind of grant was most likely the intention of the grantor.

The first deed is a clear grant of a fee simple absolute. Fee simple absolute is the most complete and comprehensive right to a piece of real estate that is recognized under our law. Fee simple includes all rights to use, limit, or alienate the property consistent with the laws of nuisance, zoning, and alienation. In that case, the deed would use standard language in the granting clause ("convey and warrant") with perhaps other clear indications that a fee simple was intended by such terms as: "granted in fee simple," "to the railroad forever," "with no limitations," and so forth. Also, there would be no confusing limitations in the habendum clause, like "railroad use only" or "right-of-way." Such was the situation in *Tazian v. Cline*,[55] in which the court found that an 1873 deed to the Fort Wayne Railroad Co. conveyed a fee simple. The deed stated:

> said parties of the first part, in consideration of five hundred dollars, . . . do grant and convey and warrant to the party of the second part . . . a strip of land fifty feet in width on West side of railroad over, across, and through the following described tract of land . . . forever for the uses and purposes therein expressed.[56]

The Tazians contended that the phrase, "for the uses and purposes therein expressed" constituted a limitation which should be read as analogous to the term right-of-way which would imply that the conveyance was of an easement only. The court of appeals disagreed, citing the rule of *Claridge v. Phelps*[57] that "when the granting clause of a deed is general or indefinite respecting the estate in the lands conveyed, it may be defined, qualified, and controlled by the habendum."[58] But, if the granting clause is not ambiguous, then the habendum clause does not defeat the grant. In *Tazian*, the court's reluctance to give any credence to the

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55. 673 N.E.2d 485 (Ind. Ct. App. 1996). *See also* Sowers v. Illinois Cent. Gulf R.R., 503 N.E.2d 1082 (Ill. App. Ct. 1987) (holding similar deed to convey a fee simple).

56. *Tazian*, 673 N.E.2d at 487.

57. 11 N.E.2d 503 (Ind. App. 1937).

58. *Id.* at 504.

limitation in the habendum clause comports with general rules of construction that hold that the presumption against forfeitures leads to nullification of ambiguous limitations that are not accompanied by clear terms of reversion or transfer if the limitation is violated.[59] In any event, where a railroad owns a fee simple interest in the railbed land, it may convey or lease it without notice or consideration to adjoining landowners, and subject only to general laws on nuisance and zoning.

The second type of deed one may encounter grants what is called a defeasible fee.[60] A defeasible fee is fee simple title that carries with it a limitation or a condition on the land's use, a violation of which results in reversion of the land back to the grantor or a right of reentry. A defeasible fee is generally used when grantors convey property for specific, enumerated purposes. But before a court will find that a deed conveyed a defeasible fee, the deed must use explicit language spelling out the conditions or limitations on the use *and* what would occur in the event of a violation. Thus, a clear grant of a defeasible fee would use the same language in the granting clause of a fee simple absolute, such as "convey and warrant" or "granted in fee simple." But in the habendum clause would appear clear language of limitation and reverter. For instance, it would "convey and warrant" a said piece of property, "for railroad purposes only" or "only so long as a railroad operates on the land." And it would explain what might happen when railroad service ceases: "If the railroad ceases operations, the land will revert back to me" or "If the land is no longer used for railway purposes, it will be deemed to have been abandoned, and the grantor, or his heirs, will have a right to re-enter and take back the land." A defeasible fee was clearly conveyed in *Bruch v. Centerview Community Church, Inc.*,[61] by a deed that stated: "[grantors] convey and warrant to [grantees] as long as used for church purposes, when not used as church purposes said property reverts back to [grantors]."[62]

There is a standard rule of property law that provides for a presumption against forfeitures. Because it can be very disruptive when well-established property interests are canceled or forfeited, courts require that any conditions and limitations on the use be clear and explicit and that the conveyance clearly spell out where the land goes in case of forfeiture. Thus, if the railroad acquires a defeasible fee, the original grantor will retain what is called a possibility of

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59. *See* Idaho v. Hodel, 814 F.2d 1288, 1292 (9th Cir. 1987) ("[Forfeiture] provisions are construed liberally in favor of the holder of the estate, and a construction which avoids forfeiture must be adopted if at all possible."); Wood v. Board of County Comm'rs, 759 P.2d 1250 (Wyo. 1988). The Indiana Supreme Court in *Lewellen* violated this principle. In *Lewellen*, the deed recited a conveyance of land. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV-368, 1997 WL 335018, at *1-2 (Ind. June 19, 1997). The court read that provision right out of the deed.

60. *See generally* CUNNINGHAM ET AL., *supra* note 43, § 2.3.

61. 379 N.E.2d 508 (Ind. App. 1978).

62. *Id.* at 509. *See also* City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160, 168 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (fee simple absolute not defeated by a clause declaring the purpose especially where the purpose will not inure to benefit of the grantor but rather to the public); McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985) (finding a railroad deed conveyed a fee simple subject to executory limitation that was extinguished by statute).

reverter which is a future interest in the land. However, all states, including Indiana, have Marketable Title Acts[63] that extinguish these contingent future interests if they are not periodically recorded. In Indiana, reversionary interests are extinguished after fifty years if they are not kept alive by recording at the county courthouse, and the defeasible fee is converted into a fee simple absolute. Hence, any deed conveying a defeasible fee to the railroad will most likely be converted into a fee simple absolute by operation of law if the original grantor, or his successors, did not record their future reversionary interest.

The third type of deed one might encounter is a clear, unambiguous grant of an easement or a mere right of use over the land in question. An easement is generally created by using different language in the granting clause, such as "grant," "release," or "reserve" and explicitly describing the interest in the habendum clause as an "easement" or a "right-of-way." This was the situation in a number of recent Indiana cases. In *Richard S. Brunt Trust v. Plantz*,[64] the court interpreted the following deed to convey an easement only: "I, ___, do hereby release and quitclaim to ___ . . .the right of way, for railroad purposes only, for such railroad described as follows, to wit: . . . ."[65] In *Lake County Trust Co. v. Lane*,[66] the court interpreted the following deed to convey an easement only: "various parties quit claim deeds conveying to said _____, in trust for such railroad company or companies . . . a right of way for such a railroad as in each of said quit claim deeds is specifically described."[67] In *Ritz v. Indiana & Ohio R.R.*,[68] the court found the following deed to clearly convey an easement only: "That the said party of the first part in Consideration . . . of the Sum of One Dollar . . . does hereby consent that said party of the Second part (illegible) occupy, and use forever for Railroad purposes so much of the Real and Personal property . . . with its Rights of Way, . . . as lies between the following points. . . ."[69] The courts had no difficulty finding these deeds to convey an easement because the language in the granting clause clearly indicated conveyance of a right only, not the land outright.[70] And where the granting clause did not contradict the limitations of the habendum clause, the interpretation of the deed was fairly straightforward.

Difficulties arise when deeds contain a combination of these elements such that it is unclear exactly what was intended from the language of the deed. This can occur, for example, when the granting clause uses the language of a fee simple but the right is referred to in the habendum clause as an easement. It can also occur when the language is so informal or inaccurate that it is difficult to identify

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63. IND. CODE § 32-1-5-4 (1993). *See also id.* §§ 32-1-5-1 to -10 (1993 & Supp. 1996).

64. 458 N.E.2d 251 (Ind. Ct. App. 1983).

65. *Id.* at 252-53.

66. 478 N.E.2d 684 (Ind. Ct. App. 1985).

67. *Id.* at 685.

68. 632 N.E.2d 769 (Ind. Ct. App. 1994).

69. *Id.* at 773.

70. This is to be contrasted with the deed at issue in *Consolidated Rail Corp. v. Lewellen*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997), where the granting clause referred to land. *See infra* Part IV.

which section is the granting clause and which the habendum clause. In *Brown v. Penn Central Corp.*,[71] the deed specified "[t]hat [the grantors] do give, grant, bargain, sell and convey . . . the right of way for the use of the Railroad."[72] This deed was found by the court of appeals to be ambiguous because it purported to convey both the strip of land and a right-of-way. The Indiana Supreme Court reversed, finding that it conveyed only a right-of-way. The presence of both fee simple and easement language forced the courts to look beyond the terms themselves to resolve the ambiguity.

How the courts decide whether a deed is ambiguous and, if so, whether to construe it as a fee simple, a defeasible fee, or an easement, depends on applying a series of rules of construction and making educated guesses about the application and outcome of those rules. In an attempt to explain some of these rules, I will begin with the most important and offer some examples that Indiana courts have faced in recent years.

