Beyond Railroad Day

Speakers Respond to Questions

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You know something's a success when people ask for more. The overwhelming enthusiasm for "Railroad Day" at the International Seminar in Louisville, Ky., has spawned this compilation of questions and answers received from the audience. In forming these written responses, the speakers have combined or condensed some questions to avoid redundancy.

The following questions and answers are offered for information purposes, and should not be taken as legal advice or opinion on specific facts or circumstances. Consult an attorney concerning your situation and any legal questions you have.

continued

Jon Erik Kingstad
Attorney at Law
Lakeland, Minn.

Cristin A. Cochran

Reversionary and Servient Interests

Fee, limited fee or easement and implications for reversion

Q—*Why do you say an eminent domain grant reverts to original fee owner upon abandonment? Does this not mean the court or someone has determined that only an easement was condemned?*

A—The general rule in the law is that eminent domain acquisitions of right of way result only in the taking of an easement rather than a fee interest. This is only another way of stating the commonly understood proposition that an adjoining landowner holds the fee title to the underlying property to the middle of the right of way where he/she owns the fee on both sides of the right of way. Once the condemned easement is abandoned, it ceases to exist in the eyes of the law so that the land "reverts" back to the underlying fee owner.

The issue of reversion commonly arises after a right of way has been abandoned where an adjoining landowner and some other party dispute each other's claims to the abandoned right of way. At that point, a court will have to decide whether the property was an easement or some other interest. If the property was condemned, a court will usually hold automatically in favor of the adjoining landowner on the grounds that a condemnation only entailed acquisition of an easement. I would refer any reader interested to the case of *McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131 (Iowa, 1985) for a typical analysis.

Q—*You indicated land reverts to adjacent landowner. 1) Landowner or heirs of owner at time of grant? and 2) many lands adjacent to right of way have sold many times. Sales often describe bounds as to railroad right of way. How is property adjacent to railroad property claimed if it was not in description of sale or purchase?*

A—1) Where a right of way is an easement, the reversion will be triggered in favor of the adjoining owner. The reversionary interest of a limited fee is in the grantor or the grantor's successors in interest to the property. The grantor's heirs under laws of succession are not involved unless they succeed to the property through probate or trust.

2) I assume that your second question involves a claim to an abandoned railroad right of way. The answer depends on the nature of the interest held by the railroad in the right of way. An adjoining property owner may not be able to assert a claim to adjoining property if it is excluded from the property description if the right of way is a limited fee which was not granted by the adjoining owner's predecessors. If the right of way was held as fee simple absolute, a property owner adjoining an abandoned rail corridor can simply request a quit claim deed from the railroad or, failing that, take steps to claim ownership through adverse possession. If the right of way is only an easement, the adjoining owner may be able to simply assert title, arguing that the exclusion of the right of way from the abutting land description was based upon a mistake.

Q—1)*"No fee by condemnation." Does this apply if the taking defines the interest acquired?*

2) *You mentioned that right of way acquired under eminent domain is essentially an easement. Does this apply to rights of way acquired under threat of eminent domain when a voluntary agreement if reached or just when litigated?*

A—A condemnation implies that the right of way is taken involuntarily by judicial process which culminates in a judgment awarding compensation to the owner. Courts have generally construed such condemnation awards as vesting such interest in the condemnor as meets public necessity. If the public necessity for the right of way is abandoned at any time, the general rule is that the right of way is also extinguished. Even if the condemnor defines the right of way taken as a fee simple absolute, courts will reserve the right to determine upon abandonment what interest was actually taken.

Q—*What is the difference between a railroad "condemning" right of way and a federal or state highway administration condemning right of way? Do they both get easements or one gets easement and the other fee? If the latter, why?*

A—Procedures governing the acquisition of right of way by eminent domain are applicable generally to all entities exercising such powers. In general, the same substantive rules will also apply.

Q—*An abstract is not considered adequate notice of the railroad rights? What protection do owners or potential owners of adjacent contiguous land have if this is true?*

A—An abstract may not be sufficient to determine whether a railroad has a limited fee simple interest from the federal government through a land grant. *The Northern Pacific Railway Co. v. Townsend* decision discussed in

ment from the servient landowner. Since some courts have held that a servient landowner essentially lacks standing to challenge a transfer of a right of way to another public service corporation or oppose the imposition of an additional servitude for a use consistent with the original use of the railroad, this appears to have some basis in the law. Whether the property should be acquired from the railroad rather than the underlying landowner may be a function of cost and economics more than a matter of law.

