Limited Fee and Reversionary Interests

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A growing body of case law across the country is recognizing that other governmental entities are entitled to reversionary interests in land grant railroad rights of way under federal law. The U.S. Supreme Court decision of *Northern Pacific Railroad Co. v. Townsend* [1] established that certain land grant railroad rights of way were not easements but constituted a "limited fee" interest with an implied right of reverter upon abandonment of the railroad. Although the reversionary interests were then in the U.S. government as grantor of the lands from the public domain, subsequent congressional legislation assigned these interests to municipalities, as well as to abutting owners, but both subject to other highway purposes. The purpose of this article is to discuss the genesis of the "limited fee" interest in railroad right of way, when reversionary interests are triggered by an abandonment, and what procedures are available for acquiring such revisionary interests in the right of way for public purposes.

The Townsend Decision

The notion of a "limited fee" interest in the right of way with an implied right of reverter has its origin in the attempts of the federal government before and during the Civil War to settle the American frontier. As part of its overall attempt to secure the settlement of new lands during the mid-to late 19th century, the federal government embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. Approximately 70 railroads received land grants, which, before the government ceased its policy in 1871, amounted to approximately 158 million acres, or an area equal in size to the New England states, New York and Pennsylvania. The more notorious of these grants were the Union Pacific grants of 1862 and 1864, and the Northern Pacific grant of 1864. The Northern Pacific grant was the largest, totalling an estimated 40 million acres.[2]

Public outrage over these grants resulted in discontinuance of the land grant policy by Congress with the enactment of a resolution in 1872. The last lavish grant was to the Texas Pacific Railway in 1871. Between 1871 and 1875, Congress passed special acts granting only rights of way through the public land to certain railroads. Finally, in 1875, to alleviate the burden of dealing with special enactments, Congress enacted the General Right of Way Act of 1875. Unlike the land grants that had preceded it, the General Right of Way Act did not grant alternate sections of public land nor direct financial subsidy.[3]

Congressional reform coincided with reforms at the state level abolishing special legislation that granted charters to specific companies. The land grant legislation had been implemented by the States through the grant of special corporate charters, which included franchises, such as the right to collect tolls, exemption from property taxation, the right of

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in Railroad Right of Way

eminent domain, as well as the title to the rights of way appropriated by Congress from the public domain.[4] Land grants to railroads occurred along with the special charters enacted directly by state and territorial legislatures at the time. Because the railroads were given special powers, including the power of eminent domain and exemptions from property taxes, the land grant charters were deemed by the courts to constitute "franchises."[5] Since it was inextricably bound up with the corporate franchise, the land could not be freely alienated without special permission from the sovereign as grantor.[6]

The concept of a "fee simple determinable" or "limited fee" was devised by the U.S. Supreme Court to define the more abstract notion of a franchise in terms of real property. The issue arose in *Northern Pacific Railway Co. v. Townsend* where the Minnesota Supreme Court had ruled in favor of a person who claimed that he had acquired land falling within the railroad's 400-foot right of way by adverse possession. The Minnesota court rejected the railroad's argument that the right of way, being part of the franchise, could not even be voluntarily alienated, much less relinquished by adverse possession.

The U.S. Supreme Court, however, reasoned that Congress had intended to grant the land to the railroads in fee title, but not in fee title absolute. On the other hand, Congress also granted the land to the railroads for a special specific purpose, which could not be simply taken away by sale or other subordinate act, such as the act of a legislature, allowing persons to claim title to real property by adverse possession:

Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way of any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for railroad right of way. In effect, the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.[7]

The Townsend decision involved the land grants to the Northern Pacific. However, the same principle has been applied to other land grants, such as the Union Pacific [8] and Illinois Central land grants [9] to name a few of many. Subsequent cases were to hold that "limited fee" rights of way were generally limited to those land grants before 1871.[10] Whether a particular Act constitutes a grant of a "limited fee" or rather an easement has been held to be a matter of statutory construction and legislative intent.[11]

Whether a land grant is a "limited fee" or an easement has significant practical consequences. Since the "limited fee" takes effect by virtue of the grant itself, rather than subsequent acts of the grantee, such as survey, map and construction of the railroad, it is unnecessary for the railroad to acquire the property by eminent domain. A further difference between the right of way as a "limited fee" and an "easement" can be defined in terms of how the right of way is treated upon termination or abandonment of the right of way. Under an easement right of way, the adjoining landowner retains underlying fee ownership and therefore reacquires the interest upon abandonment of the right of way. Under a "limited fee," however, the property reverts to the original grantor or the grantor's successor in interest.

