Some Good News for Joint Use of Federally Granted Railroad Rights of Way

■ CHARLES H. MONTANGE

Approximately 30,000 of the 150,000 miles of railroad lines in the United States were originally located on federal lands pursuant to federal statute. Most of these federally granted rights of way are west of the Mississippi River. Reams have been written concerning the ownership of minerals underlying these properties. Equally important, if much less extensively explored, is the subject of ownership interests in the surface and non-mineral subsurface estates.

Questions concerning ownership interests in the surface and non-mineral subsurface estates are more relevant today than ever before. Pipelines and utilities seeking corridors along or across railroad rights of way have long been vitally interested in these issues. Additionally, there is a growing interest in rail lines for fiber-optics purposes. Further, there is an expanding movement to preserve rail corridors for public recreational purposes and for future use as transportation corridors (so-called "railbanking"). Pipelines, utilities, fiber-optics companies, recreational users, and railbankers are all interested in the same thing: who owns the surface or non-mineral subsurface estates in federally granted railroad rights of way.

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Roller-Coaster Signals from the Interior Department

The United States Department of the Interior, which is the lead federal agency in interpreting federal land grants, has vacillated over the years on the question of who owns what in federally granted rail corridors. In recent years, the Department, frequently in reliance on the *ETSI* (Energy Transportation Systems, Inc.) cases of the Tenth and Eighth Circuits,[1] has suggested that federally-granted railroad rights of way are a "mere surface easement."[2] By implication, the ownership of virtually all non-railroad interests in the surface estate, as well as all non-mineral subsurface rights, are controlled by state common law. Under the common law of at least some western states, these rights appear to be owned by abutting landowners.[3] This can be desirable in certain instances from the perspective of potential corridor users. For example, if a pipeline wishes to transect a rail corridor, but the railroad for some reasons wishes to obstruct the pipeline, the ability to obtain the necessary rights from an abutting landowner is obviously beneficial to the pipeline. As Energy Transportation Systems did in the *ETSI* decisions, the pipeline company can negotiate the necessary rights from abutting landowners, leaving the railroad high and dry. However, concentrating the various property interests in abutting landowners can render infinitely more difficult the task of a utility, fiber-optics company, or public user seeking to use any substantial linear portion of a rail corridor. In such cases, the prospective user must secure rights from a myriad of abutting landowners, some of whom may simply refuse to deal. This can be a cumbersome, costly, and ultimately impossible process.

Two New Developments

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First, on January 12, 1989, the Acting Solicitor of the Interior Department released an opinion expressly overruling certain earlier Interior Department opinions suggesting that federally granted railroad corridors were "mere surface easements."[4] The Acting Solicitor declared that the federally granted rail corridors were, as to pre-1871 grants, fee interests,[5] and as to 1875 Railroad Act[6] rights of way, "an interest tantamount to fee ownership."[7]

Second, the National Trail System Improvements Act of 1988 was signed into law on October 4, 1988.[8] Under prior law, manifest in 43 U.S.C. § 912, all non-mineral interests of the federal government in federally granted rights of way were vested (with certain exceptions) in abutting landowners within 1 year of a judicial decree or legislative declaration of abandonment. The new law in effect repeals this prospective gift. It retains, for all abandonments after October 4, 1988, all federal interests in the federal government. It encourages their availability for public recreational trail and other compatible purposes, and otherwise authorizes their sale if the property in question is not in or adjacent to existing federal lands.

Fees or Easements?

Before discussing the implications of these two events, it is necessary to lay some additional background. There are three basic categories of federally granted railroad rights of way. The first category encompasses the so-called "charter railroads," which predate 1871. From 1850 through 1871, the era of the great transcontinental railroads, Congress passed individual "charters" for each rail line, with associated checkerboard land grants on each side of the right of way itself. The second category, spanning the period 1871 to 1875, involved individual "charters" but without the associated checkerboard land grants. For reasons that are beyond the scope of this article, this second category can be regarded as a special case of the initial "charter" railroad classification. The third category is the so-called 1875 Railroad Act rights of way. The 1875 Railroad Act was a generic grant of right of way across federal lands to any railroad company. The nature of the interest held by the railroad, and the interest retained by the federal government, differs depending on the category.