The first rule is that we must try to ascertain the intention of the grantor. If that intention is evident from the specific language of the deed, then we need look no further. But if the deed is unclear, there are two generally-accepted rules for where to look next. The first is to look at other sources indicating what the grantor believed he had given away.[73] Thus, a later will, in which the grantor devised his remaining property, which he described as a fee simple with no mention of the railroad's land would indicate that he believed he had given the railroad the strip of land in fee. Because he did not include any mention of the railroad's strip in a later conveyance of his remaining land, he presumably did not believe he retained any rights in that strip. Similarly, if the grantor later executed a warranty deed for his remaining land and did not include a description of the railroad's strip, he presumably did not believe he had retained any rights in that strip. On the other hand, if the grantor later executed a quitclaim deed in which he conveyed all of his rights and interests in his remaining land and in the railroad's strip, it would be reasonable to assume that he believed he had retained either a reversionary interest in that strip or had granted only an easement. Thus, the next place to look is at subsequent conveyances of the grantor's remaining land.[74]

The second rule for ascertaining the grantor's intent is the presumption against forfeitures. This presumption, which has been codified in some states, holds that every conveyance of real estate shall pass all the estate of the grantor unless the

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71. 510 N.E.2d 641 (Ind. 1987).

72. *Id.* at 643.

73. *See, e.g.*, City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (in which court looks to several subsequent documents executed by the grantor as evidence that the grantor conveyed fee simple absolute to the railroad).

74. This may not be conclusive, however, for she might choose to convey all of her land except her rights in the railroad's strip, in which case she could retain a reversionary interest that might devolve on her heirs rather than on the adjoining landowner in case the railroad's interests are extinguished. *See* C.J.S. *Deeds* § 93 (1956 & Supp. 1996); King County v. Squire Inv. Co., 801 P.2d 1022 (Wash. Ct. App. 1991) (grantor's successor retained reversionary interest, not abutting landowner).

intent to pass a lesser estate appears clearly, or is necessarily implied, from the terms of the conveyance.[75] The policy reason behind this presumption is to promote the marketability of estates of land as fully and completely as possible and to prevent the disruptions that occur from changes in ownership due to the termination of lesser interests. Hence, where the goal is to protect the reasonable expectations of the parties and their settled interests, courts will look long and hard before they work a forfeiture or termination that results in a change in ownership. At this first stage, therefore, we can see a presumption in favor of fee simple unless limitations are expressly and clearly evident on the face of the deed.

If the grantor's intent is still not evident from the above-described tests, courts also look to such extrinsic evidence as the amount of money paid by the railroad[76] or statutes restricting the kinds of interests the railroads may acquire under eminent domain. These statutes provide a backdrop for understanding the kinds of property interests that the parties reasonably believed were up for negotiation. Although the 1905 Condemnation Act prohibited the railroads from acquiring fee simple title by condemnation, it did not prevent them from purchasing fee simple title directly from the landowners.[77] Other documents or circumstances surrounding the original grant, may also clarify the grantor's intent.

Also, under section 32-1-2-12 of the Indiana Code, deed language that uses terms customarily associated with fee simples, will pass a fee simple regardless of conflicting language in the habendum clause. The statute reads: "any conveyance of lands worded in substance as . . .'A.B. conveys and warrants to C.D.' . . . shall be deemed and held to be a conveyance in fee simple."[78] As is consistent with general rules of construction, only if the granting clause is indefinite will courts look to the habendum clause for help in defining the interest being conveyed.[79] Thus, if the granting clause is clear and specific, it controls without reference to any confusing or conflicting limitations in the habendum clause.

The Indiana Supreme Court has addressed a number of these rules of construction in relation to railroad deeds in its influential opinion in *Ross, Inc. v. Legler.*[80] First, the parties must prevail only on the strength of their own title, not on weaknesses of their opponents' title.[81] Second, construction of the deeds must

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75. *See, e.g.*, WYO. STAT. ANN. § 34-2-101 (Supp. 1996).

76. *See* Tazian v. Cline, 673 N.E.2d 485 (Ind. Ct. App. 1996). *See also supra* note 11. It is also important to remember that the consideration recited in the deed may not reflect what was actually paid.

77. *Cf.* McKinley v. Waterloo R.R., 368 N.W.2d 131, 135 (Iowa 1985) (distinguishing conveyances governed by statute and those governed by private agreement as expressed in a deed); Brown v. Washington, 924 P.2d 908 (Wash. 1996) (giving thorough analysis of deed construction in light of eminent domain statute).

78. IND. CODE § 32-1-2-12 (1993).

79. *See* 4 HERBERT THORNDIKE TIFFANY, TIFFANY ON REAL PROPERTY § 980 (3d ed. (1939)). "The habendum and subsequent covenants may modify, limit and explain the grant, but they cannot defeat it when it is expressed in clear, unambiguous language." *Id.*

80. 199 N.E.2d 346 (Ind. 1964).

81. This has long been the law in Indiana. *See* Grigsby v. Akin, 28 N.E. 180, 181 (Ind.

encompass every part of the deed, not just a part. Third, deeds should be construed so that no part will be rejected. Fourth, public policy does not favor the conveyance of strips of land by fee simple titles because alienation from the parent bodies of land would create otherwise unusable strips of land. However, this fourth rule should be read in light of the court's footnote that "a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way."[82]

Unfortunately, the *Ross* court held that a railroad deed, "when the interest conveyed is *defined or described* as a 'right of way,' conveys only an easement in which title reverts to the grantor . . . upon the abandonment of such right-of-way."[83] The court held that the deeds at issue in that case transferred only an easement because each deed expressly described the conveyance as a right-of-way. This holding, which has been denominated the "*Ross* rule," was too broadly stated and has therefore been misapplied in some later cases. The issue, as cogently argued by the dissent in *Ross*, is that the rule the majority expressed is too general, that merely describing the land as a right-of-way does not necessarily convert it into one.[84] In *Ross,* the deeds used the term "conveyed" a parcel of land (with a description) in the granting clause, which was then followed by the sentence: "Said strip of right of way being located in the . . . [description]."[85]

The problem with *Ross* is that a description of a right-of-way in the habendum clause should not, under standard rules of deed construction, override a clear, unambiguous grant of a fee simple in the granting clause. This does not mean that use of the term right-of-way is irrelevant. The logical rule, and the rule that was most likely intended by the majority, is that where the deed is ambiguous *and* the granting clause is not specific, references to the interest being conveyed as a right-of-way gives rise to a presumption that an easement was intended. However, later

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1891). Amazingly, this cardinal rule of property law appears to have been neglected by the courts to date in resolving title disputes between the railroads and adjacent landowners. Without presenting evidence of a deed containing a description of the disputed corridor land, the adjacent landowners have no standing to challenge the railroads' title. *Id.* at 347 and cases cited therein.

82. *Id.* at 348 n.2.

83. *Id.* (emphasis added). However, the *Ross* court noted that the deed "expressly defined and described" the right as a right-of-way, which is more than a mere mention of the term.

84. *Ross*, 199 N.E.2d at 350-51. The *Ross* majority decision was questioned in *Phar-Crest Land Corp. v. Therber*, 242 N.E.2d 641, 642 (Ind. App. 1968) in which the court of appeals made the following comment: "It is the considered opinion of more than two members of this Court that the majority opinion of the Ross case, . . . is erroneous and that the dissenting opinion of the Ross case correctly states the law applicable to the factual situation now before us. Therefore, this cause is now transferred to the Supreme Court." Unfortunately, the supreme court declined to address the value of the *Ross* precedent and instead dispensed with the case on laches. Phar-Crest Land Corp. v. Therber, 244 N.E.2d 644 (Ind. 1969). The question remains, therefore, as to whether or not the *Ross* rule, that describing land as a right-of-way implies that only an easement was conveyed, will survive for long.

85. *Ross*, 199 N.E.2d at 351.

cases have misapplied the *Ross* language, even when the right-of-way language was the only term that was inconsistent with a clear grant of a fee simple.[86]

Apparently, the *Ross* majority believed that arguments about granting clauses and habendum clauses were an "overrefinement of the rules of construction."[87] This is particularly troubling, not just to property professors, but in light of the well-recognized dual meaning of the term "right-of-way." Where a legal term has two meanings, its use should not magically create an ambiguity.[88] The U.S. Supreme Court has noted that the term, "right-of-way," has two distinct meanings, thus presenting a possible ambiguity that precludes the creation of a strict rule: "the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."[89] In addition, the Indiana Supreme Court has recognized this distinction, a distinction between a legal right and the physical corridor of land, by citing nearly the same language the U. S. Supreme Court used in *Joy*.[90] Nonetheless, some attorneys have argued for a blind application of the *Ross* rule in which any mention of the term "right-of-way" in a deed converts the property right into an easement.[91] Such an interpretation is of questionable merit and

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86. *See* Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

87. *Ross*, 199 N.E.2d at 351.