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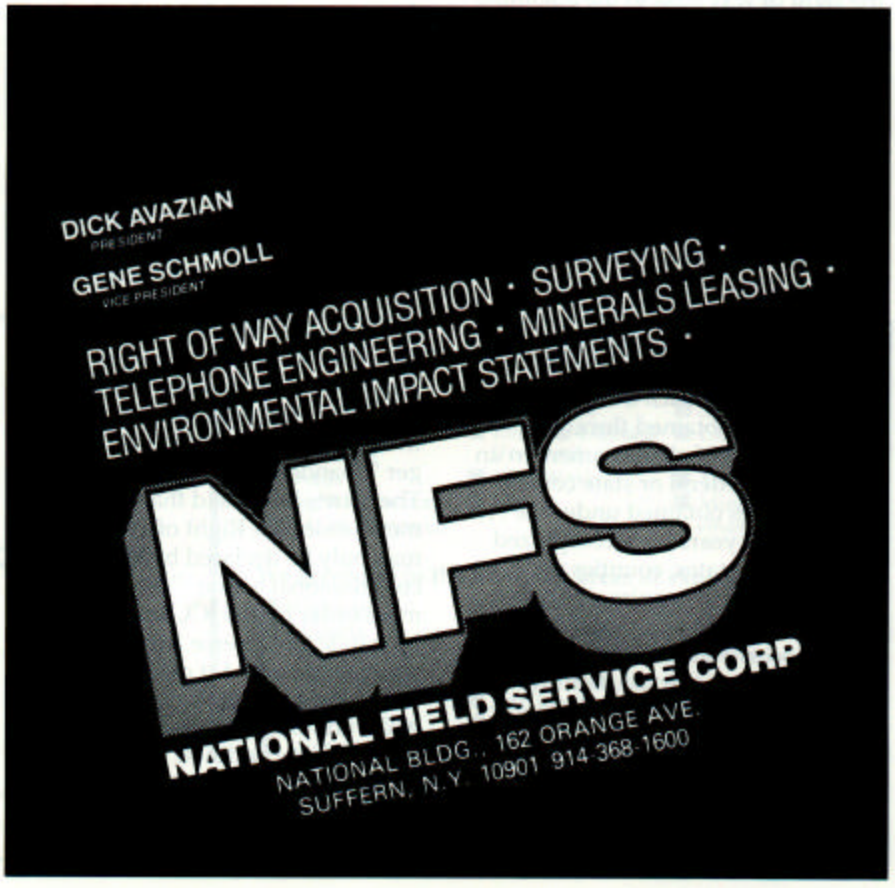

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The Act of 1922

The Townsend decision in 1903 set the stage for congressional curative legislation to conform to the already established principle that right of way revert to the abutting landowner. This legislation was the Act of March 8, 1922 otherwise known as the Right of Way Abandonment Act of 1922.[12] This Act, creating section 912 of Title 43 of the U.S. Code, was specifically created to divest the federal government of the innumerable strips of rights of way to which the government would succeed under the Townsend decision.[13]

The Act defined three potential classes of beneficiaries in the underlying right of way. First, adjoining landowners in rural areas; second, municipalities in urban areas; and last, other public authorities where the right of way could be put to further use as a public highway.

Where the right of way traversed a municipality, it would go to that municipality without further deed or conveyance whatsoever." Only in rural or unincorporated areas, would the right of way pass to the adjoining landowners. Congress was more interested in seeing that the abandoned or forfeited right of way continue to be used for public purposes than in the interests of abutting landowners. In both rural and urban areas, the reversion would be subject to the creation of a public highway within one year of a declaration of abandonment or forfeiture.[14]

Although the Act allows a local government to obtain a declaration of abandonment or forfeiture by an Act of Congress, such a declaration is more usually obtained through a judicial decree of abandonment in an appropriate federal or state court. Court decrees obtained under the Act in the last 10 years have recognized the ability of states, counties and municipalities to acquire right of way through the right of reverter for public purposes.[15] Thus, in some cases, municipalities have successfully asserted their rights to these properties against railroads that had completed abandonment.[16] In other cases, states and counties have successfully upheld their right to establish "public highways" including hiking and biking trails against the objections of abutting landowners.[17]

Triggering Reversion Under the Act

The modern rule of right of way is that the public authority holds an easement unless the record shows that it holds a fee title.[18] No effort of the adjoining landowner is usually required to "trigger" the reversionary interest upon abandonment of an easement since the adjoining landowner already owns the underlying property interest.[19] By contrast, since the "limited fee" interest with the implied right of reverter results in a reversion to the grantor, here the federal government, some defined legal action would be necessary to vest the property interest in third parties.

A recurring question in the cases arising under the Act is when the railroad has abandoned the right of way to allow an action to trigger the reversionary interest. The case law reveals that much of the confusion arises from the concept of abandonment for purposes of regulation by the Interstate Commerce Commission as opposed to abandonment for purposes of the Act. A logical question is why an Interstate Commerce Commission abandonment order does not trigger reversion.