In *Northern Pacific Railway v. Townsend*,[9] decided in 1903, the Supreme Court held that a pre-1871 "charter" railroad right of way grant conveyed a "limited fee" interest in the right of way. The interest was tantamount to a fee simple interest, with the "limit" referring not to the scope of the fee but to its duration. More specifically, the Supreme Court found 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." The reversion, if any, was to the United States, and not to abutting landowners who may have obtained federal patents to adjacent lands subsequent to the location of the railroad right of way.[10]

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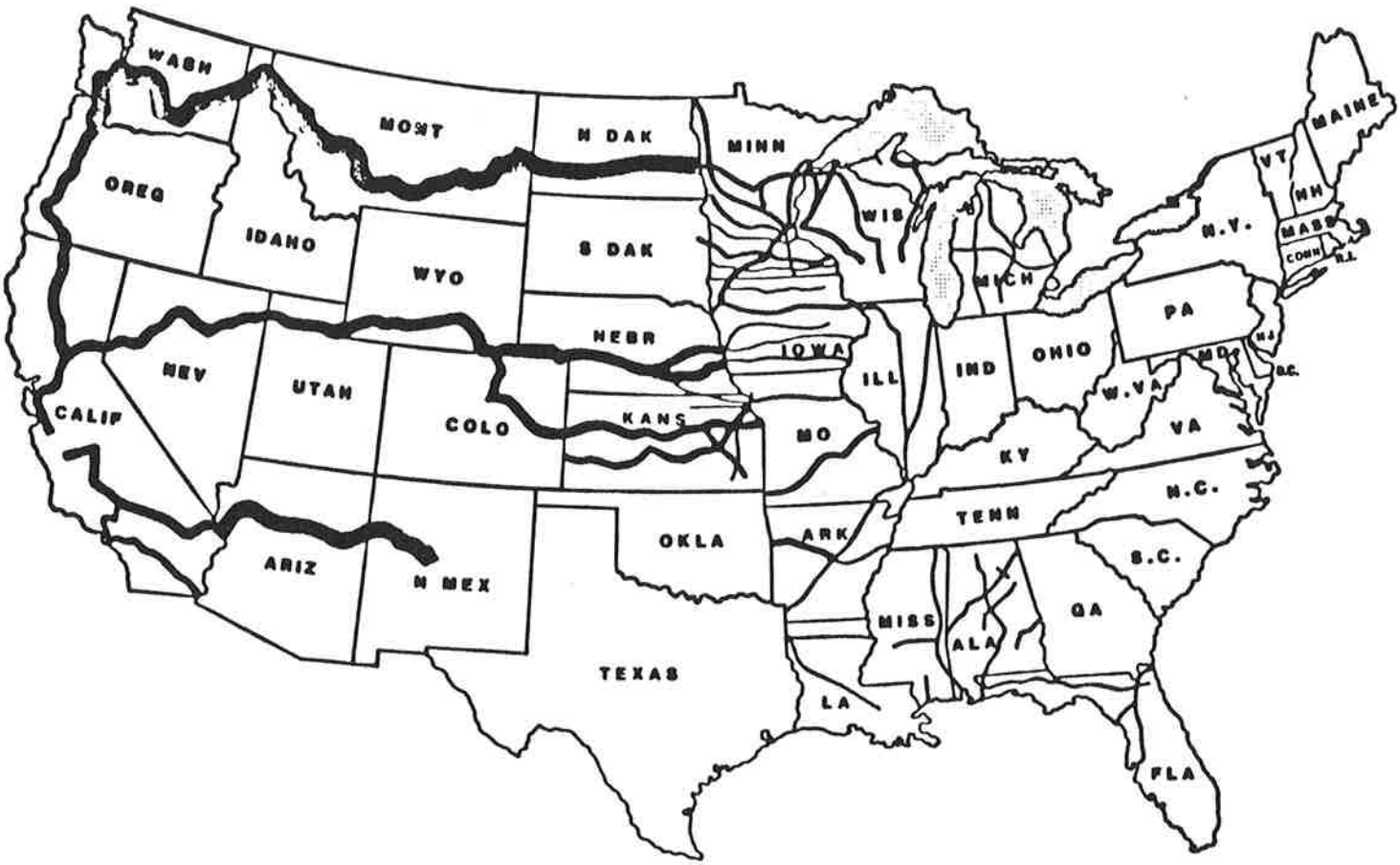
In its 1915 decision in *Rio Grande Western Ry. v. Stringham*,[11] the Supreme Court held that 1875 Railroad Act rights of way were also "limited fees." The Interior Department acceded to the *Stringham* decision, although it had previously taken the position that the 1875 Act did not convey a fee interest like the "charter" statutes.