88. The court's reasoning violates the basic rule of construction that the granting clause defines the property right being conveyed and takes precedence over ambiguous or non-explicit limitations in the habendum clause. As Cunningham, Stoebuck & Whitman explain in their influential property treatise: "For some reason, easements seem to evoke careless drafting. The instrument should say that the grantor or testator 'grants' 'an easement [or profit] for the purpose of' such and such to the grantee. One should avoid words of grant like 'convey and warrant' or 'quitclaim and convey,' which suggest estates in land. The thing conveyed should be described as an 'easement' or 'profit' or, if in doubt, a 'right to use' but never as a 'strip of land,' 'right of way,' or the like. These latter phrases are very suggestive of an estate and have caused terrible problems, especially in any number of railroad cases." CUNNINGHAM ET AL., *supra* note 43, § 8.3, at 442. In general, terms like "convey" and "warrant" that show up in the granting clause should be interpreted to convey a fee simple, regardless if the property is later "described" as a right-of-way.

89. Joy v. City of St. Louis, 138 U.S. 1, 44 (1890).

90. *See* Marion, B.&E. Traction Co. v. Simmons, 102 N.E. 132, 133 (Ind. 1913). Other courts have recognized the two meanings of right of way. *See* Brown v. State, 924 P.2d 908, 914 (Wash. 1996). Also, Black's Law Dictionary distinguishes between the two meanings of right-of-way as "a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it." BLACK'S LAW DICTIONARY 1326 (6th ed. 1990).

91. In *Ross*, the granting clause appeared to convey a fee, but the habendum clause described the interest as "[a]ll of that right of way." The court used the public policy of limiting railroad rights to easements to support its interpretation that the habendum clause limitation should determine the nature of the interest. On the other hand, in *Pumpkinvine*, the Elkhart Superior Court

should be avoided whenever possible.[92]

In early June 1997, the Indiana Supreme Court decided a related case that touched on some of these issues. *Hefty v. All Other Members of the Certified Settlement Class*[93] concerned two similar classes that were certified at different times by different courts. A settlement between U.S. Railroad Vest and all persons owning property adjacent to an abandoned Penn Central right-of-way in Indiana was challenged by a second identical class that sought to intervene in the first class negotiations and promulgation of settlement notices. The trial court held a hearing on the fairness of the settlement and issued an order and final judgment accepting the settlement proposal of the first class.[94] The second class appealed, but the court of appeals affirmed the trial court.[95] The supreme court reversed and clarified the standard of review to be applied by a trial court when reviewing a class action settlement, and to that extent the case is not relevant to the issues discussed here.

However, because the case concerned railroad title issues, and because likelihood of success on the merits is one factor to be considered in reviewing a class action settlement, the court briefly reiterated three principles that, it felt, had not been adequately attended to in the settlement hearing and the findings of the trial court. The court reiterated the general principle that ambiguous deeds should be construed against the drafters, which in most instances were the railroads.[96] The court also restated its position in *Brown v. Penn Central Corp.*,[97] that deeds purporting to convey rights are generally construed to pass only an easement and deeds conveying a "a strip, piece, or parcel of land," without limitation, are generally construed to pass an estate in fee.[98] The court then restated the confusing *Ross* rule that "reference to a right-of-way in such a conveyance

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ruled that a similar ambiguous deed conveyed a fee simple. That deed stated, "[A and B] Convey and Warrant to [C], in consideration of the sum of sixteen Hundred dollars, the following real estate . . .: A strip of land eighty (80) feet in width, ... This deed is made subject to . . . the right which the grantors hereby reserve of constructing and maintaining at their own expense two farm crossings, connecting the parts of their farm divided by said right of way, at such points as said grantors shall deem most convenient." *See* Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment). The *Pumpkinvine* court refused to interpret *Ross* to mean that any mention in a deed describing the land as a right-of-way suddenly converted the interest into an easement only. The court explicitly held that where the term right-of-way clearly means the strip of land and not the property right to use, the *Ross* rule does not apply.

92. *See id.*

93. Hefty v. All Other Members of the Certified Settlement Class, Nos. 61A05-9308-CV-290, 61S05-9507-CV-799, 1997 WL 287653 (Ind. June 2, 1997).

94. *Id.* at *2.

95. Hefty v. All Other Members of the Certified Settlement Class, 638 N.E.2d 1284, 1292 (Ind. Ct. App. 1994), *vacated*, 1997 WL 287653 (Ind. June 2, 1997).

96. *Hefty*, 1997 WL 287653 at *7.

97. 510 N.E.2d 641 (Ind. 1987).

98. *Hefty*, 1997 WL 287653 at *7.

generally leads to its construction as conveying only an easement."[99] Unfortunately, the age of the cases cited and the general assertion that the term, right-of-way, magically converts the right into an easement do not help clarify the problem that is facing the lower courts in these title cases. The term, right-of-way, clearly carries two meanings, which makes the *Ross* rule difficult to apply and open to misapplication. This is ironically illustrated by the title of this very case. The defendants are "All Other Members of the Certified Settlement Class, Namely, All Initially Noticed Persons Owning Real Property Adjacent to Railroad *Rights-of-Way* in the State of Indiana . . . ." If the definition of right-of-way as an easement was intended, then the class does not include any property owner adjacent to railroad parcels owned in fee simple. If the definition of right-of-way as the strip of land along which a railroad constructs its tracks was intended, the class might be all-inclusive (which was clearly the intention of the lawyers for the class) but it would subvert the principle articulated in the case that mention of the term leads to its construction as meaning only an easement.

Because the court did not have any specific deeds before it, and because the issue of this case was the standard of review in class actions and not railroad deed construction, the case does little more than perpetuate the confusion already created by these thirty-year-old cases. It is hoped, therefore, that the court will take the opportunity to address this issue explicitly in a case specifically on deed construction.

A final issue to be considered in interpreting ambiguous deeds is what, if any, public policy supports a presumption in favor of one construction over another? As we saw with the presumption against forfeitures, public policy supports grants in fee simple because they are more marketable. The *Ross* court, however, explained that public policy, as expressed in the 1905 Condemnation Act, supports a finding that the railroad took only an easement, not fee simple title. Thus, if we have gone through all of the above tests and have still been unable to ascertain whether a deed conveys a fee simple or an easement, we may need to consider the policy expressed in *Ross*. But there are two reasons why the *Ross* language should not be accepted blindly. The first is the footnote creating an exception for public uses. Clearly, all other things being equal, a deed construction that frustrates the *public* use exception must be contrary to *public* policy. And second, the reasons behind the easement presumption do not always support such a finding.

As the court explained:

> Public 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. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such

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99. *Id.* (citing L&G Realty & Constr. Co. v. City of Indianapolis, 139 N.E.2d 580 (Ind. App. 1957)).

> severance generally operates adversely to the normal and best use of all the property involved.[100]

But in the case of railbanking and trail conversions, the alienation of these strips of land is precisely necessary to the purpose for which the conveyances are made after abandonment of rail use. Remember, *Ross* was decided in 1964 when neither railbanking nor trail use was seen as a valuable use of these strips of land. The issue in *Ross* was whether it was better to find the railroad had fee simple so that the railroad's grantees would acquire the strip or to find the railroad had only an easement, in which case abandonment would allow the servient estate owner to reclaim use of the land. The situation envisioned in *Ross* is that a finding of fee simple for the railroads would lead to sales or reversions of small sections of the corridors to outside, disinterested parties. But that is not to be feared in the case of railbanking and trail conversions because the value of the property exists specifically in its being a long, narrow strip of land severed from its adjoining neighbors. Thus, even the public policy reasons behind the *Ross* easement presumption do not pertain thirty-three years later in light of modern railbanking and public trail needs.

Clearly, the *Ross* court did not imagine that it was creating a rule whereby any mention in a deed of a right-of-way proved per se that the parties only intended an easement, especially because the term right-of-way has two meanings, only one of which would act as a limitation. The *Ross* rule instead should be interpreted to mean that "express descriptions" of the *interest* (not the land) should be interpreted to convey an easement. But most importantly, the term right-of-way is not a synonym for the term easement. Where there exist two recognized and well-defined meanings of the term right-of-way, there is no reason to assume that use of the term in a deed automatically creates an ambiguity to which public policy and rules of construction should then be applied. Courts should first substitute each meaning into the deed language and adopt whichever meaning is most consistent with the language of the deed as a whole.