Q,—*What type of document may a railroad give a subsurface (pipeline) user — an easement, lease or license? Does it make any difference if the federal government is the user?*

A—As a general rule, a railroad has no interest in the land below the surface of its right of way. Since the railroad's interest in a right of way is limited to a surface interest, and such interest in so much beneath as may be necessary for support it is unlikely that it may grant any of these interests to a pipeline occupying the land beneath the surface. It would therefore make no difference whether the pipeline was owned by the federal government. But see the answer above.

Q—*Can Union Pacific charge telephone companies dollars per mile for underground cable along or across their right of way? Can railroads sell their abandoned right of way or charge for and transfer/grant easements in property before abandoned?*

A—Since right of way is defined as limited to surface interests, and such interest beneath the surface as is necessary for support, a railroad should not be able to charge a telephone company to run underground cable under or across right of way as long as the cable does not interfere with the railroad's ability to operate safely. The telephone company or other subsurface cable company should acquire the property from the servient landowner. But again, see above.

The case law in a number of jurisdictions holds that a railroad can grant or transfer an easement to another public service corporation prior to abandonment. In other words, an abandonment does not occur as long as the right of way remains subject to some public use and occupation. Again, this policy is consistent with the case law which holds that a railroad can allow an additional servitude without compensation to the servient owner. While the law may support obtaining an easement or lease from the railroad, it may be preferable as a practical matter for a telephone company or other public service corporation to simply negotiate with the servient landowner for the easement.

Another option, suggested by a recent study by the Conservation Fund and the American Gas Association is for the public service corporation to co-operate with a county, municipality, rail bank program or rails to trails organization, to establish a "public highway" or trail on the abandoned right of way. Where the right of way is limited fee, or in those jurisdictions such as Minnesota, the establishment of a trail might be a way of minimizing the cost of acquisition.

Q—*When many pipeline attorneys determine that the railroad has an easement they feel that they can buy crossing rights for the pipeline across the railroads' easement from the underlying fee property owner and are not required to obtain any rights from the railroad. Please elaborate on your opinion: can the utility cross the railroad right of way without concurrence of the railroad?*

A—See my answers above. The decision to acquire concurrence of the railroad to cross the right of way usually involves issues such as cost rather than legal considerations, although the transactional cost of "hold-up" litigation must probably be factored in.

Q—*If title is fee simple with a reversionary interest, is the railway in a position to grant long term leases on a portion of the right of way?*

A—If the railway has title to right of way in fee simple, even a limited fee, this ownership interest is sufficient to require or grant a lease or easement to cross the right of way above the surface. This rule would not apply to subsurface use because courts have construed even limited fee interests in right of way as limited to above surface. The railroad with a limited fee right of way is in no different position than the easement holder to require or grant leases or easements from subsurface users.

Q—*Can a private company purchase railroad right of way corridor (petroleum pipeline)? In Georgia the state DOT purchased a railroad corridor for an intermodal corridor.*

A—If petroleum pipelines are organized as common carriers of petroleum, they may acquire right of way in the same manner for their pipelines as other public service corporations. State DOT's frequently purchase right of way for rail banks and authorize their use for other public purposes.

Q—*Did Wisconsin Central apply to longitudinal as well as transverse installations? Was issue adjudicated as to longitudinal?*

Georgia S. Snodgrass

A—The case of *Wisconsin Central, Ltd. v. Public Service Commission of Wisconsin*, 490 N.W.2d 27 (Wis. App. 1992) involved only the issue of perpendicular crossings of railroad tracks at public highway crossings. The Wisconsin statute, however, governed any situation where a railroad and a public utility could not agree and where the public convenience and necessity required that a public utility be permitted to extend its lines "on, over or under the right of way." It is likely that the Wisconsin PSC's interpretation of the statute would apply to longitudinal as well as transverse crossings as long as the public convenience and necessity required it and as long as the crossing will not materially impair the ability of the railroad to serve the public.

Rails to trails

Q—*Does not the more recent rails to trails federal act override all state legislated dictates applying to less than fee right of way?*

A—The National Trails Systems Act as amended in 1983 authorized the Interstate Commerce Commission to permit interim uses of abandoned rail lines as recreational trails to preserve abandoned rail corridors for future trail use. While this act would probably override any state common or statute law allowing an adjoining landowner to claim a reversionary interest in an easement right of way, it would not necessarily preempt state common law or statute law which were not inconsistent with the letter or policy of the Act.