Congress, which had earlier provided that "public highways" could be established on federally granted railroad rights of way,[12] was concerned about the administrative difficulties to the United States arising from reversion to the federal government of abandoned or forfeited strips after the *Townsend* and *Stringham* decisions. In 1922, Congress adopted legislation to dispose of these strips. The legislation, codified at 43 U.S.C. § 912, provided that the federal interest could be devoted to public highway use if a public highway were established in the corridor within 1 year of a judicial decree or congressional declaration of



The pre-1871 "land grant" railroad rights of way, and the relative amounts of checkerboard land grants associated therewith, are shown. 1875 Railway Act rights of way are basically west of the Mississippi and are too numerous to display on this scale. From Root, T. Railroad Land Grants from Canals to Transcontinentals. American Bar Association, 1987.

Table 1. Acreage Received by Railroads for Rights of Way

Source of Acquisition	Acreage*
Federal government	627,668
States	46,746
Local governments	2,261
Private parties	295,762
Apparent aids (obtained for nominal consideration)	521,753
Total	1,494,190

Note: The data presented above are from the U.S. Office of Federal Coordinator of Transportation, *Public Aids to Transportation*, 1938, Vol. II, p. 118.
* Acreage, as of date of acquisition, acquired before federal valuations (generally between June 30, 1914 and Dec. 31, 1922).

abandonment. Otherwise, the federal interest would vest, after such decree or declaration, in the abutting landowner unless the right of way were within a municipality, in which case it would vest in the municipality.

The Supreme Court then proceeded to throw 43 U.S.C. § 912 out of whack in two decisions involving the mineral estate underlying the federally granted rights of way. In *Great Northern Ry. v. United States*,[13] decided in 1942, the Court overruled *Stringham*. The Court held that 1875 Railroad Act rights of way were not "limited fee" interests, but instead were a "right to use the land for the purposes for which it is granted and for no other purpose." The Court indicated that the fee simple title to the land is in whomever holds the patent for the legal subdivision traversed. In *United States v. Union Pacific*,[14] decided in 1957, Justice Douglas, without overruling *Townsend*, held that railroads owning "charter" railroad rights of way did not enjoy the mineral estate underlying that property. While not necessary for his result, his opinion contained broad language which could be read to suggest that a "charter" railroad received only a surface easement in its right of way. In neither *Great Northern* nor *Union Pacific* did the Court evidence any awareness of Congress' implicit indorsement of *Townsend* and *Stringham*, manifest in 43 U.S.C. §§ 912–13, as applied to non-mineral subsurface interests and the surface estate.

If, per extension of *Great Northern* and *Union Pacific*, a railroad received only a typical common law surface easement from the federal government, three consequences follow. *First*, under the law of many states, a "mere easement" would be insufficiently broad for the railroad to permit many otherwise compatible uses. *Second*, the potential compatible user would therefore have to secure sufficient interests from other parties to permit his/her proposed use.[15] The United States (or, where the legal subdivision traversed had been subsequently patented, the United States and abutting landowners) would control all interests in the corridor, other than those contained in the railroad's "mere easement." Thus, permission from the United States (or private abutters) would in general be necessary for the compatible uses. *Third*, statutes like 43 U.S.C. §§ 912–13, purporting to control disposition of federally granted right of way upon abandonment, would be largely meaningless, especially where the legal subdivision traversed had been patented to a private party. The fee simple for the property would have vested in the abutter when he or she obtained the initial patent. The abutter would enjoy all rights in the surface upon lawful abandonment of the rail line.