As should be apparent by now, interpreting ambiguous deeds is not a simple process. However, the common law has developed a number of interpretive aids which should allow the courts to reach the best decisions in most cases. And even when the deeds are still unclear, the presumption is clearly in favor of finding fee simple title in the railroads. This is because a finding of fee simple or a defeasible fee both support the presumption against forfeiture and the rule of the superiority of the granting clause. Additionally, the public policy reasons behind the *Ross* easement presumption are questionable and the *Ross* rule of construction is overbroad and has been called into question by the lower courts.

This does not mean, however, that all railroad deeds should be construed as fee simple absolutes. On the contrary, clear grants of easements and ambiguous grants that, in light of the foregoing rules of construction, are deemed to be easements must be subjected to the laws regarding extinguishment of easements. Nonetheless, once we have ascertained the railroad's interest in the corridor land,

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100. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).

we can proceed to the second stage, identifying the current interests of the different parties.

2. Step Two: Who Now Holds the Original Grantor's and Grantee's Interests?—Once we know what interests in the corridor land the grantor conveyed to the railroad, we also know what rights, if any, the grantor retained in that land. The railroads appear to have kept good records of their conveyances to successive railroads so that any deviation between the interest the original railroad acquired and the interests now owned by a current railroad or its successor should be traceable. If the railroad received either a fee simple or a defeasible fee its successors now have good title to the corridor land. If the railroad acquired only an easement, however, we must determine who now holds the title to the easement and who holds title to the burdened land. For simplicity's sake, I will assume that the railroad has quitclaimed its easement rights to either a successor railroad or those rights have already been sold to a trail group or a governmental entity. In that case, we know who holds the easement right and who will lose that right if, at stage three, the easement is found to have been extinguished.

The original grantor of the corridor land retains no interest in the land if he conveyed a fee simple. If he conveyed a defeasible fee[101] *and* kept his reversionary interest alive through periodic recording, his successors in interest have a true reversionary right. This right may or may not be included in later conveyances of the adjoining land. If it was, the reversion is held by the adjoining landowner. But if it was severed, which would occur at any time the adjoining land was conveyed without a description of the corridor land or mention of the reversionary right, the adjoining landowners would have no interest in or title to the corridor land, even if the reversion is triggered.[102]

If the railroad held only an easement, the original grantor retained title to the corridor land and could convey that title to others. If, as would most likely be the case, he conveyed it along with his interest in the adjoining land, the current landowners must present a valid deed that includes a description of the corridor land in their chain of title. If they cannot prove title to the corridor land, it will be deemed to have been severed and retained by the grantor and his heirs.[103] Thus,

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101. The defeasible fee could either be a fee simple determinable or a fee simple subject to a condition subsequent.

102. It may very well be the case that the original grantor, in a subsequent conveyance of his remaining land, purposefully omitted a description of the corridor because he could not warrant that the railroad's strip was free of encumbrances. It is vital, therefore, that a close examination be made of the successive conveyances of the adjoining land. For unless the adjoining landowner can prove his or her right to the land, on the strength of his or her own title, the weaknesses in the railroad's interest are irrelevant.

103. *See* King County v. Squire Inv. Co., 801 P.2d 1022 (Wash. Ct. App. 1991) (holding that the railroad acquired an easement and that it had been extinguished, the court found title in the grantor's heirs, not the adjacent landowner). As the court noted:

> [Adjacent landowner's] ownership should be determined according to the title he holds. . . . Why should the successors to the grantor of a right-of-way be deprived of their title without notice? The fact that the property may have greater value to the abutting owner

if the easement is extinguished, either the adjoining landowner's fee will be disencumbered or the grantor's heirs will be able to take their possessory rights free of the railroad's easement. Whoever is deemed to have retained the underlying fee may convey it to a trail group if he or she desires.

It is important that any claimant must present clear title to the underlying fee of any railroad easement. If the adjoining landowner cannot show clear title, he or she may acquire it through the operation of state law. Section 32-5-12-10 of the Indiana Code provides that the owner of the underlying fee (the "right-of-way fee") will acquire the railroad's interests upon the railroad's abandonment of its rights. The fee owner must provide a deed that contains a description of the real property that includes the easement or right-of-way. Only if there is no deed will the railroad's interests vest in the owner of the adjoining fee under section 32-5-12-10(c) of the Indiana Code. This section applies only if the railroad does not own the underlying fee.

In sum, if the railroad owned only an easement, and we can ascertain who owns the underlying fee, we must proceed to step three to determine what must occur for the railroad's interests to be extinguished and vest in the fee owner.

3. Step Three: Has the Railroad's Easement Been Extinguished?— Termination of an easement, under Indiana law, can occur upon any number of events. The railroad could release the right to the owner of the underlying fee so long as it is accepted by the fee owner. The right to an easement may be lost by an adverse occupation by the servient estate owner through the usual acts of hostile, notorious, exclusive, open, and continuous use for the statutory period. Or, an easement can be abandoned. However, nonuse, by itself, does not constitute abandonment.[104]

Termination of a railroad easement, under a theory of abandonment, must depend on an "intent to release the property right" and not just an intent to discontinue use. Even if an abandonment certificate has been issued by the ICC, the railroad's easement should not be terminated unless there is an independent showing of intent to abandon the easement. Additionally, a limitation on an easement that would terminate the right must be clearly established.[105] As I discussed more fully in Part II, claimants must show "consummation of abandonment" before the railroad's state property interest will be extinguished.

IV. THE *LEWELLEN* CASE

All of these issues of abandonment and deed construction are implicated in the court of appeals decision in *Conrail v. Lewellen* and its affirmance by the supreme

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than to the successor of the grantor was not found persuasive . . ."

Id. at 1027-28.

104. "An easement created by grant is generally not lost through mere non-use." Brock v. B&M Moster Farms, Inc., 481 N.E.2d 1106, 1108 (Ind. Ct. App. 1985).

105. *See* Indiana Broad. Co. v. Star Stations, 388 N.E.2d 568 (Ind. Ct. App. 1979); GTA v. Shell Oil Co., 358 N.E.2d 750, 753 (Ind. App. 1977).

court on June 19, 1997.[106] And unfortunately, neither court interpreted the deeds in compliance with the well-established rules of construction elaborated here. Because the supreme court primarily affirmed the court of appeals decision without much discussion, I will explain and critique the reasoning of both opinions in order. In the case, the court of appeals found the following deeds conveyed easements only:

> [Grantor], for consideration, " . . . hereby Conveys and Warrants to the [Railroad] the Land, Right of way and Right of drainage for its Railway . . ." One of the deeds also contains the following language: "(if the Road is abandoned this Land Returns to me)." One of the deeds conveyed "a strip of land through a part of a lot of land of twenty acres . . . for the Right of Way of [Railroad]." Another conveyed "the Right of Way for so much of said Rail Road as may pass through the following described piece, parcel or body of land. . . ."[107]

A quick look at the 1852 statute shows that railroads had the power to condemn whatever land was necessary for its railroad, including "a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains."[108] Nonetheless, the court held:

> that use of the term 'right of way' causes the deeds in question to convey easements only. To hold, as Conrail urges, that the 'right of way' interest is merely subsumed in the conveyance of the 'land' in fee simple, would render use of this key term superfluous or meaningless in the interpretation of the deed. We hold that 'right-of-way' means easement regardless of whether the deed may be considered ambiguous because the term 'right-of-way' can have two meanings, as discussed above.[109]

The court of appeals' decision is incomprehensible on a number of grounds. First, the court appears not to have looked at the statute in force governing railroad deeds at the time. The statute clearly envisions appropriation of fee simple title to the corridor land, as well as title to land for side-tracks and water stations, and for rights to construction materials (generally gravel), access easements for construction and maintenance, and drainage. The statute explicitly provides that the railroads may acquire multiple estates, including fee simple title to the corridor

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106. 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

107. *Id.* at 960.