Q—*What title might be passed to public agency over Act of Congress land where they are changing use—for bike trail or continuous right of way uses? New law in this regard?*

A—Title to reversionary interests held by the United States is passed by the Abandoned Right of Way Act of 1922 to municipalities and adjoining landowners in rural areas. The Act also provides that where a right of way traverses or occupies any other legal subdivision or part thereof, that part of the right of way embraced within a public highway established within a year of a declaration of abandonment is vested in the legal subdivision. Legal subdivisions have been held to include counties. Therefore, where the reversion is triggered for the purpose of establishing a public highway, the title would probably be vested in the municipality or adjoining owner as the case may be subject to a public highway right of way easement.

Under the National Trail Systems Act of 1983, public agencies acquiring right of way for trail use do not acquire fee simple title but are limited to easements.

Q—*In the event of abandonment of railroad right of way, what environmental (i.e hazardous material) liabilities remain with the original right of way owner?*

A—This question is outside the scope of my materials. I will defer to other speakers who cover the topic of environmental liabilities of right of way owners.

Q—*What happened to the Preseault case versus the Vermont Railroad and State of Vermont in U.S. Supreme Court? Abandoned right of way was turned into a bike path rather than reverting to owner. It split his property, no access to lake. Just compensation seemed to be an issue.*

A—*Preseault v. ICC*, 494 U.S. 1 (1990) decided the issue of whether 1983 amendments to the National Trails System Act which allowed the ICC to preserve abandoned rail corridors for possible future rail use by allowing interim use as trails was an unconstitutional taking of the land of the servient owner. The Court held that no taking resulted. ❑

James E. Farrell
Union Pacific Railroad
Omaha, Neb.

Physical Issues

Q—*What is the approximate depth of burial of fiber optic cable?*

A—Early construction (in the mid-1980s) was typically at 42 inches minimum depth, with 60 inches minimum required under certain facilities. Today 48 inches (rather than 42 inches) is the prevalent standard minimum depth in typical open area conditions.

Exceptions may be found, for example, where cable has been installed by cutting a trench into subsurface rock where additional depth can add substantial installation cost without any significant improvement in cable survivability.

Q—*What is the depth of maximum disturbance that can occur in a "train wreck"?*

A—This is a function of speed, cause of derailment and soil conditions. A high speed derailment caused by a broken rail sending the train into wet soil is a "worst case" scenario in which certain components such as a wheel or piece of rail might penetrate several feet. The typical derailment will remain within or atop the track structure, with only a few inches of soil disturbance. The greater threat to underground facilities is the heavy equipment moving on the surface to remove the derailed equipment and restore the area of the incident, particularly in wet conditions—however, this phase is controllable to avoid additional damage to surface and subsurface facilities.

Q—*In reference to the stability of land outside of the railroad right of way, what are your rights?*
A—In general, any landowner has the right to not have the use of their property disturbed by an adjacent landowner; e.g., one person cannot excavate to build a swimming pool and cause the neighbor's garage to collapse, even if the excavator confines the digging to the area of their owned property. A railroad has additional rights resulting from its performance of intra- and interstate commerce and duty of public safety. Typically, if the slope of a railroad track embankment extends beyond its general right of way width in a particular area the railroad will have a slope easement from the adjacent landowner.

Q—*Does conventional boring or directional boring (rather than trenching) for the installation of new cable along a rail line cause less damage to the integrity of the trackbed?*
A—The advances in boring technologies during recent years have been substantial and these technologies are currently being evaluated based upon the results of various installations that have been approved on an experimental or test basis.

These advancing technologies offer the benefit of less soil disturbance by eliminating bore pit excavation or trenching where subsurface conditions permit their use. However, many of these boring technologies utilize water, or water mixed with another ingredient, in quantities controlled by the boring machine operator which can cause problems in the stability of a rail roadbed.

Richard Zulaica, SR/WA

The remainder of the question cards contain general observations and comments, or questions that relate to specifics that vary transaction-by-transaction. ❑

Donna B. Crosby, SR/WA

Charles C. DeWeese
De Leuw, Cather & Company
Pasadena, Calif.