Against this backdrop, the *ETSI* decisions are easy to understand. While *Great Northern* and *Union Pacific* involved ownership of the mineral estate (with the Supreme Court striving to retain that estate in the federal government), the *ETSI* decisions involved the non-mineral subsurface. ETSI sought a route for a coal slurry pipeline. The pipeline would be competitive with the railroads, and the railroads refused to grant interests sufficient to permit the proposed pipeline to cross their tracks. ETSI then purchased easements from private landowners holding the legal subdivisions traversed by the rail lines. In the *ETSI* cases, the U.S. Courts of Appeals for the Eighth and Tenth Circuits held that ETSI could properly cross the rail line on the basis of rights obtained from abutting landowners. Both "charter" and 1875 Railroad Act rights of way were viewed in essence as mere surface easements.

The Acting Solicitor's 1989 Opinion

The opinion of the Acting Solicitor, issued January 12, 1989, brings order to this jumble of authority. The opinion arises from a request for guidance concerning whether MCI Telecommunications Corporation (MCI) or Southern Pacific Transportation Company must obtain right of way grants or permits from the Bureau of

Land Management in order to permit MCI to install a fiber-optic communication line and associated facilities within existing federally granted railroad rights of way where those rights of way cross federal land. Although the opinion is limited to cases in which the federal government is the abutter, by easy extension it is germane to situations in which private landowners now own the land traversed by the federally granted railroad corridor.

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After an extensive review of the case law, the Acting Solicitor concluded that "the Supreme Court's ruling in *Townsend* is the controlling precedent" with respect to pre-1871 "charter" railroad grants. The Acting Solicitor reasoned that the railroads enjoy fee ownership in such property, except for the mineral estate where it was reserved to the United States as per *Union Pacific*. The Acting Solicitor explained that the "scope" of these charter rights of way "includes the surface, subsurface (except minerals) and airspace." The "duration," he stated, "is perpetual, subject to a possibility of reverter if the lands are no longer used for railroad purposes." Under these circumstances, the railroad can authorize use of right of way for purposes compatible with the railroad use. Further, such an authorization is "not subject to the administrative jurisdiction" of the Interior Department. The United States, however, could bring suit to recover title "where it appears that the reverter has been triggered."[16]

As to 1875 Railroad Act rights of way, the Acting Solicitor acknowledged that the railroads obtained an "easement," but most emphatically not "an ordinary common-law easement." Instead, the Acting Solicitor said, the interest "includes . . . exclusive use of the surface" and is "tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface and airspace." This right extends in perpetuity, implicitly subject to termination if the easement is no longer used for railroad purposes. The Acting Solicitor indicated that the federal government retains an interest in the remaining subsurface (including the mineral estate) and airspace, at least where the right of way crosses federal lands and, although not directly addressed in the opinion, the Acting Solicitor's logic implies there is a retained interest even where the right of way now traverses private lands. In a footnote, the Acting Solicitor noted that a "third party" could seek federal approval "to utilize the government's retained subsurface or airspace interests in an 1875 Act grant. . . ."[17]

The Acting Solicitor's opinion is consistent with the result, but certainly not the reasoning, in the *ETSI* decisions insofar as those cases involved 1875 Railroad Act rights of way. The upshot of the Acting Solicitor's interpretation is that the railroad may authorize use of the non-mineral subsurface in such rights of way. In the absence of railroad authorization, the United States where federal lands are involved, or, where private lands are traversed, the abutting private landowner (or, based on its "retained interest," conceivably the United States) may authorize the use, so long as that use does not interfere with any rights granted or used by the railroad.

The opinion, however, is inconsistent with the *ETSI* decisions insofar as "charter" rights of way are involved. In such situations, all interests in the non-mineral subsurface would belong to the railroad, with a possibility of reverter in the United States.[18] The Acting Solicitor frankly implies that the *ETSI* cases were based on faulty reasoning. The *ETSI* cases, he wrote, "appear to confuse . . . the duration of the railroad's estate with the scope of the estate." Abutters, the Acting Solicitor said, "only have future rights in the right of way, i.e., only upon abandonment."[19] By implication, the abutters hold insufficient rights to permit use of the corridor in "charter" rights of way or to control such use in 1875 Railroad Act cases. The Acting Solicitor observed that the Tenth Circuit itself had implicitly called the *ETSI* decisions into question in *Missouri-Kansas-Texas Railroad Co. v. Early*,[20] which held that a pre-1871 federal grant across Indian lands conveyed a fee interest.