108. IND. CODE § 8-4-1-16 (1993).

109. *Lewellen*, 666 N.E.2d at 963. Reference to standard railroad operating procedures manuals and books on the railroads shows that after acquiring the actual corridor and depot lands, the railroads also made provisions for access to the tracks for maintenance purposes and rights to drain the corridor land of surface water. *See, e.g.*, Orwig, *The Real Estate Records of a Great Railway System*, 49 ENGINEER NEWS: A JOURNAL OF CIVIL, MECHANICAL, MINING, & ELECTRICAL ENGINEERING 108 (1903).

land plus easement rights over the adjacent land for access and drainage. It is not a matter, therefore, of the deed granting either fee simple *or* an easement; it clearly granted both. In fact, this specific deed appears to have granted three interests: fee simple in the land, an easement for access, and drainage rights. It is important to realize that the rights-of-way listed in the deed do not pertain to corridor land, because clearly the corridor land is the dominant estate, not the servient one. It cannot be an easement and also hold an easement. Hence, the grantor conveyed fee title to the corridor land and granted two appurtenant easements over his remaining land for access to and drainage from the granted fee corridor. This represents the standard diversity of potential interests envisioned by the statute and makes sense of all three elements of the granting clause.[110] Moreover, it avoids the finding of a forfeiture.

Second, the court suggests that the grant of land somehow included within it the lesser rights of access and drainage. But this is clearly illogical. Although it is true that a grant of fee simple, because it is the most comprehensive bundle of sticks, must contain lesser rights, the rights of access and drainage in this case pertain to the adjacent, servient land, not the corridor land itself. To say that one owns a right-of-way over land one owns in fee simple is certainly true, but nonsensical. But if one grants a fee and a right-of-way, the obvious interpretation is that the right-of-way is over the *neighboring* fee for access to the *granted* fee. Similarly, it would be absurd to interpret the deed as granting a right of drainage within or onto the corridor land, which is implied by the argument that the fee includes the right of drainage. Instead, the right of drainage is clearly the right to expel surface water from the corridor onto the adjacent land, and thus implies a servitude on the *neighboring* fee, i.e. the fee retained by the landowner. Because many railroad beds are elevated, drainage, and the right to be free of liability for damage caused by run-off, is an important right that the railroads would explicitly seek and purchase.[111] Thus, not only is this deed unambiguous, it so closely tracks the language of the 1852 statute and the physical requirements of the railroads that any other construction is illogical and inconsistent.

Third, the deed also uses clear, explicit fee simple language of convey and warrant in the granting clause.[112] The court erroneously cites the *Ross* rule to be

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110. For deeds that convey multiple interests, including fee simple absolute and an easement, in the granting clause, see Annotation, *Conveyance of 'Right of Way,' in Connection with Conveyance of Another Tract, as Passing Fee or Easement*, 89 A.L.R.3D 767 (1984 & Supp. 1996).

111. *See* Martin J. McMahon, Annotation, *Liability for Diversion of Surface Water by Raising Surface Level of Land*, 88 A.L.R.4TH 891 (1991 & Supp. 1996) (discussing liability of railroads for diversion of surface water); City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160, 163 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (deed stating, "culverts shall be constructed and maintained as may be necessary for the free passage of water across the same, and so located that the lands adjacent to said right of way will not be flooded on account of the roadbed of said railroad forming an embankment." The right of drainage did not defeat the conveyance as a fee simple, nor did the term right of way in the drainage clause.).

112. This holding cannot be reconciled with the statute. "Any conveyance of lands worded in substance as follows: 'A.B. conveys and warrants to C.D.' . . . 'for the sum of' . . . *shall* be

that "any reference to a right-of-way in a deed . . . [conveys] only an easement."[113] But *Ross* did not say "any reference;" it said where the *interest* is "defined or described as." This is exactly the kind of misapplication the dissent in *Ross* feared. This deed does convey an easement. But it also conveys fee simple title.

Fourth, the court erroneously relies on the fact that there are two different meanings to the term, right-of-way, as somehow creating a per se ambiguity in the conveyance. The ambiguity, it asserted, therefore justifies application of the *Ross* rule so that mere mention of the right-of-way causes the deed to be interpreted as an easement. But where either meaning of right-of-way leads to the same result, the "ambiguity" is the result of a judicial sleight of hand. One interpretation (that the term refers to the strip of land itself) is in accord with the granting clause conveying a fee simple, and the other interpretation (that the term refers only to a right which is subsumed in the greater interest to the land and is attached to the land) is also in accord with the grant of a fee simple. The court thus creates confusion where it does not exist. By calling the deed ambiguous when it contains one term with two alternative meanings, each of which leads to the interpretation of a fee simple, the court seems to think ambiguity allows it to apply the public policy rule of *Ross* to override the clear language of the conveyance and the clear statutory command.

Fifth, the court also cites to the language in *Ross* that "[p]ublic policy does not favor the conveyance of strips of land by fee simple titles to railroad companies for right-of-way purposes. . . ."[114] The court, however, neglects to mention the footnote in *Ross* that "a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way."[115] Hence, even if the conveyance was ambiguous, it is not at all clear that public policy reasons demand interpreting the deed as an easement.[116] In this case, the land was not isolated, but was accessible from a public thoroughfare.

Sixth, even if the court finds these deeds convey easements only, it is not at all evident that Conrail has abandoned its property interests in the corridor so as to extinguish the easements. Although Conrail received a certificate of abandonment from the ICC in 1982 and removed the tracks, Conrail left other

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deemed and held to be a conveyance in fee simple . . . ." IND. CODE § 32-1-2-11 (1993) (emphasis added). Where the legislature has mandated that certain language "shall be deemed" a conveyance in fee, the courts usurp the legislative prerogative to determine how property rights will be conveyed when they decline to follow the express terms of the statute. *Compare City of Manhattan Beach*, 914 P.2d at 167 (applying numerous statutes on deed language and deed construction to find a quitclaim deed conveying a "right-of-way" conveyed fee simple title).

113. *Lewellen*, 666 N.E.2d at 962.

114. *Id.*

115. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).

116. The court's statement that "this public policy argument raises serious questions regarding the taking of private property rights . . ." puts the cart before the horse. If the deeds convey fee simple, there will be no taking. Moreover, the court, it seems, gave little or no thought to upsetting the private property rights of the railroad.

structures, like bridges, culverts, and drainage tiles in place. Conrail also continued to pay real estate taxes on the land. In 1992 Conrail entered into negotiations to sell its property rights for a trail conversion and executed a quitclaim deed in July 1994. All of these activities evince a belief on the part of Conrail that it had not abandoned its rights to the disputed property. And just as we construe the grantor's intent liberally in interpreting deeds, so too must we do in construing the intent of Conrail to give up a valuable property right. It might be most helpful if the court would consider what, if any, activities Conrail must do, short of operating railroad services at a loss, to preserve its property interests in the corridor land. It must be pointed out that terminating Conrail's legitimate property rights without a judicial determination of abandonment is unconstitutional.[117]

The Indiana Supreme Court recently affirmed this decision. In doing so, the court spent a mere four paragraphs on the issue of deed construction, blindly adopting the lower court's rationale, and it did so without the benefit of oral arguments or substantive briefs on the merits. This is particularly disturbing because the issue is of extreme public importance and, by not addressing the legal claims directly, the court is losing the chance to clarify the precedents, overrule the dangerous *Ross* rule, and bring Indiana into harmony with the other states that have actually faced these cases head-on. Not only is Indiana a black hole in the middle of a nationwide system of trails, but its law continues to reflect nineteenth-century frontier attitudes in which uniformity among one's neighbors and conformity with well-established principles of property laws were not values to emulate.

Justice Sullivan's opinion is open to less criticism than Judge Robertson's of the court of appeals only because it is less substantive. Sullivan notes that the Indiana statute in place at the time of the grant, and still in place, requires that deeds using the terms "convey and warrant" the land shall be deemed to convey the property in fee simple. But his application of the law to the deeds in the case is frankly incomprehensible.

> With regard to this argument, we adopt the Court of Appeals' reasoning that the use of the term "right of way" in the deeds in issue in this case conveyed to the railroad only an easement. We emphasize that the language of the deeds in question in this case does not trace the cited property statutes. Rather, the majority of the deeds states that the grantor "conveys and warrants" to the railroad "Land, Right of way, and Right of drainage for its Railway."[118]

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117. *See* Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158 (7th Cir. 1992) (holding Indiana statute unconstitutional).

118. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV368, 1997 WL 335018, at *2 (Ind. June 19, 1997). Should it be necessary to prepare three separate deeds in order to prevent the complete annihilation of two of the interests which the court effected in its current interpretation?

The only way in which the deed deviates[119] from the language of the statute is that it purports to convey two additional property interests besides the land: an easement to access the land over the neighboring fee and a right to expel surface water. The fact that three interests are being conveyed instead of one does not undermine the obvious application of the statute to the first interest, the conveyance of the land.