Valuing Corridors

Q—*Where do you start negotiation?*
A—First, let's consider the issue of substitution. In most urban settings, the concept of securing a 100-foot-wide corridor just is not viable. A new corridor is not going to be cut through most urban areas. This means that there are no comparable values, and the sale is going to be negotiated. Certainly, the computational exercise associated with ATF is possible, and the result of that computation may make some feel more comfortable. So be it. The facts that I have encountered lead me to believe that the value lies in each party's choices and alternatives and not much else.

As to how to start the negotiations, the initial offer from a prospective buyer should be as low as possible, and yet not so low as to make the seller think there is not a sale possible. I have used railroad system averages to estimate net income from a segment, sales of nearby abandoned lines, and the real estate tax on operating property. The initial offer from sellers has generally been the substitution ATF calculation, inflated by some number generally between 1.2 and 3.0 for a corridor enhancement multiplier to show the effect of the remnants after assembling a corridor. These two offers have been as far apart as a factor of 10.

Q—*What concerns do you have with low title quality where the corridor won't be used for real purposes?*
A—The short answer is "lots!" The more reasoned answer depends on the planned use, the eminent domain powers of the acquiring party, and the effect of losing title. The best answer I've seen is the Rails-to-Trails program, and while it appears that the corridor can remain intact, I've not yet seen such a trail re-converted to other more intrusive transportation uses, such as light rail. Thus, the corridor is preserved, but not for all potential corridor uses.

The issue as to how hazardous material is considered is again, subject to negotiation. In my experience, the typical railroad urban right of way is neither clean nor very dirty. Future use will probably require clean-up, the materials are usually petroleum-based, and the estimate to clean up is a factor in the price.

DART had the power of eminent domain only when approved by the city council of the appropriate city. The railroad purchases were, for the most part, within more than one city. DART thought it politically more wise to negotiate than to attempt any exercise of eminent domain. Additionally, DART determined that ownership of the entire corridor was the "best" answer. Condemning for an entire railroad corridor, in effect severing a line, is very difficult. Certainly, the possibly of condemnation existed; it was always felt that a negotiated deal was the best answer for both parties.

The value of trackage rights varies as does the value of railroads and railroad corridors. In its most basic application, it gives a railroad many of the same rights as own-

ership. Trackage rights can only be extinguished by the Interstate Commerce Commission, the same as railroad operating rights. In the event of abandonment by the owner of a line, a carrier with trackage rights has the first right to purchase, because the trackage rights give the same right to reach a destination that ownership of the line gives. The result is that if a line on which one railroad owns and another has trackage rights is sold, the purchaser has the trackage rights holder as a tenant.

Non-operating railroad right of way should be, I believe, valued in the same manner as other real estate not owned by railroads. Only the railroad operating right of way has the special characteristics that I believe are so important.

The extent to which electric or gas lines change (the question is diminished but I think that's an assumption) the value of a railroad corridor is a function of the use the purchaser is to make of the line, and the terms of the placement of the gas and electric line. If the lines presence sharply increases the cost of the prospective use, then they diminish the value proportionally. On the other hand, if they contribute a cash stream, that's a positive. Sign boards, while not included in the question, raise similar issues.

I'm not familiar with the situation where a railroad holding an easement, cannot grant a license to cross that easement. In my experience, railroads generally treat an easement the same as ownership for all day-to-day operations and transactions. There has been some challenge of that with respect to sign boards and on easement property, but I know of no case where a license cannot be granted. The license the railroad holding and easement granted may not be sufficient for the licensed use, and some additional effort with the underlying owner may be required. ❑

Mark H. Brain
Law Offices of Fennemore Craig
Phoenix, Ariz.