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the confused situation that arises upon abandonment of current railroad use. The Acting Solicitor's opinion suggested that at that time the holder of the reverter (the United States) in "charter" grants and the abutting landowner (the United States or private parties) could quiet title against the "compatible user." Another way to say this is that upon a duly authorized rail abandonment, fiber-optics companies, utilities, highways, and pipelines occupying the corridor under color of rights granted by the railroad would be trespassers.

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Until recently, the only postabandonment title protection afforded the compatible user under federal law was 43 U.S.C. § 912. This statute authorized continued use of the corridor as a "public highway" after abandonment, if the public highway were established within 1 year of a judicial decree or congressional declaration of abandonment. The district courts were split on the availability of this provision to sustain an 1875 Railroad Act corridor for highway use. *City of Aberdeen v. Chicago & N.W. Transportation Co.*,[21] suggested that there was no federal interest in the corridor sufficient to apply 43 U.S.C. § 912 to such rights of way. *State of Idaho v. Oregon Short Line R. Co.*[22] reached the opposite result.

The Acting Solicitor's opinion did not directly address the question whether 43 U.S.C. § 912 has the effect or preserving the rights of pipelines, utilities, and other corridor users where rail use is converted to public highway use. However, the thrust of the opinion is consistent with preservation of corridor uses originally authorized by the railroad. Further, the opinion is consistent with the view that additional such uses may be authorized by the United States on the basis of its "retained interest" or by the public highway user (on the theory that it stands in the place of the railroad).

The Acting Solicitor embraced the analysis in *State of Idaho* that 1875 Railroad Act rights of way encompassed a broad interest on the part of the railroads, which, although not a fee interest, was tantamount to a fee. Further, the Acting Solicitor, buttressed by the *State of Idaho* decision, recognized a significant "retained interest" on the part of the United States "in addition to the mineral rights" in the 1875 Act corridors. Quoting the district court, the Acting Solicitor explained that although the federal government's retained interest "need not be shoe-horned into any specific category cognizable under the rules of real property law," the interest was sufficiently broad to encompass "a secondary right to use the subsurface of the rights of way."[23] If the federal government retains such "secondary rights," they presumably continue in the event that the corridor survives by means of continued public highway use. This is especially the case in light of the "familiar canon of construction" that questions concerning federal land grants "are resolved for the Government, not against it."[24] If a rail corridor can be preserved as a public highway, a compatible user, such a pipeline or fiber-optics company, therefore may coexist in much less fear of ending up a trespasser or being forced to deal with a host of hostile claimants.

National Trail System Improvements Act of 1988

This analysis in turn makes the National Trails System Improvements Act of 1988 all the more important. This new statute is predicated on the notion that the United States in fact enjoys the reversion in "charter" railroad rights of way, and that the retained federal interest in 1875 Railroad Act rights of way is substantial as well. The new law in effect amends 43 U.S.C. § 912 by providing that, in the event a "public highway" is not established on a federally granted corridor, the federal interest does not automatically vest in the adjacent landowner or municipality, but instead is retained by the federal government. The new statute authorizes use of this interest for public recreational trail and other compatible purposes. If the corridor is in or adjacent to federal lands, it is incorporated into those lands. If it is outside federal lands, and neither the federal land manager nor local agencies or organizations wish to manage the corridor as a trail, the retained federal interest may be sold, with the proceeds going to the federal Land and Water Conservation Fund.

During congressional consideration of the legislation, the Department of Agriculture and, to a lesser degree, the Interior Department expressed concern, based on the *ETSI* decisions, that the federal government in fact may have no "retained interest" in federally granted rights of way because they all may be mere easements. The Acting Solicitor's 1989 opinion unquestionably comes to the opposite conclusion, and instead recognizes a significant retained federal interest.