Sullivan also notes, after having already decided that the deed conveys a mere easement only, that the principle object of deed construction is to ascertain the intent of the grantors. But without further mention of what the grantors might have intended, Sullivan cites the 1957 *L&G Realty* case that "reference to a right-of-way in such conveyance generally leads to its construction as conveying only an easement."[120] This rule's application in this case is preempted by the statute mandating that deeds using the relevant convey-and-warrant-the-land terms "shall be deemed" fee simple conveyances. Thus, for the first property interest, the land, the statute should apply to determine that the interest conveyed was fee simple title. For the second property interest, the right of way for access to the land, the common-law rule about conveyances of rights of way would apply to find that the railroad acquired an easement to build and maintain their railbed. And for the third property interest, the servitude allowing the railroad to drain its corridor of surface water, the common-law rules of servitudes should apply. Any other interpretation is inconsistent with the conveyancing statute, the eminent domain statute, the common-law rules on deed construction and servitudes, and the real-life practices and needs of the railroads.[121]

Furthermore, the court rejected the argument that even if the interest conveyed was an easement, it had not been abandoned by finding that the 1987 statute preempted state common-law rules requiring intent and consummation of abandonment. Under the statute, a railroad was deemed to have abandoned its easement rights when the ICC issues a certificate of abandonment and the "rails, switches, ties, and other facilities" have been removed from the right of way.[122] In this instance, the railroad had removed its rails and ties, but had not removed such "other facilities" as trestles, bridges, culverts, drainage tiles and subsurface ballast. In applying the principle of ejusdem generis the court held that "other facilities" could only include things of a like kind or class as those designated by the specific words. This is a nice doctrine in theory, but when considering railroad practices, it is difficult to come up with any "other facilities" that are in the same kind or class as ties and rails since there aren't any. The fact is that rails, ties, and

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119. Justice Sullivan's interpretation also reads the conveyance of land right out of the deed. Moreover, Justice Sullivan's emphasis on the fact that "the deeds in question in this case do[] not trace the cited property statutes" is misplaced because the statute only requires that the wording be "in substance." IND. CODE § 32-1-2-12 (1993).

120. *Lewellen*, 1997 WL 335018, at *7.

121. Also troubling about this decision is that the court applies cases conveying a single property interest to the current deeds which clearly conveyed three separate and distinct interests.

122. IND. CODE 8-4-35-4 (1993) (repealed 1995) (current version at IND. CODE § 32-5-12-6(a)(2) (Supp. 1996)).

switches are the only things that lie on gravel beds, bridges, culverts, and drainage tiles which in sum constitute the entire set of facilities that make up a railbed. If the court wishes to restrict the class to things that are like ties and rails and unlike bridges and trestles, the term "other facilities" will be meaningless because it will be an empty category.

And finally, the court rejected the argument that public policy favoring preservation of railroad corridors should count as a factor in interpreting these railroad deeds. The court dispensed with this issue by deciding that the public policy evinced by the National Trails System Act and the Indiana Trails Act would be considerations only in legal disputes involving application of those acts. But that is an absurd limitation. If the case concerned actions taken pursuant to either of these statutes we would not need to consider public policy because the statutes would tell us what to do. But in construing ambiguous deeds, public policy clearly is a relevant factor, and where better to discover public policy but in the public acts of the state and federal legislatures?

This is a disappointing turn of events for many reasons. First, one always hopes that the Indiana Supreme Court, which has the final say regarding Indiana law, will address itself to a serious and comprehensive analysis before handing down a decision. The very brief discussion of deed construction in this case makes it unworthy of the precedent it purports to set. Second, the court failed to address a number of crucial issues presented by the lower court's opinion, like whether the landowners in this case had shown clear title to have standing to challenge the railroad's title in the first place. Third, there was no reference to the 1852 statute in place at the time of the conveyance that would have clarified the types of property interests the railroad was likely to acquire. And fourth, the importance of this issue to the future of Indiana property law and the economic development of the state requires a more thoughtful and careful analysis of the property rights being litigated than what was given.

Although it may be too late for the court to reconsider its hasty ruling in this case, it will have more opportunities to reconsider the *Ross* rule. The precedent it set is unsatisfactory and will continue to generate further litigation in the near future. Hopefully, because *Ross* was decided in 1964, the court may decide the public policy rationale expressed in *Ross* requires modification, especially in light of the national and state policies of promoting railbanking and trail conversions.[123] The rule in *Ross* is also unworkable if it means that any mention anywhere in the body of a deed of the term, right-of-way, magically converts the conveyance into an easement for it continues to lead to absurd results like the *Lewellen* decisions. Such a rule violates rules of construction regarding looking first and foremost to the grantor's intent, rules regarding the character of granting and habendum clauses, and general rules about specificity and public policy. The *Ross* rule also ignores the fact that the term, right-of-way, has two meanings, at least one of which is consistent with a grant in fee simple.

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123. The court would be well-advised to consider the common-law maxim: "*Cessat ratione legis, cessat et ipsa lex.*"

V. POST-ABANDONMENT EASEMENTS AND REVERSIONARY RIGHTS

In many of these railway situations, courts are faced with ambiguous deeds, confusion on the parts of adjoining landowners, ambivalence by the railroads as to whether they have abandoned or not, and a whole array of messy and confusing facts, dates, circumstances, and opinions. In deciding how to reconcile these disputes, the courts must look to overarching laws and policies to aid them in their decision making. I need not remind the reader that courts do more than decide disputes; they make law. In these cases that fall into that ever-expanding gray area, there are many legal and policy considerations for postponing reversionary rights to railroad corridors when the railroad's title is ambiguous or is a mere easement and abandonment is not certain.

One of the most obvious and convincing policy considerations is embedded in the very precedent that has been used to trigger the reversionary rights of adjoining landowners—the public use exception in *Ross*. In 1964, rails-to-trails conversions were unheard of, but the Indiana Supreme Court had the prescience to realize that where public policy considerations actually provide the basis for a rule of construction, that rule must be responsive to changes in social needs and circumstances. Footnote 2 expressly holds out an exception for exactly this kind of situation.[124] With growing demand in urban areas for alternative transportation resources, the public needs of millions of potential users justify a new rule of construction for long-forgotten and unused property claims. Hence, if the postponement of these reversionary rights is not considered a taking, then the public-use exception in *Ross* and the changing definitions of abandonment that postpone these reversionary rights under state law are legally permissible and socially beneficial.

Second, Indiana, along with every other state in the country, has in place a Marketable Title Act[125] designed explicitly to extinguish contingent future interests that are not periodically recorded to give future purchasers notice of pre-existing claims. Indiana's statute requires that "Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the fifty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said fifty-year period."[126] Thus, if any adjoining landowners do not record their interest within fifty years of abandonment by the railroad, the reversionary interests terminate. Because most of these titles are over 100 years old, the Marketable Title Act should effectively convert all defeasible fees into fee simple title in the railroads because the adjoining landowners' interests have been extinguished.[127]

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124. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 n.2 (Ind. 1964).

125. IND. CODE § 32-1-5-4 (1993).

126. *Id.*

127. Interestingly, the Indiana courts have not interpreted these ambiguous conveyances to be defeasible fees. One reason may be the general dislike of future interests and the possibility of

This Act explicitly provides for deeds that use fee simple language in the granting clause but contain ambiguous limitations. They are, under all rules of construction, defeasible fees which convert to fee simple absolutes upon the passage of time, thus settling property interests that were contingent on possible future events.

And even if the conveyance is ambiguous, the purpose behind these Marketable Title Acts would militate against finding an easement. Property users who occupy, pay taxes, and invest in property are generally deemed to have a stronger interest in the land than those who are dissociated from it.[128] In many cases, the benefit that would accrue to the adjoining landowner from acquiring clear title to these narrow strips may be de minimis. The land is often not productive and, in its current state, can be a nuisance. Cleaning up these corridors, and protecting the property rights of the railroad's successors, furthers the general policy goal of protecting the legitimate property rights of those most interested in the land.

Third, the Indiana statute governing railroad conversions to hiking and biking trails evidences a state-wide public policy promoting railbanking. In 1995, the Indiana Legislature authorized the establishment of a Transportation Corridor Planning Board, a Transportation Corridor Use Master Plan, and resources and mechanisms for acquiring abandoned rights-of-way.[129] The statute provides that "[t]he state may acquire any part of a railroad's interest in a right-of-way under this chapter for any of the following purposes: (1) A present or future rail line. (2) A transportation corridor . . . (4) A recreational trail."[130] The extensive regulations and funding of these conversions not only evince an official statement of the desirability of railbanking and trail conversions, but allow the state to purchase a railroad's "rights-of-way" as well as fee simple interests in corridor land. Use of the term "right-of-way" throughout the Transportation Corridor Act indicates a legislative intent to promote trail conversions of all types of railway corridors, even if the underlying property interests are mere easements.