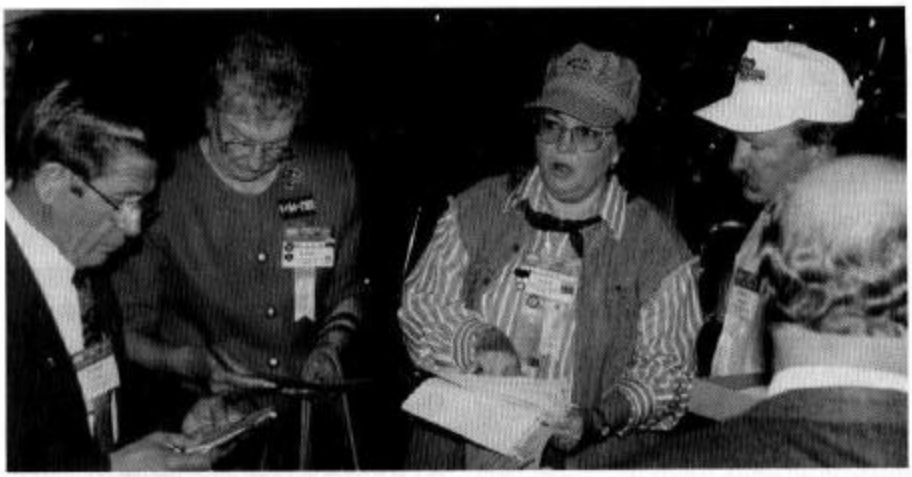
Licensee Agreements

Q—*Are agreements in which a licensee agrees to indemnify a railroad for the railroad's negligence really enforceable?*

A—At common law, public policy considerations rendered these types of agreement unenforceable because the courts thought that such agreements would encourage people to be negligent. The clear modern trend, however, is to reject that reasoning; the notion that such agreements encourage negligent acts is refuted by society's experience with automobile insurance policies, among other things. Accordingly, most courts now recognize that such agreements are fully enforceable. Several states, do, however, require that specific language be used in the agreements. For example, several states refuse to impose liability on a license for a railroad's negligence where the indemnity agreement at issue does not expressly state that this result is intended. An excellent source of further materials on this issue is the annotation entitled *Validity, Construction and Effect of Agreement, in Connection with Real Estate Lease or License by Railroad for Exemption from Liability or for Indemnification by Lessee or Licensee, for Consequences of Railroad's Own Negligence*, 14 *A.L.R.3d* 446.

Q—*Is it fair to impose liability on a licensee for a railroad's negligence, or should the railroad instead accept responsibility for its negligence?*

A—This question cannot be answered in a vacuum. The indemnity agreements at issue arise from arms-length negotiations, in which the railroad grants an easement through its right of way in return for compensation. Indemnity agreements are simply another form of compensation, and the ultimate question is whether the total compensation received by the railroad is fair in relation to the value of the easement given. In evaluation whether the total compensation is fair, the licensee must realize that, when a railroad allows a licensee to use its right of way, it faces the risk that it will be subject to liability that it would not otherwise face. The value of the indemnity clause can sometimes be roughly determined through quotes on insurance policies that would cover the risks involved (remembering, of course, that quotes from various insurers for the same risks can vary widely, and that insurers attempt to charge premiums that somewhat exceed the actual risk involved so that they can earn a profit). ❑



John G. Pinto
Rail Trac Associates
Havertown, Penn.

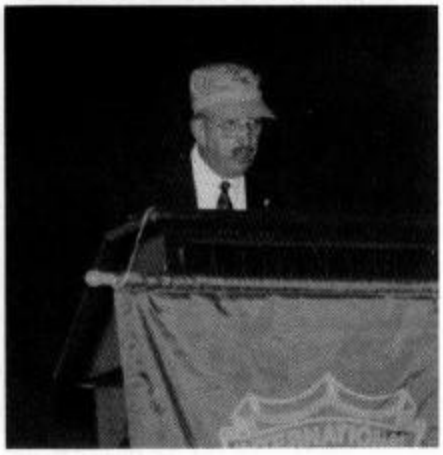
Q—*Do you feel railroads have rights to increase license fees?*

A—Yes. They are in fact the owner of the property one wishes to cross or occupy and

as such have the same rights as any other owner to assess for the use. Whether or not the amounts of such fees are reasonable is a different issue and continues to be a source of ongoing debate between the parties.

Q—*In the case of a railroad abandonment, upon which a utility company has previously been granted an easement by the railroad, does the utility company's interest survive reversionary provisions in the original deeds of in-conveyance to the railroad?*
A—There cannot be a valid conveyance of interests in property which are greater than those hold by the grantor. It is my opinion that, if in fact there is to be a reversion of possession to the holder of the reverter interest upon abandonment, any permissions or rights granted by the railroad during their tenure of possession can only legally survive if the holder of the fee title consents either in the original grant to the utility or subsequent amended or additional conveyance. The railroad is obviously free to grant or sell whatever anyone wishes to acquire. It is incumbent upon the grantee to determine the validity of the grantor's rights.