The American Farm Bureau, which opposed the new legislation, claimed that the National Trail System Improvements Act was a "taking" in that 43 U.S.C. § 912 "vested" any retained federal interest in adjacent landowners (and presumably municipalities, where a municipality is traversed) upon adoption of that statute in 1922.[25] But 43 U.S.C. § 912 on its face provided that the federal interest did not vest in abutters or municipalities until a judicial decree, or congressional declaration, of abandonment. Further, any vesting was contingent upon nonestablishment of a "public highway." "Public highway" is generally construed to encompass any trails, tracks, paths, routes, or roads open to the public at large, regardless of the form of surface locomotion. The Improvements Act, which is prospective only, thus does not interfere with a vested property right. Further, even if the property "right" were viewed as vested by 43 U.S.C. § 912, that

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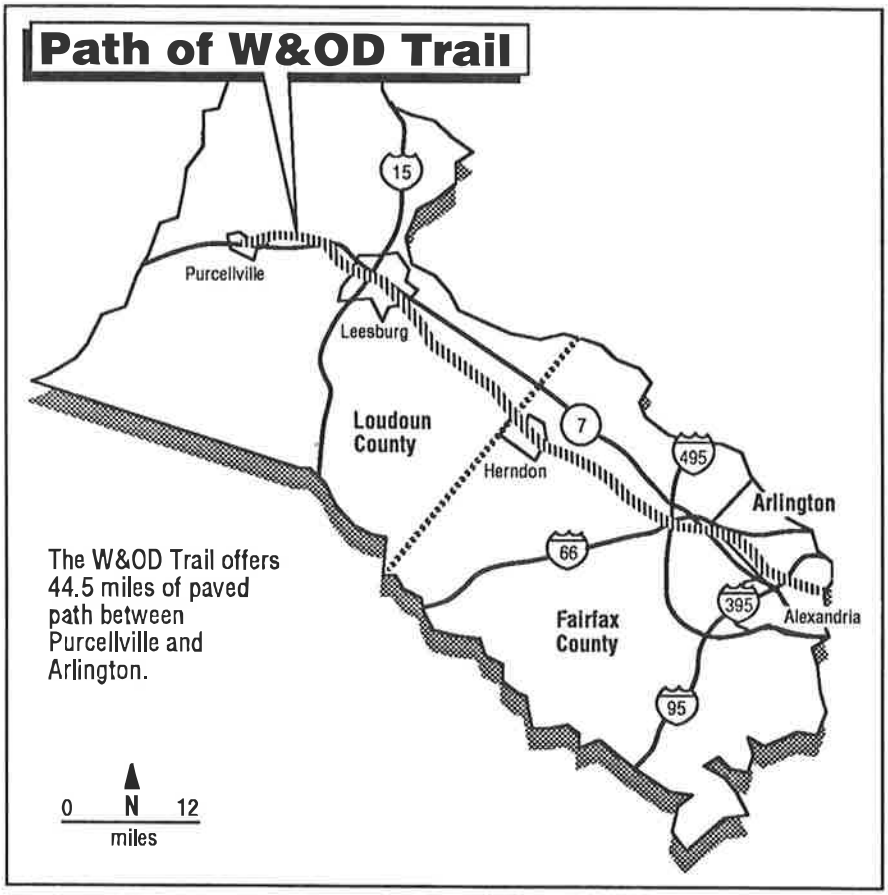

The W & OD Regional Park: An Example of Joint Use

After 107 years, the Washington & Old Dominion Railroad (nicknamed "the Virginia Creeper") stopped running in 1968. Its right of way was acquired by the Virginia Electric and Power Company (VEPCO), an electric utility, as a route for its transmission lines. Retaining transmission line rights, the utility sold the 44.5-mile right of way to the Northern Virginia Regional Park Authority (NVRPA) for use as a bicycle, hiking, and equestrian trail. Besides serving as a utility corridor for VEPCO, the "W & OD Trail" now enjoys some 1,000,000 recreational users per year. In addition, AT & T recently installed a fiber-optics cable on a portion of the corridor. Plots of land in the right of way are rented to neighboring businesses, and nearby residents also rent space for gardens. Darrell Winslow, NVRPA's Executive Director, reports that proximity to the park appears to have "a positive effect on land values" in adjacent residential neighborhoods and that businesses along the trail have likewise benefitted from "the large number of people that use the trail." NVRPA's address is 5400 Ox Road, Fairfax Station, VA 22039. More information on joint use is also available from Rails to Trails Conservancy, 1400 16th Street, N.W., # 300, Washington, DC 20036.