Railroads subject to regulation under the Interstate Commerce Act are obligated to obtain a certificate of discontinuance or abandonment from the ICC before either discontinuing service or abandoning the line, or must obtain an exemption under the Staggers Act amendments to the ICA.[20] Neither of these administrative acts is sufficient by itself to trigger "abandonment" under the Act. The courts have held that abandonment under the Right of Way Act may only be declared by judicial or congressional action.[21] An abandonment order by the ICC under the Interstate Commerce Act is not equivalent to an Act of Congress under the Right of Way Act.[22] The ICC's administrative action serves only as a precondition to an actual physical abandonment, which may or may not actually occur.[23]

Whether a railroad line is abandoned is a question of fact under the Right of Way Abandonment Act.[24] An abandonment order is evidence of intent, which is relevant to proving this fact along with other acts of dismantling the road. Obviously, a road that has been completely dismantled is an abandoned road. However, it is not necessary for the road to have been completely dismantled in order for a court to declare the road abandoned. One court has identified the following factors to be considered in determining whether abandonment under the Act has occurred: railway service has been discontinued; trackage and other structures have been removed; right of way had not been used for any railroad purpose; maintenance of the line had been discontinued; the railroad had ceased paying taxes on the right of way.[25]

It is important to note that a reversionary interest in right of way can only be acquired after the ICC's jurisdiction over the line has ceased. When this occurs, it will usually be stated in the abandonment order.

Rights of Way Subject to Reversionary Interest

If the Act obviates the major cost of purchase and eminent domain acquisition for state and local governments in some cases, it also creates special problems for the right of way specialist in terms of simply identifying which rights of way are available. For one thing, it is not possible to identify which rights of way and properties are subject to reversionary interests simply through an examination of title abstract. Since the Townsend case was not decided until 1903, after the railroad lines were laid and constructed, many rail lines also acquired properties by purchase or condemnation before that time from landowners who had laid claim to the properties between the land grant and 1903 under various acts such as the Homestead Act. However, as the Supreme Court has held, all lands granted to parties under legislation subsequent to the land grants themselves were subject to the rail lines even though the lines may not have even been surveyed or laid out until after the landowner established his or her claim.[26] Congressional grants were

held to be *in praesenti*, meaning that they gave railroads first in time priority status at the time Congress made them. Thus, notwithstanding that a railroad may have acquired its right of way by purchase or condemnation before 1903, it may still have an underlying limited fee interest in the right of way with a reversionary interest that overrides the rights of abutting property owners upon abandonment and even the railroad's own interest revealed in the title abstract.[27]

Identification of the reversionary interest therefore requires examination of the Bills of Congress, state legislative records, court records and in some cases, Department of Interior, Bureau of Land Management records, reports of the Interstate Commerce Commission and Bankruptcy Court records to identify mergers, acquisitions and reorganizations. Typically, limited fee rights of way were granted in the special charter itself together with other franchises such as property tax exemptions. The actual patents to right of way were sometimes not granted until the early 20th century. Since the limited fee right of way overrides the abutting owner's interest, the ordinary title examination ordinarily used in right of way acquisition may not identify the limited fee right of way.

Unresolved Issues Under the Act

The case law arising under the Right of Way Abandonment Act has not addressed all issues of practical concern to right of way specialists and public authorities. One question is whether a state or county may establish a "public highway" on an abandoned right of way against a railroad without a dedication by the railroad itself. In other words, is further evidence of a dedication necessary beyond the intent of Congress in promulgating the Act itself and a declaration by a court of competent jurisdiction that the right of way is abandoned and available for dedication as a public highway? So far, the cases involving public highways have involved a dedication of the right of way by the railroad to public highway purposes, sometimes in order for the railroad company to retain right of way for fiber optic or pipeline purposes.[28] These conveyances have been sustained against the claims of adjoining landowners who claimed reversionary interests under the Act. The case law implies that whether the public authority is a municipality accepting the grant or some other public authority seeking to establish a "public highway," the Act itself is sufficient evidence of a further dedication of any right of way to public purposes so as enable an act of acceptance a basis for overriding any claims to the contrary.

The second question is whether any conflict arises between the Interstate Commerce Act and ICC abandonment orders under that Act and the Right of Way Abandonment Act. Section 10905 authorizes the ICC to determine whether "the rail properties proposed to be abandoned are suitable for public purposes, ..." If the Commission makes that determination, then "the properties may be sold, leased, exchanged or otherwise disposed of only under the conditions provided in the order of the Commission." On the other hand, the U.S. Supreme Court has recently observed, "unless the Commission attaches post-abandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end."[29] Presumably, if public authorities are patient enough to wait for the abandonment of a limited fee right of way to occur, including the dismantling of the track and the road structures, they can avoid any claim of the exclusive jurisdiction of the ICC precluding the triggering of the reversionary interest. However, this issue may require further resolution by the U.S. Supreme Court.

The Abandoned Right of Way Act constitutes a little known but potentially powerful tool for the acquisition of right of way by public authority under appropriate circumstances.

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The unresolved issues should not be obstacles to public authorities seeking less costly ways of acquiring abandoned right of way for public purposes. Compared to the large costs of acquiring right of way through purchase or eminent domain, the cost of identifying and recovering abandoned limited fee right of way is small. Public authorities have little or nothing to lose but much to gain by attempting to identify and recover abandoned land grant right of way by triggering of dormant rights of reverter.

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