Q—*Do you think that nationalization of right of way and maintenance of right of way covered by used fees paid to the federal government would be helpful to railroads? Rail corridors would be considered federal rail corridors.*
A—No. The federal government could not maintain at cost competitive with what the private sector currently does. The requisite layered bureaucracy with its attendant paperwork would make it extremely difficult. It may work in other countries, but I do not believe it would work in the United States.



Donald C. Smith

Q—*If the rules are unique but universal, why not standardize fees for various occupations of railroad property?*
A—An attempt was made a few years ago, but attorneys for some of the Class I roads counselled that the effort might be looked upon as collision, and the discussions were aborted.

Q—*Is the driveway to a rural residence or a public business a public crossing? Could you define public crossing.*
A—A public crossing is generally considered one which is a dedicated public road owned and maintained by a municipality or other public entity.

Q—*Upon the sale of abandoned railroad right of way, is it legal for the railroad to reserve an easement for a utility license and continue to collect rents?*
A—Assuming the railroad had good marketable title to the property, and the easement is recorded, the reservation would generally be considered valid.

Q—*Why would a railroad grant an easement to a utility company already occupying a right of way (under a license) about to be abandoned? Would it not diminish the value of the right of way?*
A—It would depend upon the location of the right of way, the intended use by the purchaser and whether or not it was part of a multiple location easement. If the right of way is in an area of low land value, the fee from the easement may be many times the amount per square foot in the sale price. If the purchaser intends to retain the corridor intact for a leaner use, that may his primary concern and if the easement does not interfere with the intended use, he probably will not push for much of a reduction in the purchase price. If the easement was a portion of a larger occupation extending over adjoining Railroad lands, which are retained or in removed locations owned by the railroad, the consideration for the total package would compel the railroad to include all owned locations. ❑

William C. Basney
CSX Transportation, Inc.
Jacksonville, Fla.

Insurance and Liability

Q—*Why doesn't the railroad issue a Certificate of Insurance when a third party purchases protective liability? What proof does a party have that they are covered?*
A—Please recall that the insured party is the railroad. if a utility wants a copy of the policy, a copy will be furnished upon request. This is not normally done since the railroad is the insured party.

Q—*What type of liability is normally granted where a utility obtains an easement by way of a civil action to cross?*
A—By civil action, I assume you mean an eminent domain action. Many such proceedings make no findings about liability in the Final Judgment. If liability is an issue, it is usually raised by the condemnee.

Q—*How is the maintenance of private road crossings, i.e., sight distance, "policed"?*
A—Visual inspection by railroad personnel, such as a Roadmaster or a Trainmaster, while in the area.

Q—*Is the $3,000,000 insurance requirement of the railroad of a per-occurrence basis?*
A—Yes.

Q—*Are environmental assessments allowed in railroad rights of way to establish the current environmental conditions prior to the signing of joint-use agreements?*
A—Yes.

Q—*If contamination exists, how would the environmental liability issues be negotiated?*
A—It would depend upon the nature and extent of the contamination. It is an issue that

would need to be dealt with through an apportionment of responsibility.

Q—*Is Construction Risk Insurance available in Canada?*
A—Yes.

Q—*Are the policies and principles of the railroads in the United States consistent or comparable with those in Canada?*
A—In my experience, they are remarkably comparable.

Q—*Do leases with the railroad require more insurance than just the right to occupy the railroad corridor?*
A—No. The requirements are similar.

Q—*If a utility company provides a general liability policy, then why is a railroad protective policy also needed? Are these railroads not being adequately covered by the general liability policy?*
A—The answer is because most general liability policies exclude work with 50 feet of a railroad track.

Q—*Why don't railroads set more reasonable rates for longitudinal occupations?*
A—Why I can't speak for all railroads, most rates are based on fair market value of the underlying real estate as determined by appraisal. Of course, buyers always think values are too high and sellers think values are too low. Our experience is that the negotiating process usually produces an acceptable value for both sides.

Q—*You say applicants for roads, etc., should indemnify the railroad for its negligence because if the roads weren't there, you couldn't have an accident. Do you think if the railroads weren't there by virtue of government grants, then we wouldn't have these problems with roads, pipelines?*
A—If there were no railroads, then there wouldn't be accidents involving railroads. The real issue is whether crossings are available. If a private way is desired, the party benefitted should be responsible for the risk created.