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right is by no means absolute. To the contrary, it is in the nature of an expectation contingent upon the preemptive right of the government to establish or to permit use of the corridor as a public highway of some sort. The Improvements Act modifies or regulates this expectation but in a fashion basically consistent with the contingency to which the right or expectation all along has been subject. This is not the stuff of a "taking." Finally, if there were a "taking," it was back in 1922 when the original statute was passed.

The net result of the Acting Solicitor's 1989 opinion and the National Trails System Improvements Act of 1988 is to increase the possibilities for economic use of federally granted railroad rights of way by compatible users, including pipelines, fiber-optics companies, utilities, highways, and purely recreational users. These two new developments should facilitate both pre- and postabandonment corridor uses. Of course, there are many uncertainties which remain to be worked out, but corridor users have good reason to be cheered. (IRWA)

End Notes

1. *Energy Transportation Systems, Inc. v. Union Pacific Railroad Company*, 606 F.2d 934 (10th Cir. 1979); *Energy Transportation Systems, Inc. v. Union Pacific Railroad Company*, 619 F.2d 696 (8th Cir. 1980).
2. E.g., Memorandum, Associate Solicitor, Energy and Resources, to Director, BLM, July 5, 1985; Letter, Associate Solicitor, Energy and Resources, to R. Walkley, Union Pacific RR, Feb. 24, 1986. The Department of Agriculture also has subscribed to the "mere easement" view in the recent past. Letter, R. Lyng (DOA) to J. Bennett Johnson, April 22, 1988, attached as an appendix to S. Rep. No. 100-408. This view is inconsistent with opinions issued by the Interior Department in the early 1980s, (e.g., Memorandum, Assistant Solicitor, Realty to Director, BLM, August 22, 1980; Letter, Office of Solicitor to BLM, Oct. 15, 1981), or in previous decades. E.g., *State of Wyoming*, 83 I.D. 364, 377 (1976) and authorities cited.
3. At least such is the presumption of the *ETSI* decisions, *supra* note 2.
4. Memorandum (M-36964), Acting Solicitor to Assistant Secretary, Land & Minerals Management, Jan. 12, 1989 ("1989 Memorandum").
5. 1989 Memorandum, *supra*, at 9–10.
6. General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934. The 1875 Act was repealed, effective October 21, 1976, insofar as applicable to future rights of way through public lands and the lands in the National Forest System. *See* section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793, and section 701(a), 90 Stat. 2786 (preserving preexisting rights of way).
7. 1989 Memorandum, *supra*, at 15.
8. P.L. 100-470, adding a new subsection (c) to section 9 of the National Trails System Improvements Act, 16 U.S.C. § 1248.
9. 190 U.S. 267 (1903).
10. E.g., *H.A. & H.D. Holland Co. v. Northern Pac. R.R.*, 214 F. 920 (9th Cir. 1914).
11. 239 U.S. 44 (1915).
12. E.g., 43 U.S.C. § 913.
13. 315 U.S. 262 (1942).
14. 353 U.S. 112 (1957).
15. Of course, under state law the railroad may be able to exclude other uses, even if compatible, which it is not willing voluntarily to permit, so the approval of the railroad might be necessary as well. And even if state law does not recognize such a right on the part of the railroad, it may be an arguable consequence of federal law which clearly seeks to preserve the entire granted corridor for public transportation and communication purposes.
16. 1989 Memorandum, *supra*, at 14. The reverter would presumably be triggered where the railroad use had been abandoned, or where the alleged "compatible" use was in fact inconsistent with the railroad use.
17. 1989 Memorandum, *supra*, at 15–16 and note 14.
18. One might still make a policy argument that