Fourth, public policy also promotes the establishment of parks, linear trails, and recreational facilities. The City of Indianapolis, after lengthy studies and public meetings, determined that the best use of the Monon corridor was as a recreational trail. Other options, like the operation of a high-speed light-rail

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upsetting settled property interests through forfeitures.

128. In *Lewellen*, Conrail had been paying taxes on the corridor land up to the date of the suit. The court's determination that Conrail held only an easement and that it had been extinguished means that Conrail had been paying taxes on land it did not own for over a decade. The result of this decision may be so far-reaching that county assessors will have to reassess every parcel of land adjacent to an abandoned corridor to insure that the landowner is paying the appropriate property taxes. The burden of doing so is immense and will must likely outweigh the tax revenue to be gained. But this decision so fundamentally undermines settled property rights and interests that a thorough recalculation and investigation will need to be made.

129. IND. CODE §§ 8-4.5-4-1 to -6 (Supp. 1996).

130. *Id.* § 8-4.5-4-2.

system or a bus route were rejected in favor of the needs of recreational users.[131] In Indianapolis, George Kessler, who developed the original Indianapolis parkway system in 1909, envisioned a series of interconnected linear parks to provide needed flood plains and recreational areas.[132] These recreational trails (1) provide economic boosts to local businesses;[133] (2) help clean up what are often unsightly, dangerous and unhealthy corridors; (3) allow bikers and walkers to utilize alternative modes of transportation in ways that reduce environmental impact and pollution and are not a hazard to themselves or motorized traffic; and (4) make for a healthier citizenry. In 1991 Congress initiated a national commitment to recreational trails by explicitly defining biking and walking as forms of transportation (rather than merely recreation), thereby opening up federal transportation funds for development of linear trails.[134]

Fifth, state property laws may extinguish easements when their usage is significantly changed so as to become burdensome to the servient estate. Some landowners have claimed that railroad use is so different from walking and biking that any change from railway use should constitute a termination of the easement. This argument is without merit. Under the doctrine of "shifting public use," a taking does not occur when property is put to a different—but still public—use. The court of claims in *Preseault* cited two noted railroad treatises to explain the doctrine.[135]

> Under the doctrine of shifting public use, when an easement is given for public use, such as a railroad, and then put to another similar use, no abandonment will be held to have occurred. The doctrine has been reviewed by a number of railroad scholars, including Edward L. Pierce, who discussed the shifting public use doctrine in his Treatise on the Law of Railroads:
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> > Changes of Use, when a new Taking.—The use of property taken by the right of eminent domain is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpracticed and unknown.

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131. *Saving Strips of Green*, INDIANAPOLIS STAR, June 2, 1994, at A8.

132. Derrick Stokes, *City Plans to Develop 'Linear' Park System*, INDIANAPOLIS NEWS, Oct. 23, 1992, at C3.

133. A Penn State University study estimated $1.25 million in annual direct spending for every 13 miles of trail. Paul Miner, *Hendricks Commissioners Endorse Trail*, INDIANAPOLIS NEWS, Aug. 8, 1995, at C8. A recent study of the Monon Trail by IUPUI showed extensive and varied use of the trail, overall satisfaction by users and adjoining landowners, and significant economic benefits to local businesses along the trail. *See* GRADUATE PLANNING WORKSHOP TEAM, INDIANA UNIV. PURDUE UNIV. INDIANAPOLIS, INDIANAPOLIS GREENWAYS USE AND MANAGEMENT PROJECT, DATA REPORT AND MANAGEMENT REPORT (1996) (on file with author).

134. Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, §§ 1007(c), 1024(a), 105 Stat. 1914, 1931, 1955-62 (codified as amended at 23 U.S.C. §§ 101(a), 134 (1994)).

135. Preseault v. United States, 24 Cl. Ct. 818, 829, 832-33 (1992).

> When property has been taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to another public use—certainly if one of a like kind—does not require further compensation to the owner. Nor is such compensation required when there is a change in the person or body enjoying or controlling the property taken, or in the conditions upon which the public may use it. Accordingly, the adjoining owner is not deprived of any constitutional right when a highway is transferred to a private corporation charged with the duty of maintaining it and invested with the power of taking tolls, nor when a turnpike becomes free to public travel. There is no change of use involving a new taking when, under legislative authority, the location of a plankroad or canal is converted into that of a highway, or of a railroad.
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> . . . .
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> A Railroad in a Highway not necessarily a Different Use.—The purpose of opening a highway or street is, to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles, operated in such a mode and by such force as an advanced civilization may require. . . .[136]

Chief Justice Redfield also recognized the doctrine of shifting public use in a later 1888 edition of THE LAW OF RAILROADS:

> The mere possibility of reverter to the original owner, or his heirs or grantees, is not regarded . . . as any appreciable interest requiring to be compensated.
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> . . . The most the owner of the fee could claim in such case is to recover compensation for any additional land taken, and for any additional burden imposed upon the land appropriated . . . [beyond the original use], as well as for any additional damage to the adjoining lands of the same owner.[137]

Most railroad easements may be regarded as "perpetual easements," and subject to the shifting public use doctrine. As one court held: "use of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates."[138] And if trail conversions are found to be more burdensome

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136. *Id.* at 832-33 (quoting E.L. PIERCE, A TREATISE ON THE LAW OF RAILROADS 233, 234 (1881)) (footnotes omitted).

137. *Id.* at 829 (quoting I.F. REDFIELD, THE LAW OF RAILWAYS 269 (6th ed. 1888)).

138. Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543, 545 (Minn.

than railroad use, the difference could be compensated for by paying the landowners directly for the increased burden.

Indiana courts allow railroads to lease or sell easement rights to public utilities for laying telephone lines, cable, water and sewer lines, and other public services, even when the railroad only held an easement itself.[139] These uses were considered sufficiently in keeping with the original use of the easement so as not to trigger a termination. The Indiana Legislature twice has authorized railroads to grant sub-easements to utility companies for uses that ultimately benefit the public.[140] More importantly, as our cities continue to grow, rail corridors provide ideal locations for utility and public service easements. Even if a railroad abandons its line, it is not unreasonable to argue that trail conversions constitute a continuing use of railroad easements consistent with the public nature of utility and transportation easements.

Sixth, until the Indiana courts have established a clear rule for determining when abandonment of an easement has occurred, courts run the risk of depriving the railroads of their property rights without due process. I have mentioned more than once the confusion that surrounds the issue of abandonment. An ICC certificate of abandonment is not conclusive proof of "intent to abandon" or "consummation of abandonment." Other states have grappled with this issue and determined that a whole series of activities should be considered as factors tending to show abandonment, but no single one should be conclusive. Continued payment of taxes should weigh strongly against a finding of state law abandonment. Although we may disapprove of the way the railroad originally acquired its property rights, no property is safe if we dispense with careful application of well-established property laws and start extinguishing public grants of land when nineteenth-century conditions no longer adhere.

Finally, I must address whether the postponement of these reversionary interests or the continuation of existing easements constitutes a taking without just compensation. As noted above, the U.S. Supreme Court, in *Preseault v. ICC*,[141] found that a landowner's takings claim was premature because a Tucker Act remedy was available in the U.S. Court of Claims. Consequently, the Preseaults brought suit in that court alleging a taking under the NTSA when a railroad easement over their property was converted into an interim trail. The Preseaults argued that their property was taken when the ICC forestalled triggering reversionary rights by ruling that the railroad discontinued rather than abandoned their easement. However, the claims court ruled that a taking only occurs when economic harm results from interference with the reasonable expectations of property owners. Because the Preseaults acquired their property after 1920, they

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1983).

139. *See* Fox v. Ohio Valley Gas Corp., 235 N.E.2d 168 (Ind. 1968); Wendy's of Fort Wayne, Inc. v. Fagan, 644 N.E.2d 159 (Ind. Ct. App. 1994); Deetz v. Northern Ind. Fuel & Light Co., 545 N.E.2d 1103 (Ind. Ct. App. 1989).

140. *See* IND. CODE § 8-1-35-6, -7 (1993) (later held to be unconstitutional for other reasons); *Id.* § 32-5-12-11 (Supp. 1996).