Q—*Why do some railroads require they be named as additional insured?*

If a private way is desired, the party benefitted should be responsible for the risk created.

A—This is a matter of differences in risk management philosophy. Some railroads feel the need to be an additional insured, others are comfortable relying on the underlying contract. This subject is a topic of discussion at the 1995 Railroad Insurance Managers' Association meeting.

Q—*What criteria do you use for determining the manner of warning at road crossings? (gates, lights or stop signs)*
A—At public crossings, the involved government determines the type and degree of crossing protection. At private crossings, the railroad makes a decision about crossing protection based upon a variety of factors (location, traffic, topography, speed of train operations, visibility)

Q—*What makes railroad property valued higher than, say, electric power corridors, hospital grounds, interstate municipal roadways?*
A—In our experience, railroad property values are comparable to electric corridors value. No one can compete with the values offered by the government since there is no profit motive. Our experience with hospital property is very limited.

Q—*Why do the railroads charge for permits where they received the property from the federal government at no charge? I can see a charge for administration fees, but why charge fair market values?*
A—In fact, the charge for land is waived on U.S. grant right of way. There are other components that go into the permit charge at these locations, but the land value portion is waived.

Q—*Do you require insurance for flammable pipe contents—including natural gas?*
A—Yes.

Q—*Why do railroads require this special railroad liability construction insurance when the permittee (Utility Co.) has multi-million liability insurance, provided certificate of some and names railroad as an additional insured?*
A—The construction risk insurance is still required. The general liability requirements can be self-insured by the utility company.

Q—*Can the Construction Risk Fee be waived if the work is being done by a self-insured company?*
A—No.

Q—*My question is about the requirement to have insurance to cover a user's construction phase. Is the price on a per day basis or on a per location basis?*
A—The charge is on a "per location" basis.

Q—*Do you require a flagman when an underground crossing is constructed.*
A—Yes.

Q—*Why?*
A—The purpose of the flagman is to protect the rail operations, which will be continued during the installation.

Q—*Please address railroad engineering standards for underground pipeline crossings v. API recommended practices. Re: cased versus non-cased pipe.*
A—We are not familiar enough with the API recommendation to discuss the pros and cons. Underground pipelines are governed by the AREA (American Railroad Engineering Association) standards.

Q—*You mentioned maintaining sight distances for a "Couple football fields each way." What right of entry do I have to perform the work?*
A—It is granted in the agreement.

Q—*When?*
A—As often as needed.

Q—*Can my contractor perform the work?*
A—Yes.

Q—*Can I request the railroad do it and bill me later?*
A—No. The railroad doesn't perform this service. ❑

Robert L. Bartholic
Law Offices of Hamilton & Faatz
Denver, Colo.

Crossing Native American Reservations

Q—*What type of right of way is across the Crow Reservation in Montana, or reservations in general terms?*

A—History[1] indicates that the railroads now operating in Montana obtained their railroad rights of way of varying widths across the Crow Reservation under several Acts of Congress. They are arranged by their current designation and location.

• Burlington Northern Railroad Company (Northern Pacific Main Line) across the Crow Reservation (Burlington Northern Railroad Company (BNRR) successor by merger to Northern Pacific Railway Company (NPRyCo), successor to the Congressional Company Northern Pacific Railroad Company (NPRR). Act of Congress approved July 10, 1882, 22 Stat. 157.[2]

The railroad owns and occupies a 400-foot wide railroad right of way (200 feet on each side of the center of the located line) through the Crow Reservation together with certain additional land for stations-houses, depots, switches, etc. The United States purchased a 400-foot wide strip of land along the railroad located center line from the Crow tribe and then granted the Northern Pacific a 400-foot wide railroad right of way across the land under Section 2 of the Act of Congress, approved July 4, 1864, (13 Stat. 365),[3] which act established the Northern Pacific and granted right-of-way for the construction and operation of the same (and supplemental acts).

In my opinion, the title to this right of way is a limited fee made on an implied condition of reverter to the United States in the event that the company ceases to use or retain the land for railroad purposes, identical in character, title and estate to the rest of the 400-foot wide Charter of Congressional Right of Way comprising Northern Pacific main line.[4] Later cases have classified this right of way as a specialized easement.[5]

Union Pacific Museum Collection

• Burlington Northern Railroad Company (Northern Pacific), Laurel to Red Lodge Montana Line, across Crow Reservation, (BNRR successor by merger to NPRyCo, successor by purchase of the properties of Rocky Fork and Cooke City Railway Company). Act of Congress approved March 3, 1887, 24 Stat. 545.[6]

A 150-foot wide right of way (75 feet on either side of the located center line of the railroad) between Laurel and Red Lodge Montana, running along Rock Creek (Rocky Fork) 44.37 miles, with the grant of additional right of way upon which trackage was never constructed. The properties of the Rocky Fork and Cooke City Railway Company were sold to the Northern Pacific Railway Company, April 21, 1898.

• Rights of Way Across the Crow Reservation, generally. Act of Congress approved May 1, 1888, 25 Stat. 113.[7]

• Billings, Clark's Fork and Cooke City Railroad Company Act of Congress approved June 4, 1888, 25 Stat. 167.[8] I have been unable to locate any current successor to this company, nor the location of its right of way and tracks.

• Burlington Northern Railroad Company (Chicago, Burlington & Quincy Railroad Company (CB&Q) Sheridan Wyoming to Laurel Montana Main Line, (BNRR, successor by merger to CB&Q, successor to Big Horn Southern Railroad Company). Act of Congress approved February 12, 1889, 25 Stat. 660.[9]

Grants a 150-foot wide right of way (75 feet on either side of the located center line of the railroad) between a connection with the Northern Pacific at Huntley, Yellow Stone County, Montana, thence southerly along the Big Horn River, the Little Big Horn River and Owl Creek to the southerly boundary line of the Crow Reservation, in Big Horn County, Montana, with additional land for railroad facilities.

• Railroad rights of way through Native American reservations, lands and allotments, Act of Congress approved March 2, 1889. 30 Stat. 990, as amended by Sec. 16 of the Act of Congress approved June 25, 1910, 36 Stat. 855, 859.

Grants to a railroad 100-foot-wide right of way (50 feet on either side of the located center line of the railroad) with additional width for cuts and fills and additional railroad facilities, when approved by the Secretary of the Interior and compliance with regulations.[10] ❑

REFERENCES

[1] Natural Resources Law on American Indian Lands, Maxfield-Dieterich-Trelease, Rocky Mountain Mineral Law Foundation, 1977.

[2] An act to accept and ratify an agreement with the Crow tribe for the sale of a portion of their reservation in the Territory of Montana required for the use of the Northern Pacific Railroad, and to make the necessary appropriation for carrying out the same.

[3] An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern Route. 13 Stat. 365.

Joint Resolution Granting the consent of Congress provided for in Section 10 of the Act incorporating the Northern Pacific Railroad Company, approved July 2, 1864. Approved March 1, 1869, 15 Stat. 346. (Consent of Congress given to Northern Pacific R.R. Co. to issue bonds, etc.)

Joint Resolution Granting right of way for the construction of a railroad from a point at or near Portland, Oregon, to a point west of the Cascade Mountains, in Washington Territory. Approved April 10, 1869, 15 Stat. 57 (NPRR may extend its branch line from Portland to Puget Sound, and connect same with its main line west of the Cascade Mountains).

A Resolution Authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes. Approved May 31, 1870, 16 Stat. 378 (NPRR may issue bonds secured by a mortgage).

[4] *Northern Pacific Ry. v. Townsend*, 190 U.S. 267, 23 S.Ct. 671, 47 L.Ed. 1044 (1903).

[5] *Wyoming v. Udall*, 379 F.2d 635.

[6] An act granting to the Rocky Fork and Cooke City Railway Company the right of way through a part of the Crow Reservation, in Montana Territory.

[7] An act to ratify and confirm an agreement with the Gros Ventre, Piegan Blood, Blackfeet, and River Crow tribes in Montana, and for other purposes.

Article VIII. It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the [native peoples] concerned.

[8] An act granting to the Billings, Clark's Fork and Cooke City Railroad Company the right of way through the Crow Reservation.

[9] An act granting to the Big Horn Southern Railroad Company a right of way through a part of the Crow Reservation in Montana Territory.

[10] Public land statutes of the United States. A compilation of the general and permanent statutes of practical importance relating to the public lands down to the close of the second session on the 71st Congress with parallel citations to the United States Code and an index, compiled by Daniel M. Greene. U.S. Department of the Interior, 1931.