141. 494 U.S. 1 (1990).

did so with notice that their encumbered property rights might be regulated further by the ICC's authority to determine abandonment.[142] The Federal Circuit reversed the claims court in an en banc decision in which there was no majority ruling.[143]

The plurality in *Preseault* ruled that, because the railroad held only an easement and that the easement terminated pursuant to Vermont state law when the railroad removed its tracks in 1975, Vermont could not declare all railroad reversionary interests postponed post hoc in 1982, nor could Vermont convert the rail line to a public trail without offering compensation. The court did not address the fact that the ICC did not authorize abandonment until 1986; instead, they claimed that abandonment occurred pursuant to state law when railroad services were discontinued in 1975.[144] In a strong dissent, three justices argued that the railroad had not abandoned the easements in 1975 because nonuse alone is insufficient for a determination of abandonment and the ICC had not authorized abandonment. Addressing whether track removal should be dispositive of abandonment, the dissent argued that abandonment must contain an element of "intent not to reactivate" in the future. The dissent believed that because Vermont held the easements and continued operating a railroad on tracks just a few hundred yards from the Preseault's property, nonuse did not "provide the conclusive and unequivocal relinquishment signal required by Vermont law."[145]

This is a troubling case for a variety of reasons. It is a striking departure from the then-existing course of judicial proceedings in the Preseaults' controversy.[146] Further, because there was no majority opinion, only the outcome is binding. Additionally, the holding centered on the state-law definition of abandonment which, if occurring prior to the conversion, extinguished the easements. But the ICC had not issued an abandonment certificate at that time. The Court did not address the issue of federal preemptive powers under the NTSA. The Court did not address whether conversion in the case of a continuing easement would constitute a taking. But in the Supreme Court's landmark takings case of *Lucas v. South Carolina Coastal Council*, Justice Scalia noted, in the majority opinion, that: "where 'permanent physical occupation' of land is concerned, we have

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142. *See* Preseault v. United States, 27 Fed. Cl. 69 (1992), *rev'd en banc*, 100 F.3d 1525 (Fed. Cir. 1996).

143. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). *See also* Dennis Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185 (1997).

144. This fact alone should warrant reversal by the Supreme Court, for until the ICC relinquishes jurisdiction, state law determinations of abandonment should not come into play because state law is preempted.

145. *Preseault*, 100 F.3d at 1565 (Clevenger, J., dissenting). It is important to note that the plurality would find a taking in the *Preseault* case because the railroad had abandoned its easement in 1975, and hence the land had reverted back to the landowners, even though the ICC did not issue an abandonment certificate to the railroad until 1985 when it issued an NITU that allowed conversion of the easement to trail use.

146. The Preseaults have litigated their rights twice to the Vermont Supreme Court, once to the U.S. Supreme Court, and then appealed from the Court of Claims.

refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved—*though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.*"[147] Hence, converting a pre-existing easement into a permanent one might not be a taking.

In addition, what this case best illustrates is the vagueness of the term, abandonment. Until these trail conversion cases, it was unnecessary in many cases to distinguish between the railroads' rights to operate and their underlying property rights to the land along their corridors because few people cared about the land once rail service ceased. The ICC's power to regulate the operation and abandonment of railroad services is really about power to regulate services, not railroad property. Thus, when the ICC grants a certificate of abandonment, which is premised on a finding that the public no longer needs the railway service, the railroad gets the power to discontinue its operations. However, that approval says nothing about the railroad's property interests in its corridors. Under most state property laws, easements are extinguished by nonuse *and* evidence of an intent to relinquish permanently the right-of-way.[148] But a railroad may want to discontinue services yet maintain its property rights in the corridors—perhaps to lease rights to utilities or to control crossings or other trespasses on the property. Railroads may continue to pay taxes or require prior approval from the railroad when a landowner wishes to construct a grade crossing.[149] Case law does not address adequately the divergence between an intent to abandon services and an intent to abandon property rights.

If railbanking is a nationally-recognized goal and railroads need to maintain their easement rights for possible future reactivation, how can discontinuance of railway service alone trigger a termination of the easements? The takings claim should not be directed toward the ICC's power to regulate abandonment, and therein postpone reversionary property rights, because the ICC's power is principally over railroad services, not underlying property interests. (The ICC can, of course, forestall a state law abandonment.) The postponement in property rights that occurs when a railroad chooses to preserve its property rights for future uses, either through an ICC NITU certificate or through a takeover by the state, is not a compensable taking. This is because the servient landowner could have no reasonable expectation that a railroad easement would ever be permanently abandoned. Thus, the reversionary property right depends upon state-law definitions of easement termination, and abandonment of services is insufficient to trigger termination. Thus, because the NTSA simply encourages postponement of reversionary rights through railbanking, which the railroads could do anyway

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147. 505 U.S. 1003, 1028-29 (1992) (emphasis added).

148. *See* Seymour Water Co. v. Lebline, 145 N.E. 764 (Ind. 1924); Brock v. B&M Moster Farms, Inc., 481 N.E.2d 1106 (Ind. Ct. App. 1985); Perry v. Carey, 119 N.E. 1010 (Ind. App. 1918).

149. In fact, this appears to be the case in *Preseault*, in which Vermont, as owner of the easement, discontinued rail service in 1975, but required annual licenses and state approval for the Preseaults to put an at-grade driveway over the easement.

under state easement laws, the federal statute has not effected a taking. If the federal statute only allows the railroad to do that which it already had a right to do, there can be no taking.

CONCLUSION

We have seen from the foregoing analysis that most railway conversions should be straightforward and uneventful. If the railroad owned its corridor in fee simple or as a defeasible fee it may convey that land for a trail conversion without regard to the interests of adjoining landowners. If the railroad has an ambiguous deed and the courts, following standard rules of construction, find that the grantor intended to convey a fee simple, there is again no real legal issue. Only if the railroad acquired an easement do we proceed to examine whether or not the railroad has abandoned its interests. If it has not complied with federal law and obtained an abandonment certificate its easement rights should not be terminated. If it has received an abandonment certificate but the ICC also imposed an interim trail use condition, the state property rights are held in abeyance. And even if the railroad has completely abandoned under federal law, taken up its tracks and ceased operations, it should lose its easement right only if it has clearly manifested its intent to abandon by unequivocal evidence and that abandonment has been consummated. Only then do the interests of the landowners come into play, and only if they can prove a right to the corridor land in their own chain of title.

We should note that these rails-to-trails cases are not going to go away. We have a national policy of railbanking, promoting railbed conversions, and providing for alternative modes of transportation. Moreover, we have a long history of endorsing railroad corridors as national assets, even at the expense of private property rights. It is imperative that each state address these issues through a reexamination of property laws concerning abandonment, termination of easements, and the postponement of reversionary property interests. The Indiana Supreme Court certainly could resolve these matters by clarifying the *Ross* rule (and the public exception), delimiting the parameters of easement terminations, and reinforcing the public policy of railbanking (expressed in sections 8-4.5-1 to -6 of the Indiana Code). The court could facilitate economic growth and development for everyone without infringing property rights. It could modernize the 1964 *Ross* rule to accommodate social realities of the late twentieth and early twenty-first centuries. Although agricultural needs are a high priority in this state, the property gained from these railroad corridors, in many cases, is unfit for crop production because the soil has been removed, compacted, or polluted by railroad uses. But regardless of the social benefits to be gained through trail conversions, we must insure that reasonable efforts are taken to protect the property interests of adjoining landowners. Such efforts need not extend to constructing a ten-foot-high fence to separate the corridor trails from neighbors on each side, but might include signs requesting that trail patrons respect the privacy rights of the adjoining landowners and a monitoring system to insure compliance with appropriate laws and regulations. Trail conversions also should provide adequate parking and access points for patrons who wish to use the trails so they do not inadvertently trespass on the goodwill of their neighbors.

Some may think it unfortunate that social conditions prevent according property rights the sacrosanct status they have had in the past. (This concern, of course, only comes into play where reversionary rights are postponed, not where the adjoining landowners do not have fee simple title.) However, we no longer live in a frontier world in which each man's property rights fenced him in from the intrusions and offenses of the outside world. Urban sprawl and relentless development have placed a premium on the security and serenity of private property rights. But the sprawl and development are unlikely to stop, and the transportation needs of all citizens have changed dramatically in the past fifty years, property laws too must therefore adjust. That is why the common law has survived; its flexibility allows it to keep up with changing needs and values without sacrificing the vital protections and rights that we all require for a truly free society. Trail conversions effect that change in legally and socially beneficial ways.